No. 22-70013

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL JAMES KENT

Petitioner,

v.

DARRYL LACOUNTE, Director of the United States Bureau of Indian Affairs; et al.,

Respondents

On Appeal from the United States Department of the Interior
DOI No. OP-PI-21-0685

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

While the arguments set forth in Respondent's brief reflect the United States Government's thoughtful consideration of their trust responsibilities to Federally Recognized Indian Tribes and individual Indian beneficiaries, Petitioner respectfully submits the gravamen of Respondent's arguments call upon this Court to take extraordinary measures to affirm the contested determination of the Respondent Director of the Bureau of Indian Affairs Darryl LaCounte ("BIA Director"). Respondents now present this Court with the most recent three separate and distinct rationales articulated by the BIA Director for denying Petitioner the relief he is entitled to pursuant to §4712(c) of the "Act for the enhancement of contractor protections from reprisals for disclosures of certain information." 41 U.S.C. § 4712 et seq. ("Act")[1].

The agency action central to the instant case, and for which Petitioner sought the Court's review, is the BIA Director's January 5, 2022, Order ("Order")[2]. Contained therein was the justification articulated by the BIA Director for denying Petitioner relief under §4712(c) of the Act. The justification in the Order stated, without further explanation, that "41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act ("ISDEAA") agreements made under

[1] *See* Opening Brief Pg. No. 11-18.
[2] 1-CAR-36.

Public Law 93-638. "[3] Choosing not to furnish the Court with an explanation that reconciles the inherent conflict between the BIA Director's Order and the plain language of the sole exception to the Act's coverage under §4712(f), Respondents instead ask this Court to sanction a construction of the Act with far-reaching consequences that directly conflicts with Congress's clearly expressed intent to "put whistleblowing protections related to individuals working on Federal civilian contracts and grants on par with those already existing related to individuals working on Federal defense contracts and grants."[4]

In contradiction to the unambiguously expressed intent of Congress, demonstrated by the ordinary meaning of the Act's plain language, Respondents contend the scope of the Act protections is far narrower and constrained to be a "contracting or procurement law within the meaning of the Indian Self-Determination Act's ["ISDEAA"] provision exempting self-determination contracts from those laws, 25 U.S.C. § 5324(a)(1)."[5]Relying upon this heretofore unpronounced interpretation of the Act's scope, Respondents allege provisions of the ISDEAA that prohibit the application of Federal Procurement and Acquisition laws to ISDEAA agreements justify the BIA Director's determination that Petitioner's whistleblower retaliation complaint is not covered by the Act. In so

[3] 1-CAR-36.
[4] "To Enhance Whistleblower Protection For Contractor and Grantee Employees,", Senate Report 114-270, 114th Congress 2d Session. June 7, 2016. ("S. Rept. 114-270") at 1.
[5] Response Br. 13.

doing, Respondent's argument implicitly assume this Court will overlook the requirement that "where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 2125, 195 L. Ed. 2d 382 (2016). Nevertheless, Petitioner submits Respondent's arguments prove to be unavailing when appropriate consideration is afforded to the distinct lineage of ISDEAA, its legislative history, and the circumstances that beget the inclusions of the provisions relied upon by Respondents, in the "Indian Self Determination and Education Assistance Act Amendments of 1988" Pub. L. No. 100-472 § 204, 102 Stat. 2291 (1988). Additionally, Respondents narrowed interpretation of the Act's scope conflicts with established principles of Federal Appropriations Law and related statutes. Adherence to Respondent's interpretation would thereby render terms intentionally included in the Act's language superfluous and contradictory to Congress's intent.

Finally, Petitioner contends the rationale underlying Respondents does not comport with the declared policy of the United States Government's in enacting both the Act and the ISDEAA. For these and other reasons articulated below. Petitioner respectfully submits the Court should find the BIA Director's Order to not be in accordance with the law and set it aside.

II. THE TERM "PROCUREMENT" HAS A SPECIFIC AND ACCEPTED MEANING IN THE CONTEXT OF FEDERAL APPROPRIATIONS LEGISLATION THAT ALSO APPLIES TO THE ISDEAA.

Prior to proceeding, Petitioner respectfully begs the Court's indulgence, however, to provide a substantive response to the arguments contained in Respondent's brief, Petitioner submits it is necessary to first address the incongruence between Respondent's position and the Congress's purpose in enacting the ISDEAA. To properly demonstrate this contradiction, it will be necessary for the discussion to deviate from the well-established principle of statutory construction that "[w]e begin where all such inquiries must begin: with the language of the statute itself." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056, 203 L. Ed. 2d 433 (2019) (quoting *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S,* 566 U.S. 399, 412, 132 S.Ct. 1670, 182 L.Ed.2d 678 (2012) (internal quotation marks and citation omitted) and begin with a review of the relevant legislative history of the ISDEAA. Petitioner anticipates that doing so will aide the Court's recognition that analysis of the text of the Act does not "reverse the inquiry"[6], and in fact, text, history, and context affirm ISDEAA agreements are within the scope of the Act and an interpretation to the contrary is inconsistent with the United States Government policy of promoting the self-

[6] Answering Brief at 17.

determination of Indian Tribes and presents far reaching consequences that unnecessarily extend beyond the necessary scope of this case.

The United States Constitution vests Congress with the authority to draw money from the United States Treasury "in Consequence of Appropriations made by Law"[7]. In exercising this "power of the purse" Congress enacted permanent fiscal statutes, which are primarily found in Title 31 of the United States Code. In the aggregate, these statutes "form a logical framework that governs the collection and use of public money."[8], which is generally referred to as Federal Appropriations Laws. Contained within the Federal Appropriations Law are the statutory authorities creating the Government Accountability Office[9] ("GAO"). Congress vested the GAO with several statutory authorities "In furtherance of [Congress's] constitutional responsibilities to control and oversee the use of public money."[10] Amongst said statutory authorities, the GAO is responsible for coordinating with the Secretary of the Treasury, Director of the Office of Management and Budget ("OMB"), and Congressional Budget Office ("CBO") to "establish, maintain, and publish standard terms and classifications for fiscal,

[7] U.S. Const. art. I, § 9, cl. 7.
[8] GAO, Principles of Federal Appropriations Law, 4th ed., 2016 rev., ch. 1, § A.1, GAO-16-464SP (Washington, D.C.: Mar. 2016).("Redbook")
[9] *See* Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921).
[10] Redbook at ch.1, § B.1. *see also* 31 U.S.C. § 701 et seq.

budget, and program information of the Government including information on… programs, projects, activities, and functions."[11].

This information is subsequently made available to Congress, federal agencies, and the public in a number of publications including the GAO's *Principles of Federal Appropriations Law*, also known as the Red Book, and the *Glossary of Terms Used in the Federal Budget Process*[12]. Given the breadth of federal agencies involved in this process, Petitioner respectfully submits it is appropriate for the Court to utilize these sources to establish the meaning and intent of terms utilized by Congress in enacting legislation during the federal appropriations process. The precedent of both the Supreme Court and this Court lend support to this concept in recognizing "Congress does not draft statutes in a vacuum." *United States v. Merrell*, 37 F.4th 571, 576 (9th Cir. 2022) *(quoting Cannon v. Univ. of Chic*., 441 U.S. 677, 696–97, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). Accordingly, the standard rules of statutory construction begin with the presumption that "Congress is ... presumed to know existing law pertinent to any new legislation it enacts," *Merrell*, 37 F.4th at 576 (9th Cir. 2022) (*quoting United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991).

[11] 31 U.S.C. § 1112
[12] GAO-05-734SP (2005)

Title I and IV of the ISDEAA authorizes the Secretary of the Interior to contract or compact with tribes to plan, conduct, and administer programs established under the ISDEAA, Bureau of Indian Affairs ("BIA") programs authorized under the Snyder Act[13], and other non-BIA programs within the United States Department of the Interior that benefit the Indian People. Under the supervision of the Secretary of the Interior, the BIA "shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States"[14]. Accordingly, the funds expended in the operation of BIA programs, including the ISDEAA, are derived from the United States Government appropriation process. It follows that, in drafting the ISDEAA, Congress intended for terms related to "programs, projects, activities, and functions"[15] that involve the use of appropriated funds to be afforded the meaning established by the broad body of federal appropriations law. It is with this foundation established that the difference between the category of laws involving procurement and acquisition by the Federal Government are distinguished from the Act, that is the subject of the Court's review in the instant case. For those reasons articulated above, Petitioner submits

[13] Pub. L. No. 67-85, 42 Stat. 208, 25 U.S.C. § 13.
[14] 25 U.S.C. § 13.
[15] 31 U.S.C. § 1112

the GAO's *Principles of Federal Appropriations Law*, is the appropriate source for the Court to begin its analysis.

The concepts surrounding the terms "acquisition" and "procurement" within the federal appropriations process was a source of much consternation within the United States Government prior to the enactment of the Federal Grant and Cooperative Agreement Act of 1977[16]. Prior to its enactment,

> "No uniform statutory guideline exist[ed] to express the sense of Congress when executive agencies should use either grants, cooperative agreements or procurement contracts. Failure to distinguish between procurement and assistance relationships has led to both the inappropriate use of grants to avoid requirements of the procurement system, and to unnecessary red tape and administrative requirements in grants. S.Rep. No. 95-449, at 6 (1977).

In response, Congress enacted the Federal Grants and Cooperative Agreement Act[17]to:

> "Prescribe criteria for executive agencies in selecting appropriate legal instruments to achieve-
> (A) uniformity in their use by executive agencies
> (B) a clear definition of the relationship they reflect; and
> (C)a better understanding of the responsibilities of the parties to them.[18]

To achieve these purposes, sections 4-6 of the Federal Grant and Cooperative Agreement Act set forth the standards federal agencies are to use when selecting

[16] Pub. L. No. 95-224, 92 Stat. 3 (1978), codified at 31 U.S.C. §§6301-6308.
[17] *Id.*
[18] Redbook at ch.1 § B.2. *citing* 31 U.S.C. § 6301(2).

the most appropriate funding mechanism with appropriated funds.[19] When "the principal purpose is for the instrument to acquire (by purchase, lease, or barter) property or services for the *direct benefit* of the United States Government." (emphasis added)[20], Federal Agencies are to use a *procurement contract*. When the principal purpose of the relationship formed by the funding mechanism is for the Federal Agency to transfer a thing of value to a recipient "to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring by (by purchase, lease, or barter) property or services for the direct benefit of the United States Government" and "substantial involvement is expected" between the Federal Agency and the recipient when carrying out the contemplated activity, Federal Agencies are to use a cooperative agreement. (emphasis added).When the principal purpose of the relationship formed by the funding mechanism is for a Federal Agency to transfer a thing of value (money, property, services, *etc.)* to a recipient "*to carry out a public purpose* of support or stimulation authorized by law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government" and "substantial involvement is *not* expected"[21]

[19] *Id., see codification* at 31 U.S.C. §§6303-6305.
[20] *Id. , see codification at* 31 U.S.C. § 6303.
[21] *Id., see codification at* 31 U.S.C. § 6304.

between the Federal Agency and recipient when carrying out the contemplated activity, Federal Agencies are to use a *grant agreement*. (emphasis added).

A federal grant is a form of assistance provided by the United States Government in many forms that include financial assistance. The term "assistance" is defined in various statutes, examples of which are provided in the Redbook and include the Federal Program Information Act[22], which broadly defines assistance as "the transfer of anything of value for a purpose of support or stimulation authorized by [law]." Federal financial assistance is defined in the Single Audit Act[23] (which applies to agreements made pursuant to the ISDEAA by operation of the provisions at 25 U.S.C. 5305(f)(1)) as "assistance that nonfederal entities receive or administer in the form of grants, loans, loan guarantees, property, cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, or other assistance."[24]. Grants constitute one form of federal assistance[25], which is defined by the GAO in the *Glossary of Terms Used in the Federal Budget Process* as "federal financial assistance award making payment in cash or in kind for a specified purpose," and adds "The term 'grant' is used broadly and may include a grant to nongovernmental recipients as well as one to a state or

[22] Pub. L. No. 95-220, 91 Stat. 1615-1617 (1977), *codified at* 31 U.S.C. § 6101(3).
[23] Pub. L. No. 98-502, 98 Stat. 2327-2334(1984), *codified at* 31 U.S.C. § 7501(a)(5).
[24] Redbook at ch. 10 § A.1., *citing* 31 U.S.C. 7501(a)(5).
[25] *Id.*

local government."[26] The GAO Redbook summarizes these various authorities by generally defining a federal grant as "a form of assistance authorized by statute in which a federal agency (the grantor) transfers something of value to a party (the grantee) for a purpose , undertaking, or activity of the grantee that the government has chosen to assist. The 'thing of value' is usually money, but may, depending on the program legislation, also include property or services."[27]

In addition to the legislative use of the term "grant" being synonymous with the broader term of "federal financial assistance"; Federal Courts and the GAO view a recipient's acceptance of a grant of federal funds subjects to conditions that must be met by the recipient as creating a "contract" between the United States and the recipient.[28]The recognition of this concept has a longstanding tradition by the Federal Courts with the earliest case involving the United States Government making a grant of land to a state. In *McGee v. Mathis*, the Supreme Court utilized the "grant as a type of contract" approach to explain "It is not doubted that the grant by the United States to the [recipient] upon conditions, and the acceptance of the grant by the [recipient] constituted a contract."[29] This approach has consistently been applied by the Supreme Court to uphold conditions

[26] GAO, *A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (*Washington, D.C.: September 2005), at 60.
[27] *Id.*.
[28] Redbook at ch. 10 § B.1(a).
[29] 71 U.S. (4 Wall.) 143, 155 (1866).

Congress imposes on recipients of Federal Grants. In *Jackson v. Birmingham Board of Education*, the Supreme Court observed "When Congress enacts legislation under its spending power, that legislation is in the nature of a contract: in return for federal funds, the [recipient] agrees to comply with federally imposed conditions. (quoting *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed. 2d 694 (1981).[30](internal quotations omitted)

As stated above, the Supreme Court views the spending clause[31] of the U.S. Constitution to be the source of Congress's authority to enact grant legislation and provide the appropriations to fund those grants. Moreover, "Congress has the power to attach terms and conditions to the availability or receipt of grant funds, *either in the grant legislation itself or in a separate enactment.*"[32]. The Supreme Court recognized this principle in *Oklahoma v. U.S. Civ. Serv. Comm'n*, 330 U.S. 127 (1947), wherein the application of provisions of the Hatch Act[33] prohibiting political activity by employees of state or local government agencies receiving grant funds was upheld as being within Congress's powers.[34](see also *South Dakota v. Dole,* 483 U.S. 203, 207 (1987)(Congress's spending power not limited to the "enumerated legislative fields"; also authorizes the attachment of condition

[30] 544 U.S. 167, 181–82, 125 S. Ct. 1497, 1509, 161 L. Ed. 2d 361 (2005)
[31] U.S. Const. art. I, § 8, cl. 1.
[32] Redbook at ch. 10 § C(1). Emphasis added.
[33] Pub. L. No. 76-252, 53 Stat. 1147 (1939). Codified at 5 U.S.C. § 7321-7326.
[34] Redbook. at ch. 10 § B.1

to grants of federal funds to attain objectives under Article I).[35]Insofar as those conditions are (1) in pursuit of the general welfare, (2) expressed unambiguously, (3) reasonably related to the purpose of the expenditure, and (4) not in violation of other constitutional provisions, as expressed by the Supreme Court in *New York v. United States,* 505 U.S. 144, 171-72 (1992), the Federal Courts have repeatedly affirmed Congress's power to attach conditions to federal grant funds.

Thus, although there are certain aspects of the relationship created by a grant that are contractual in nature, the GAO explicitly recognizes there being a distinction between grants and procurement contracts. This difference extensively described in the GAO's multi-volume treatise concerning federal fiscal law, the Red Book.[36] The GAO identifies legal distinction between grants and procurement contracts utilizing an example from the contract law principle of consideration. Grant agreements may include sufficient legal consideration to establish a legal obligation. However, that consideration can be quite different from the type found in procurement contracts. At its core, the difference between the two situations results from the principal purpose of grants being a mechanism through which "assistance to a designated class of recipients authorized by statute to meet recognized needs."[37] Unlike procurement contracts, those needs are not for goods

[35] *Id.*
[36] Redbook at ch.10 § B.1.b.
[37] *Id.*

and services required by the Federal Government for its own benefit, but the needs of nonfederal entities which Congress has decided to assist in the public interest.[38] The relevance of this difference is highlighted by decisions of the Comptroller General under 41 Comp. Gen. 134 (1961) wherein statutory provisions to provide grants for the construction of sewer system works were able to be amended in subsequent fiscal years where high demand resulted in the prior fiscal year limited the amounts of the funds being awarded initially. The GAO's decision found the amendment to be permissible because the "consideration flowing to the government under these grants (in sharp contrast to procurement contracts) consistent only of the benefits to accrue to the public and the United States"[39] The outcome would have been the opposite if the grant agreements were procurement contracts because it would have required the government receiving additional consideration.

The distinction between federal grants and procurement contracts has also been recognized by the Supreme Court in explaining:

> Although we agree…that…[the] grant agreements [at issue] had a contractual aspect,…the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction…Unlike contractual undertakings, federal grant programs originate in and remained governed by statutory provisions expressing the

[38] *Id.*
[39] *Id. (*internal citation omitted).

> judgement of Congress concerning desirable public policy.

Bennett v. Kentucky Department of Education, 470 U.S. 656, 669 (1985). The GAO Redbook identifies other distinctions between grants and procurement contracts including the contract law doctrine of "impossibility of performance", *quantum meruit* principles, and the application of the concept "contract implied in fact" in the grant context.[40] Ultimately, the robust history of the principles of Federal Appropriations Law and the federal fiscal laws developed thereunder make clear that Congress utilizes a well-developed conceptual framework that expresses their intent for the use of public funds. That framework generally differentiates their intent for the use of funds as being whether the principal purpose is for the direct benefit of the Federal Government or to carry out a public purpose. Where Congress's intent is for the benefit of the Federal Government, the processes in which those funds are used is generally referred to in the language of enacted legislation as "procurement" or "acquisition". In contrast, where Congress's intent is for appropriated funds to be used to carry out a public purpose, the process in which those funds are used may be identified by the use of the term "grant" or "cooperative agreement". Vice versa, where legislative enactments related to appropriated funds either make explicit reference to "grants" or "cooperative

[40] Redbook at ch. 10 § B.1.b.

agreements" or *do not* make reference to "procurement", the presumption must be the expression of Congress's intent is in regard to an activity whose principal purpose is to carry out a public purpose, and it *is not* for the direct benefit of the Federal Government.

This demonstrates Congress possess the necessary vocabulary to articulate their intent for the use of appropriations and that terminology undergirds the principles of Federal Appropriations Law constitutes a reflection of that intent. In that regard, Petitioner respectfully submits the terms discussed above are akin to a "term of art", given the breadth of their application across all Federal Agencies and their development being the product of an express legislative mandate to the "establish, maintain, and publish standard terms and classifications"[41] that all Federal Agencies must utilize on an annual basis when submitting budgets to Congress for appropriations. Additionally, the Supreme Court recognizes that, where the context is appropriate, certain terms convey an accepted meaning that should be afforded deference in determining Congress's intent in enacting legislation. In circumstances similar to the instant case, this concept extends to situations where a statute does not include a definition for a particular term, but a commonly accepted meaning exists elsewhere in the United States Code[42].

[41] 31 U.S.C. § 1112.

[42] *See Stewart v. Dutra Const. Co.,* 543 U.S. 481, 482, 125 S. Ct. 1118, 1120, 160 L. Ed. 2d 932 (2005) (relying on the Dictionary Act's definition of "vessel", codified at 1 U.S.C. § 3, where the provision of the statute at issue [the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b)] did not include a definition.

Moreover, the Supreme Court recognizes that "[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248, 134 S. Ct. 852, 861–62, 187 L. Ed. 2d 744 (2014) (quoting *FAA v. Cooper*, 566 U.S. ——, ——, 132 S.Ct. 1441, 1449, 182 L.Ed.2d 497 (2012) (internal quotation marks omitted). In a recent opinion referring to this "old soil principle", the Supreme Court further held that "in the absence of indication to the contrary" that Congress's "usage [of a term of art] itself suffices to "adop[t] the cluster of ideas that were attached to each borrowed word" in the absence of indication to the contrary. *George v. McDonough*, 142 S. Ct. 1953, 1963, 213 L. Ed. 2d 265 (2022) (internal citation and quotation marks omitted).

That stated, before proceeding it is necessary to address the provisions of 25 U.S.C. § 5308 that provide:

> The provisions of this chapter shall not be subject to the requirements of chapter 63 of title 31[43] : Provided, That a grant agreement or a cooperative agreement may be utilized in lieu of a contract under section 5321of this title when mutually agreed to by the appropriate Secretary and the tribal organization involved.

[43] As originally enacted, this portion of the provision stated "The provisions of this Act shall not be subject to the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (Public Law 95-224; 92 Stat. 3). And cites to the codification at 31 U.S.C. § 3601. This provision was amended by Pub. L. No. 101-301 in 1990 to substitute "Chapter 63 of Title 31 for "the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95–224; 92 Stat. 3)"

Petitioner respectfully submits this provision does not render the accepted meaning attributable to the use of the term "procurement" irrelevant in discerning Congress's intent as it applies to the Court's analysis in the instant case. This is evident upon consideration of the legislative history of the ISDEAA, which affirms Congress's recognition of the specialized meaning attributed to the term "procurement" and the nexus of the principles of federal appropriations law to agreements made under the ISDEAA. As explained in the July 2, 1986, GAO decision B-222665[44], this decision resulted from an inquiry by Chairman Mitchell J. Parren of the Committee on Small Business in the United States Congress. The Chairman questioned the use of contract instruments by the U.S. Department of the Interior to make awards under the ISDEAA. GAO Decision B-222665 states:

> "In view of the purposes for which these funds are used, it appears to you that the use of a contract instrument is inappropriate. accordingly, you request our opinion as to whether it is more appropriate to use either a grant or cooperative agreement as the vehicle for obligating these funds and whether Interior has violated any law or regulation by its past and continued use of contracts."

In response, The GAO's Decision B-222665 discussed an April 28, 1981, Opinion of the U.S. Department of the Interior's Deputy Solicitor that reviewed

[44] Available at https://www.gao.gov/products/b-222665 and included as an attachment.

both the ISDEAA and the Federal Grants and Cooperative Agreements Act of 1977[45] and concluded:

> [T]hat Interior's Bureau of Indian Affairs (BIA) would have to change its procedures for assisting tribal governments to operate programs formerly conducted by the BIA from a contracting program to federal assistance program. Grants or cooperative agreements instead of contract were to be used when tribal governments operate programs formerly conducted by BIA, so as to reflect the basic character of the relationship.[46]

GAO's Decision B-222665 further states that in early 1982, U.S. Department of the Interior published draft regulations that reflected the Deputy Solicitor's decision that would change the BIA's system of implementing the ISDEAA from a contract to a grant system. This was followed by extensive hearings held by the Senate Select Committee in April 1982, during which tribal witnesses were uniformly opposed to the draft regulations. As a result, Pub. L. No. 98-250, April 3, 1984, 98 stat. 118 was enacted into law and consequently:

> Interior has been authorized to identify the instruments it uses to obligate funds under the Indian Self-Determination Act as contracts rather than grants or cooperative agreements and continues to use contracts *for these purposes*. (emphasis added).[47]

[45] Pub. L. No. 95-224; 92 Stat. 3.
[46] GAO Decision B-222665.
[47] *Id.*

Petitioner submits that the provision of 25 U.S.C. § 5308, exempting ISDEAA agreements from the Federal Grants and Cooperative Agreements Act of 1977, does not diminish the applicability of the Federal Appropriations Law principle and the accepted meaning attributable to terms that are utilized by Congress in the appropriations process. As stated, these principles reflect Congress's determinations about how Federal Agencies should determine the appropriate funding mechanism, depending upon the principal purpose of the relationship between the Federal Government with the recipient. In making this decision, the main criteria Congress directed Federal Agencies to apply is whether the principal purpose of that relationship is to directly benefit the Federal Government or to serve a public purpose. Within the context of the ISDEAA, the legislative history demonstrates Congress recognized the validity of applying the same conceptual framework for determining the appropriateness of a funding mechanism, depending on the principal purpose of the Federal Government's relationship to the recipient. The 1988 amendment to the ISDEAA, under Pub. L. No. 100-472, 102 Stat. 2285-2298 (1988):

> "[R]epresent[ed] a comprehensive reexamination by Congress and Indian tribes of the Indian Self-Determination and Education Assistance Act of 1975. The amendments contained in [Pub. L. No. 100-472] are intended to increase tribal participation in the management of Federal Indian programs and to help ensure long-term financial stability for tribally-run programs. The amendments are intended to remove many of the

> administrative and practical barriers that seem to persist under the Indian Self-Determination Act.[48]

The Senate Select Committee on Indian Affairs held extensive hearings that included testimony of witnesses from Indian Tribes operating programs under the ISDEAA. These tribal witnesses explained that "while there has been great progress, there have also been obstacles to Indian self-determination."[49] Specifically, the tribal witnesses identified the "[i]nappropriate application of federal procurement laws and acquisition regulations to self-determination contracts has resulted in excessive paperwork and unduly burdensome reporting requirements."[50]Although Congress anticipated a reduction in the size of the federal service bureaucracy providing direct services to Indian Tribes in proportion to the transfer of control over the administration of those programs to Indian Tribes under the ISDEAA, the result was the opposite. Congress determined the prior system that provided direct services to Indian Tribes was instead replaced by a "contract monitoring bureaucracy.

This development led to the imposition of additional administrative requirements on Indian Tribes administering ISDEAA programs that were not required under applicable laws and regulations. Tribes seeking to submit a proposal to the BIA to transfer control over the administration of ISDEAA

[48] Senate Report 100-274 (December 22, 1987), Pg. 1-2.
[49] *Id.* at 7.
[50] *Id.*

programs found themselves subject to a six-layer review process that could take up to six months to review, where the ISDEAA contemplated only sixty days for a contract proposal to procced from submission to final approval by the Secretary of the Interior. Notably, within the multi-layer review process, ISDEAA contract applications were reviewed at BIA Area Offices by the Area branch of property and supply who ensured the ISDEAA contract applications adhered to "all applicable federal acquisition regulations."[51]

During the hearings conducted for the amendment, the Assistant Secretary for Indian Affairs of the U.S. Department of Interior, Ross O. Swimmer, provided testimony about the problems in implementing the ISDEAA and stated:

> Removing the contracts, as is suggested in the bill, from procurement system is only part of the answer. It's not the purchase of goods, or it's not even the acquisition of a community development block grant from HUD. It is simply a transfer function. And we shouldn't have it in the procurement mode. And it shouldn't even be called a contract, in my opinion. It should be simply a transfer of authority.[52]

Assistant Secretary for Indian Affairs Swimmer would also testify "The negotiations[53] that go on around that mainly involve all of the procurement

[51] *Id.* at 8.
[52] Testimony of Ross O. Swimmer Assistant Secretary for Indian Affairs. United States Department of Interior. Senate Hearing 100-369 Pt. 2, Pg. 27
[53] Mr. Swimmer is referring to the pre-award negotiation process that Indian Tribes were being required to engage in with the BIA prior to being transfer the authority to administer ISDEAA programs.

regulations that we have to go through in determining how the money is spent, the kind of reporting to be done, and what-have-you."[54] Assistant Secretary for Indian Affairs Swimmer also described the confusion at the U.S. Department of Interior and the BIA in implementing the ISDEAA. A particularly salient point of confusion appears to be an outgrowth of the 1984 amendment under Pub. L. No. 98-250 authorizing the U.S. Department of the Interior to continue utilizing the term "contract". On this point, Assistant Secretary for Indian Affairs Swimmer testified:

> And *so the term, contract, was added to the whole concept of self-determination. And once that term had been added, it was followed with the idea that there were to be somehow procurement contracts*. The intent, as I understood it at the time, was that really it was to be a Federal responsibility, a Snyder Act responsibility of the Federal Government to Indian tribes, and that responsibility would be exercised by the Indian tribe. And that moneys through self-determination grants… would be made available to Tribes to establish governments where there weren't any, and develop accounting systems. *But then when it got moved over into the contracting mode, many, many pages of regulations developed around that. And we were boxed in and have been sort of boxed in over the years,* to treat these transfers of functions just like we would treat a HUD contract, or an application for a CETA grant, or any number of other things the Federal Government makes available in the-normal course of business. But that wasn't the way these functions were supposed to be operated. And so I think that when we got

[54] Testimony of Ross O. Swimmer Assistant Secretary for Indian Affairs. United States Department of Interior. Senate Hearing 100-369 Pt. 2, Pg. 30.

> it tied up in the procurement law and all, that it created those obstacles.[55]

(emphasis added). Regrettably, Assistant Secretary for Indian Affairs Swimmer's testimony would also allude to the likelihood that the transferring of programs to Indian Tribes under the ISDEAA may have incentivized BIA employees to not approve contract applications that would jeopardize their budgets or position in the agency. Assistant Secretary for Indian Affairs Swimmer stated "in the case of an agency superintendent who has successfully contracted out his agency, the most we can offer him besides maybe a pat on the back and a good rating, is a downgrade"[56] Mr. Swimmer testified "[h]e actually loses money because of that contracting out. I don't think there was sufficient consideration given to the incentives of how this program would work."[57] Ultimately, the testimony of the witnesses for the hearing to the 1988 amendment demonstrated the fact that the BIA's application of federal laws related to procurement and acquisition to Indian Tribes seeking to participate in the ISDEAA was a major impediment to the program's success.

In response to these developments The Senate Select Committee on Indian Affairs reviewed the 1984 amendment to the ISDEAA under Pub. L. No. 98-250 (98 Stat. 118) that provided the exemption from the requirements of the Federal

[55] *Id.* at Pg. 31.
[56] *Id.*
[57] *Id.*

Grants and Cooperative Agreements Act of 1977[58] and the subsequent issues that arose because of the continued use of the term "contract" for ISDEAA agreements. The resulting 1988 amendment[59] to the ISDEAA was based on the Committee having:

> [C]onsidered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement". Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.[60]

To resolve the problem of the BIA inappropriately applying requirements from federal procurement laws to Indian Tribes attempting to enter into ISDEAA contracts, the 1988 amendment added a definition for an ISDEAA contract in the definition's provisions under §4[61] stating "That no contract entered into pursuant to this Act shall be construed to be a procurement contract"[62]. The 1988 amendment also included a provision in section 105(c)[63] of the ISDEAA that explicitly identified their intent to make clear the inapplicability of federal laws related to the

[58] Pub. L. No. 95-224, 92 Stat. 3.
[59] Pub. L. No. 100-472, 102 Stat. 2285-2298. (1988)
[60] Senate Report No. 100-274 (1987), at Pg. 19
[61] Currently codified at 25 U.S.C. § 5304(j).
[62] Pub. L. No. 100-472, § 103(j), 102 Stat. 2286.
[63] Formerly section 106.

procurement and acquisition consistent with the generally accepted meaning attributed to the term "procurement" by Congress, in the Federal Grants and Cooperative Agreements Act of 1977[64]. The 1988 amendment added the language "*Provided further,* That, except for construction contracts…the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.)[65] and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts."[66] This provision would be further amended in 1994 because of:

> [T]the 1988 Amendments hav[ing] been misconstrued as requiring the full panoply of federal acquisition regulations must apply to construction contracts, despite the congressional intent in the 1988 to minimize the application of the federal acquisition regulations (FAR) to construction contracting activities. The amendment clarifies that the federal acquisition regulations are only applied to the limited extent that doing so is not inconsistent with the underlying purpose of the of the Self-Determination Act, in the context of an intergovernmental contract, to remove all unnecessary federal administrative oversight. The Committee amendment narrows the scope of acquisition regulations and similar requirements which may be unilaterally imposed on tribal contractors, and in furtherance of this policy exempts such contracts entirely from various procurement related laws.[67]

[64] Pub. L. No. 95-224, 92 Stat. 3.
[65] Pub. L. No. 93-400, 88 Stat. 796-800; 41 U.S.C. § 401 et seq.
[66] Pub. L. No. 100-472, § 204(c)
[67] Senate Report No. 103-374 (1994), at Pg. 6-7.

The language added by the 1994 amendment referenced above[68] is currently codified at 25 U.S.C. 5324(a)(3)(A)-(C) and relied upon by Respondent as the source from which the BIA Director's Order denying Petitioner relief is derived.[69]

As discussed in the above legislative history for both the ISDEAA and the body of statutes that comprise the Federal Appropriations Laws, Congress has demonstrated an acute awareness of its use of terminology from Federal Appropriations Law in the context of the ISDEAA. Insofar as Congress has chosen to make use of terminology from Federal Appropriations Law convey its purposes in the various provisions of the ISDEAA, Petitioner respectfully submits it is appropriate for this Court to recognize them as a term-of-art and therefore make use of the longstanding interpretive principle that these terms "brings the old soil with it" *George v. McDonough,* 142 S. Ct. at 1959 (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801, 204 L. Ed. 2d 129 (2019)), by adopting the "cluster of ideas that were attached to each borrowed word." *Id.* at 1963. To the extent it is necessary for this Court to consider the significance of the term "procurement" in the context of the ISDEAA for the instant case, its "presen[ce] in the disputed statute" satisfies the "first precondition of [reading] any term-of-art" *Borden v. United States*, 141 S. Ct. 1817, 1828, 210 L. Ed. 2d 63 (2021) (citing *Food*

[68] Pub. L. No. 103-413, section 102(10), 108 Stat. 4523 (1994).
[69] Answering Brief at Pg. No. 14-15.

Marketing Institute v. Argus Leader Media, 588 U. S. ——, ——, 139 S.Ct. 2356, 2365, 204 L.Ed.2d 742 (2019).

The ISDEAA provisions at 25 U.S.C. § 5304(j)(1)-(2), expressly provides no self-determination contract shall be "considered a procurement contract" or "subject to any procurement law (including regulations). In addition, as originally enacted, the primary provision cited by Respondents in support of their argument (25 U.S.C. 5324(a)(1))[70], specifically stated Congress's intent in enacting these provisions in stating "except for construction contracts…the Office of Federal Procurement Policy Act (88 Stat. 796; 41 U.S.C. 401 et seq.)[71] and Federal acquisition regulations promulgated thereunder shall not apply to self-determination contracts,"[72]. Consideration of these facts alongside the extensive discussion of the ISDEAA's history above, it is incontestable that the Congress's intent in amending the language of the ISDEAA is specifically referring to "procurement" in the same context the term is utilized by Federal Agencies in applying the criteria from the Federal Grants and Cooperative Agreements Act of 1977[73] to determine the appropriate legal instrument to utilize in expending appropriated funds. This proposition is further supported in reviewing the language

[70] Answering Brief Pg. No. 10, 12, 13, 16.
[71] Pub. L. No. 93-400 (1974)
[72] Pub. L. No. 100-472 § 204(b)(c). (102 Stat. 2291) (1988).
[73] Pub. L. No. 95-244 (92 Stat. 3) (Feb. 3, 1978), Codified at 31 U.S.C. § 6301-6308.

of the Office of Federal Procurement Policy Act[74] and the Federal acquisition regulations cited in the originally enacted language of the 1988 amendment to the ISDEAA. Under section 2 of the Office of Federal Procurement Policy Act the declaration of policy is "to promote economy efficiency, and effectiveness in the *procurement* of property and services *by and for the executive branch of the Federal Government*"[75] (emphasis added). Section 3(b) of the legislation also explains its purpose to be "to establish an Office of Procurement Policy in the Office of Management and Budget to provide overall direction of *procurement policies, regulations, procedures and forms for executive agencies* in accordance with applicable laws."[76](emphasis added). The Federal Acquisition Regulations ("FAR")[77] describes the purpose of the regulation at 48 C.F.R. § 1.101, which states "The [FAR] is established for codification and publication of uniform policies and procedures for acquisition by all *executive agencies*" (emphasis added). The meaning of the term "acquisition" as it is used in 48 C.F.R. § 1.101 and throughout the FAR is provided in 48 C.F.R. § 2.101 and states:

> Acquisition means *the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government* through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.

[74] *Id.* at n. 67.
[75] *Id.* at section 2.
[76] *Id.* at section 3(b).
[77] 48 C.F.R. *et. seq*.

> Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

(emphasis added). The definition for the term "procurement" in the FAR states "see 'acquisition'"[78]. The Supreme Court in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005) (In addition to also relying on the Redbook as an authoritative source in interpreting the ISDEAA, see *Leavitt*, 543 U.S. at 642-643) acknowledged Congress's intended the use of the term "procurement" in the language of the ISDEAA was in the same context the term was used in S. Rep. No. 100-274, that accompanied the 1988 amendment. The decision highlights that, in doing so, Congress "intended to greatly reduc[e] the federal bureaucracy associated with them.[79]" *Leavitt*, 543 U.S. at 640.

Petitioner submits it is therefore appropriate for this Court to adopt the interpretation utilized by the Supreme Court's decision in *Leavitt* with respect to the term "procurement" having the same generally accepted meaning as used by Congress in the 1988 amendment. While the 1994 amendment of the ISDEAA struck out all of the language of the 1988 amendment in §5324 to substitute its

[78] 48 C.F.R. § 2.101
[79] "them" being a reference to federal procurement and acquisition laws.

current language, the Committee Report for the amendment makes clear Congress's intent in changing the language was in order to address "the 1988 Amendments have been misconstrued as requiring that the full panoply of federal acquisition regulations must apply to construction contracts despite congressional intent in 1988 to minimize the application of federal acquisition regulations (FAR) to construction contracting activities"[80]. Thus the purpose of the amendment was to "clarif[y] that the federal acquisition regulations are only to be applied to the limited extent that doing so is not inconsistent with the underlying purpose of the Self-Determination Act."[81] Accordingly, the amendments to 25 U.S.C. §5324 of the ISDEAA provide further clarification of Congress's previously expressed intent that the FAR is not be applied to ISDEAA agreements, except for the limited purposes expressed in 25 U.S.C. §5324(a)(3)(A)-(C). Petitioner respectfully submits the amended language only reflects Congress's desire to make clear their original intent for ISDEAA contracts to be differentiated from the ordinary procurement contracts that are subject to the FAR, whether or not said ISDEAA agreement are entered into with an Indian Tribe for construction or non-construction. It was not intended to substantively alter the law as it relates to the ISDEAA. In the event of any lingering doubt regarding Congress's enduring intent

[80] S. Rept. No. 103-413 at Pg. (1994)
[81] *Id.* at 6-7.

for the term "procurement" to have the same generally accepted meaning derived from its use in the Federal Grants and Cooperative Agreements Act of 1977[82] is resolved by most recent amendments to the ISDEAA's definition for a "self-determination contract"[83] through the addition of a definitional list clarifying "no contract entered into under title I (or grant or cooperative agreement used under 9) shall be- (1) considered to be a procurement contract; or (2) except as provided in section 107(a)(1), subject to any Federal procurement law (including regulations)"[84] The amended definition's additional reference to "federal procurement law" mirrors Congress's longstanding intent to differentiate ISDEAA agreements from procurement contracts, where the term "procurement" is understood within the generally accepted meaning of the principal purpose of the relationship between the Federal Government and the recipient of appropriated funds is to directly benefit the Federal Government.

III. 41 U.S.C. § 4712 IS NOT A FEDERAL CONTRACTING AND PROCUREMENT LAW.

The main thrust of Respondent's argument is Petitioner's was properly denied relief for the whistleblower retaliation complaint because 41 U.S.C. § 4712 ("Act") is a "contracting or procurement law within the scope of the [ISDEAA's]

[82] Pub. L. No. 95-244, 92 Stat. 3.
[83] Pub. L. No. 116-180, 134 Stat. 857-881.
[84] *Id.* at 134 Stat, 878-879.

exemption provision" under 25 U.S.C. 5324(a)(1).[85] Respondents support their position by alleging the "[Act's] context and place in the overall statutory scheme confirm that it is a contracting and procurement law. *San Carlos Apache Tribe,* 53 F.4th at 1240 (quoting *King v. Burwell,* 576 U.S. 473, 486(2015))"[86]. Petitioner respectfully submits that Respondent's representation of the Act disregards the Act's plain language which provides no indication Congress intended it to apply only to procurement contracts.

The broad scope of the Act's protections are provided in 41 U.S.C. §4712(a)(1), and includes "an employee of a contractor, subcontractor, grantee, subgrantee, or personal service contractor". As discussed above, The Federal Grant and Cooperative Agreement Act of 1977[87] ("FGCAA") established the criteria for Federal Agencies to use in determining the circumstances it is appropriate use grant agreements in their use of appropriate funds. Accordingly, like the term "procurement", the term "grant" also has an accepted meaning that applies to specific circumstances based on the principal purpose of the Federal Governments relationship with the intended recipient of appropriated funds. According to the criteria established by Congress, the circumstance where the use of a grant agreement is appropriate are distinct from those where the use of a procurement

[85] Answering Brief at 10.
[86] *Id. at 15.*
[87] Pub. L. No. 95-224, 92 Stat. 3.

contract would be appropriate. Moreover, because the FGCAA differentiates the appropriateness of using a procurement contract from a grant agreement based on the principal purpose of the Federal Agencies relationship with the intended recipient. Congress's use of the terms "grant" and "procurement" when drafting legislation will also incorporate the "cluster of ideas that were attached to each borrowed word [and] the body of learning from which it is taken." *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248, 134 S. Ct. 852, 861–62, 187 L. Ed. 2d 744 (2014). The "cluster of ideas" associated with Congress's use of the term "grant" are derived from their distinct "public purpose" that is not for the "direct use or benefit" of the Federal Government. For this reason, Petitioner submits the Court may presume Congress will not use the term "procurement" where it means "grants" and vice-versa. Stated otherwise, "the legislature says what it means and means what it says." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496–97, 213 L. Ed. 2d 847 (2022)(quoting *Henson v. Santander Consumer USA Inc*., 582 U.S. 79, ——, 137 S.Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) (internal quotation marks and alterations omitted).

By its very terms, the scope of the Act's protections encompasses circumstances where the principal purpose of the relationship between the Federal Government and recipient is not for the direct benefit of the United States Government. Accordingly, Respondent's argument fails to reconcile why the Act

would be limited to apply to procurement, where the plain language clearly demands a far broader application that includes federal financial assistance awarded under federal grant programs. Petitioner contends that if Congress intended for the Act to apply only to procurement contracts, the enacted language would, at a minimum, include either the term "procurement" or some reference to the procurement process. Where, as in the instant case, the relevant statutory text does not include such evidence, Petitioner respectfully submits this Court should not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341, 125 S. Ct. 694, 700, 160 L. Ed. 2d 708 (2005)

Respondents' citation to the Act's codification by Federal Agencies into the Federal Acquisition Regulations[88] fails to provide support for the proposition that the Act is a procurement law. The Act became effective as of 180 days from its January 2, 2013, enactment date (July 1, 2013). According to its provisions, the Act applied to:

> (A) all contracts and grants awarded on or after such date;
> (B) all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and"
> (C) all contracts awarded before such date that are modified to include a contract clause providing for the applicability of such amendments.[89]

[88] Answering Brief at 13.
[89] Pub. L. No. 112–239, div. A, title VIII, §828(b), Jan. 2, 2013, 126 Stat. 1840

Under §828(b)(2), The FAR was amended to enact the requirements of the Act and §828(b)(3) in fact requires "At the time of any major modification to a contract that was awarded before the date that is 180 days after the date of the enactment of th[e] Act", the agency head of the contracting agency is required to "make best efforts" to include a contract cause providing for the applicability of the Act. As such, it is clear the source of authority from amended FAR section cited by Respondents is the Act, and its applicability to the ISDEAA operates independently of any regulation promulgated by a Federal Agency to incorporate the Act's requirements. Nevertheless, consideration of the FAR section cited by Respondents does further demonstrate that the Federal Agency[90] responsible for 14.3% of all federal funds expended in 2023, recognizes the breadth of the Act's plain language as indicating Congress's intent for the Act to have a broad scope of application. The section of the FAR cited by Respondents is a requirement for contracting officers to insert the contract clause located at 48 C.F.R. 52.203–17 in all solicitations and contracts that exceed the simplified acquisition threshold.[91]. The final rule implementing 48 C.F.R. 52.203-17 was published on October 5, 2023, by the U.S. Department of Defense (DoD), General Service Administration (GSA),

[90] The U.S. Department of Defense, according to USASpending.gov expended $1.3 trillion in 2023. That is the fourth highest amount behind the Social Security Administration at $1.5 trillion, the Department of Treasury at $1.6 trillion and the Department of Health and Human Services at $2.5 trillion.
[91] The simplified acquisition threshold is $250,000 according to the definition provided under 48 C.F.R. § 2.101

and National Aeronautics and Space Administration (NASA).[92]. The Final Rule states:

> DoD, GSA, and NASA published a proposed rule in the Federal Register at 83 FR 66223 on December 26, 2018, to amend the FAR to implement an act to enhance whistleblower protection for contractor and grantee employees, including employees of subcontractors (Pub. L. 114–261), enacted December 14, 2016. Although the statute addresses both contractor and grantee employees, including employees of subcontractors, the FAR only directly covers contracts and contractors, and indirectly covers subcontracts and subcontractors with flowdown requirements. Grants are covered in title 2 of the Code of Federal Regulations.[93]

The final rule makes clear the DoD, GSA, and NASA all recognize, as the plain language of states, "the [Act] address both contractor *and grantee* employees" (emphasis added). The adoption of the Act by these Federal Agencies is consistent with the Supreme Court's recognition that Congress may use broad language to reflect their intentional effort to afford Federal Agencies the necessary flexibility to accomplish broad policy goals. For that reason, the Supreme Court has recognized "The fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Massachusetts v. E.P.A*., 549 U.S. 497, 532 (2007). As stated in the final rule, the Act's language specifies it applies to both contracts and grants. The

[92] 88 FR 69517-69523.
[93] *Id.*

implementation of the Act within the provisions of the FAR demonstrates the Federal Agencies responsible for preparing, issuing, and maintaining the FAR System[94] share Petitioner's view that the language of the Act reflects Congress's intent for the Act to have broad application that is not limited to the context of procurement contracts. Petitioner submits the language at § 4712(a)(1) of the Act referring to an employee's disclosure of information they reasonably believe to be evidence of "a gross waste of *Federal funds*"[95] supports a broad interpretation of the Act's scope because "Federal funds" conceivably refers to all funds appropriated by Congress, regardless of whether they are transferred to a recipient in a procurement contract, grant agreement, or cooperative agreement.

Contrary to Respondent's position, the term "procurement" does not appear anywhere in the text of the Act and there is no indication in the Act's legislative history that Congress intended the scope of the Act's protections to be constrained only to the employees of procurement contractors. Respondent's argument that the Act is a "federal contracting and procurement law within the meaning of the Indian Self-Determination Act's provision exempting self-determination contracts from those laws"[96] leaves no breathing room for the Act's language specifically referring to federal grants or subgrants to have any effect. In so doing Respondent's position

[94] See 48 C.F.R. § 1.103(b).
[95] Emphasis added.
[96] Answering Brief at 13.

treats the Act's express language referring to federal grants as surplusage, and the Supreme Court has repeatedly disavowed the construction of a statute in a manner that disregards its language as having no consequence. See *Nielsen v. Preap*, "every word and every provision is to be given effect [and that n]one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." (quoting A. Scalia & B. Garner, Reading Law: The interpretation of Legal Text 174 (2012). [97] Moreover, Respondents advocate for a construction of the Act that ignores Congress's explicitly stated intent employees of federal grants and subgrants to be protected from retaliation for disclosing the fraud, waste, and abuse of federal funds based upon the implication that doing so would "hinder tribal autonomy and flexibility in the administration of [ISDEAA] programs"[98]Like the interpretive cannon against surplusage, the Supreme Court has also held "Court[s] have no license to "disregard clear language" based on an intuition that "Congress must have intended something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794, 134 S. Ct. 2024, 2034, 188 L. Ed. 2d 1071 (2014) (internal quotation marks omitted) *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund,* 138 S. Ct. 1061, 1078, 200 L. Ed. 2d 332 (2018). If Congress suspected the application of the Act's protections to ISDEAA would have the disruptive effects

[97] 139 S. Ct. 954, 969, 203 L. Ed. 2d 333 (2019).
[98] Answering Brief at 15.

Respondents suggest, Petitioner submits it would made further use of the Act's exception provisions under 41 U.S.C. §4712(f) to either limit or address their concern.

Rather than contending with the plain language of the Act, Respondent's suggest the instant case is the rare exception. In contrast to the Supreme Court's longstanding principle that the "starting point" of statutory interpretation is "the language of the statute itself." *Randall v. Loftsgaarden*, 478 U.S. 647, 656, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986), Respondents contend "the dispositive question is whether the Indian Self-Determination Act exempts the Tribe from [the Act].[99] Upon consideration, this theory only proves to further demonstrate the extent with which the BIA Director's interpretation of the Act deviates from the administrative law jurisprudence that guides the judicial review of agency actions. Chief among them is the Supreme Court's holding that "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate" *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328, 134 S. Ct. 2427, 2446, 189 L. Ed. 2d 372 (2014). Respondent's wholesale disregard of the of the comprehensiveness with which the Act's structure provides an answer to the questions "who is eligible for the whistleblower protections provided by this Act?"[100] and "who is excepted from

[99] *Id.* at 10-11.
[100] *See* 41 U.S.C. § 4712(a)(1)

the whistleblower protections provided by this Act?"[101] demonstrate the extent to which Respondent arguments would require this Court to depart from the established framework for reviewing "an agency's construction of a statute which it administers" by "First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013). Respondents instead proposes this Court look beyond the text of the Act that speaks precisely to the question "are ISDEAA agreements excepted from the Act" and instead look to the language of a different statute to affirm a rationale the agency did not articulate in the agency action subject to review. Moreover, Respondents do not provide this Court with an explanation why the express exceptions in §4712(f) not including ISDEAA agreements is not a clear expression of Congress's intent for which "the court, as well as the agency, must give effect." Id.

As stated above, the Act address both who is covered by the Act's protections and who is not. It is therefore unnecessary for the Court to address the issue raised by Respondent's arguments of whether or not the Act is a federal procurement and contracting law or whether the Act is within the scope of the exemptions provided in the provisions of the ISDEAA. Petitioner respectfully submits the clarity with

[101] *See* 41 U.S.C. § 4712(f)(1)-(2).

which Congress's intent is expressed in the Act also precludes Respondents arguments that "[the Act's] context and 'place in the overall statutory scheme' confirm that it is a contracting law."[102] While the Supreme Court has held "the heading of a section" is a "tool[] available for the resolution of a doubt about the meaning of a statute," *Yates v. United States,* 574 U.S. 528,540 (2015)(quoting *Almendarez-Torres v. United States,* 523 U.S. 224, 234 (1998))[103]. Petitioner respectfully contends the Supreme Court's decision in *Yates* does not support Respondent's argument in the instant case given the proximity of the sections heading to the text in each matter. In *Yates,* the Supreme Court considered the caption of 18 U.S.C. § 1519 to determine whether the term "tangible object" contain in the language of the section encompassed the fish that Yates was prosecuted for having destroyed. Ultimately, the Supreme Court held the heading of §1519 was a clue that Congress did not intend for "tangible object" to broadly sweep in every physical object "including things no one would describe as records, documents, or devices closely associated with them". *Yates,* 574 U.S. at 540. Furthermore, the subject matter of the chapter of the United States Code in *Yates* was a much closer match to the underlying conduct at issue than the name of the chapter in the instant case. In *Yates,* the caption of §1519 was "Destruction,

[102] Answering Brief at 13.
[103] *Id.* at 14.

alteration, or falsification of records in Federal investigations and bankruptcy." This section was located under Chapter 73, "Obstruction of Justice" within Title 18 of the United States Code. In the instant case, the Act is codified in §4712 of Chapter 47 "Miscellaneous" of Title 41 of the United States Code. In *Yates,* the subject matter of the sections surrounding §1519 all related to acts involving some form of the obstruction of justice. In the instant case, there is far less uniformity in the subject matter of the sections surrounding §4712 to provide an equivalent indication of Congress intent regarding the scope of the Act's protections.[104] As such, Petitioner respectfully contends the accepted meaning of the terms "procurement" and "grants", and the clarity of Act's plain language in addressing the individuals who are covered in addition to the provision further clarifying which individuals are excepted from the Act's protections are sufficient for this Court to find the requisite doubt about the statutes meaning is not present in the instant case. For these reasons, Petitioner respectfully directs the Court's attention to the Supreme Court's application of "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Trainmen v. Baltimore & Ohio R. Co*., 331 U.S. 519, 528–529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). Given the resounding clarity with which Congress has spoken in the Act,

[104] Headings under Chapter 47 range from § 4708 "Payment of reimbursable indirect costs in cost-type research and development contracts with educational institutions" to § 4713"Authorities relating to mitigating supply chain risks in the procurement of covered articles".

Petitioner respectfully submits the application of this rule would be prudent in the instant case.

Furthermore, the provisions related to the application of federal procurement and acquisition laws to ISDEAA construction contracts under 25 U.S.C. § 5324(a)(3)(A) was apart of the 1994 amendment of the ISDEAA. In addition to the express policy goals the amendment was intended to fulfill[105], the title of the United States Code wherein the Act is codified did not exists. Furthermore, the language of the 1994 amendment to the ISDEAA referencing "Division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of title 41"[106], as originally enacted stated "Title III of the Federal Property and Administrative Services Act of 1949 (63 Stat. 393 et seq., chapter 288)[107]. It was not until Title 41 of the United States Code was created pursuant to the authority of Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3677, that the language of 25 U.S.C. § 5324(a)(3)(C)(ii)(IV) was revised to reflect its current language. Although the language of this section may appear to include the Act in the scope of the sections of the United States Code that are excepted from ISDEAA construction contracts, the Supreme Court has held "absent [substantive comment by Congress] it is generally held that a change during codification is not intended to alter the statute's

[105] *See supra* at n. 64.
[106] 25 U.S.C. § 5324(a)(3)(C)(ii)(IV)
[107] Pub. L. No. 103-413, section 102(10), 108 Stat. 4523 (1994).

scope". *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 318, 105 S. Ct. 3180, 3187, 87 L. Ed. 2d 220 (1985). Considering the Act was not enacted into law until approximately two years after the 2011 revisions to 25 U.S.C. 5324(a)(3)(C)(ii)(IV) and nothing in the 2020 amendment to the ISDEAA indicates Congress's intent to include the Act within the sections of Title 41 of the United States Code precluded from applying to ISDEAA agreements by the 1994 Amendment, Petitioner submits there exist no "substantive comment" in the language of the ISDEAA that reflects Congress's intent for the Act not to apply.

Lastly, in addition to the textual evidence demonstrating Congress's intent for the Act to have a broader application that procurement contracts, the Senate Report accompanying the Act references its application to federal grantees. Page 2 of Senate Report 114-270 states "S. 795 addresses current gaps in whistleblower protections for the individuals that work on projects funded by the over $1 trillion in contract and grant funding provided by the Federal Government each year." Statements such as these demonstrate Congress clearly recognized the magnitude of federal appropriations expended under federal grant programs and its expansion of whistleblower protections to the employees of federal grantees and subgrantees was an intentional act to safeguard those funds from fraud waste and abuse. For this reason, Petitioner reaffirms the argument included in the Opening Brief[108], that

[108] Opening Brief at 37.

Congress recognized the successes of the whistleblower protections provided in the American Recovery and Reinvestment Act of 2009[109] ("ARRA") and sought to expand those protections to *all* federal funds except for those expressly excluded.[110]. Under the Act, Congress laid down a law which clearly articulates their intent for whistleblowers that make protected disclosures regarding the fraud, waste and abuse of federal funds to be protected from retaliation. Respondent's interpretation substantially narrows those protections and directly conflicts the express language of the law.

IV. RESPONDENT'S INTERPRETATION CONFLICTS WITH THE BROADER FEDERAL POLICY OF INDIAN SELF-DETERMINATION.

The Senate Report accompanying the 1988 amendment to the ISDEAA provides an extensive discussion of the United States Governments relationship with Indian Tribes and the Federal Policy developed as a consequence thereof. These foundations form the basis of the federal policy of Indian self-determination, which is described as:

> The federal policy of Indian self-determination is one of the most progressive federal Indian polices in our Nation's history. The self-determination policy is premised on the notion that Indian tribes are the basic governmental units of Indian policy…The federal policy of Indian self-determination is premised upon the legal relationship between the United States and Indian tribal governments. The present right of Indian tribes to govern their members

[109] Pub. L. No. 111-5, Division A, Title XV § 1553, 123 Stat. 297-302. (2009)
[110] Senate Report 114-270 at 2-3.

> and territories flows from a preexisting sovereignty limited, but not abolished.[111]

For this reason, "[a] fundamental objective of the federal policy of Indian self-determination is to increase the ability of tribal governments to plan and deliver services appropriate to the needs of tribal members."[112] Congress envisioned the ISDEAA to "provide[] tribes with the flexibility to redesign Federal programs and services to meet the needs of Indian people."[113] The Senate Report also describes the United States Government's recognition that the recent development of Indian Tribal Government to:

> [O]perat[e] health services, human services, and basic governmental services such as law enforcement, water systems and community fire protections…and to engage in sophisticated economic and community development….all of these achievements have taken place during a time when tribes have also developed sophisticated systems to manage and account for financial, personnel, and physical resources." [is] "directly attributable of the federal policy of Indian self-determination[114]

Alongside the increasing capacity of Indian Tribes provide services to their members were "[i]mprovements in tribal financial, personnel, property and

[111] S.Rept. 100-274 at 3-4.
[112] *Id. at 5.*
[113] *Id.*
[114] *Id.* at 4.

procurement systems [that have] enabled tribes to manage increasingly complex matters." [115]

The report describes the Department of Interior Office of Inspector General reporting an increase in tribal assumption of responsibility for tribal financial management, and this assumption was with a combination of "tribal funds, indirect cost reimbursements associated with self-determination contracts, Bureau of Indian Affairs self-determination grants, and Indian Health Services tribal management grant."[116] Of note, the Senate Report explains:

> "The conditions for successful economic development on Indian lands are… community stability, including adequate law enforcement and judicial systems and basic human services. There must be adequate infrastructure including roads, safe water and waste disposal systems, and power and communications utilities. When these systems and services are in place, tribes are in the best position to implement economic development plans, taking into account the available natural resources, labor force, financial resources and markets.[117]

To attain successful economic development, the Senate Report recognizes "Indian tribes use self-determination contracts to meet basic human needs in Indian communities. The tribes then use tribal, federal and private resources to create jobs and support businesses on Indian lands."[118]

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

Thus, from the perspective of the United States Government, the principal purpose of the ISDEAA and the agreements created between the Federal Government and Indian Tribes is fundamentally to carry out a public purpose of support of Indian Tribes for the benefit of their membership. When these purposes are considered alongside the United States Government's intent for policy of Indian self-determination to achieve these means through the process of the Secretary of the Interior and the Secretary of Health and Human Services to provide direct services until such time that "a tribe freely chooses to contract to operate those services.", at which point "the Secretaries are required to transfer resources and control over those programs to the tribe."[119]. In this regard, policy of self-determination is premised on the idea that there will not be substantial governmental involvement between the Federal Government and an Indian Tribe administering an ISDEAA agreement. Consideration of these elements compel the conclusion that the ISDEAA's principal purpose is to carry out a public purpose of support for Indian Tribes and their members in a manner that is intended to promote self-government through "maxim[um] tribal administration and autonomy in the provision of services through self-determination agreement."[120]

[119] *Id.*
[120] Answering Brief at 15.

For these reasons, a conclusion that recognizes the parallels between the principal purpose and fundamental characteristics of agreements entered into under the ISDEAA and the criteria set forth by Congress in the FGCA that direct a Federal Agency to utilize grant agreements as the legal mechanism for providing appropriated funds is inescapable. As detailed above, the exemption provided under Pub. L. No. 98-250 was enacted into law for the limited purpose of permitting the U.S. Department of the Interior to continue utilizing the "self-determination contract" naming convention and thereby avoid upending the U.S. Department of Interiors internal system for transferring appropriated funds to recipients.[121]. It did not alter the substance of Congress's purposes for enacting the ISDEAA and its policy regarding the promotion self-determination and autonomy for Indian Tribe's serving their membership. Petitioner respectfully contends the consistency of the purposes between ISDEAA agreements and the criteria applicable to Federal Agencies use of grant agreements supports a construction of the Act that includes ISDEAA agreements within the scope of its protections.

The recognition of these characteristics is not unique to Petitioner's argument in the instant case. The Senate Select Committee on Indian Affairs also recognized these shared characteristics between federal grants agreements and the ISDEAA contracts in the discussion surrounding the 1988 amendments in explicitly stating

[121] See GAO Decision B-222665

the Committee "[C]onsidered deleting the term "contract" and using another term such as "self-determination grant"[122]. While the Committee ultimately chose to continue utilizing the term "contract" to "convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party"[123] and maintain consistency in the language of other provisions of the ISDEAA, Congress's recognition that ISDEAA contracts share fundamental characteristics with grant agreements remained undisputed. Furthermore, Congress explicitly considered ISDEAA contracts and agreements being subject to federal oversight in circumstances involving the fraud, waste and abuse of the federal funds provided to Indian Tribes. In discussion regarding ISDEAA reporting requirements, the Senate Select Committee on Indian Affairs Report for the 1988 Amendment states:

> "These amendments are consistent with the philosophy that the Federal government should not intervene in the affairs of State, local, or tribal governments *except in instances where civil rights have been violated or gross negligence or mismanagement of federal funds is indicated, as provided in Section 109 of the Act.*[124]

(emphasis added). These considerations clearly indicate Congress's intent in enacting the ISDEAA included their recognition of the appropriateness of federal

[122] Senate Report No. 100-274 (1987), at Pg. 19.
[123] *Id.*
[124] Senate Report No. 100-274 (1987) at 21.

oversight to prevent the fraud, waste, and abuse of federal funds. The whistleblower protections provided under the Act are clearly an extension of this concept and Respondents have presented this Court with no explanation why ISDEAA "contracts" are not also covered by the Act's inclusion of the term "contracts" in the provision establishing the scope of its protections. In addition to the linguistic consistencies, the ISDEAA's legislative history confirms Congress's emphasis the ISDEAA creating a binding contractual promise between Indian Tribes and the Federal Government. Nevertheless, Respondent provides no argument why this Court should not interpret the Act's use of the term "contract" to include ISDEAA contracts.

Finally, Respondent's argument that the maximization of tribal administration and autonomy requires a construction of the Act that precludes its application to the ISDEAA. As discussed above, the U.S. Government's concept of self-determination by Indian Tribes is premised on the recognition that Indian Tribes are in the best position to serve the needs of their membership where they have been able to develop "sophisticated systems to manage and account for financial, personnel, and physical resources."[125] These systems provide the foundation for Indian Tribe's to develop the necessary infrastructure and governmental services to successfully implement economic development plans that

[125] *Id.* at 4.

maximize their use of natural resources, tribal, federal and private resources that will in turn "create jobs and support business on Indian lands"[126]. This concept makes a clear association between the appropriate use of federal funds provided by the ISDEAA and Indian Tribe's developing the institutional capacity to promote the interest of their membership and attain greater autonomy and self-determination.

Nevertheless, Respondent's argument advocates the removal of the whistleblower retaliation protections Congress implemented to safeguard the same federal funds that have been extensively used by Indian Tribe's to fully recognize the policy objectives of self-determination advanced by the ISDEAA. Petitioner respectfully contends an interpretation of the statute in this manner would create the type of absurd result the Supreme Court avoids. (see *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252, 73 L. Ed. 2d 973 (1982) "It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). For these reasons, Petitioner respectfully submits the plain language of the Act can be interpreted harmoniously with the text and purpose of the ISDEAA. In contrast, Respondents have failed to establish the requirement articulated by the Supreme Court that "[a] party seeking to suggest that two

[126] *Id.*

statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1624, 200 L. Ed. 2d 889 (2018) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995) (internal quotation omitted). Moreover, under such circumstances, the standard required by the Supreme Court is for Congress's intentions to be "clear and manifest." *Morton v. Mancar*i, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483, 41 L. Ed. 2d 290 (1974). Respondent's position that 25 U.S.C. § 5324(a)(1) requires the Act to expressly state it applies to Indian Tribes is insufficient to overcome this burden because both the ISDEAA's legislative history, as discussed above, and the context of the provision cited negate preclude an interpretation of § 5324(a)(1) that would include the Act within its scope. Congress had a clear understanding of the meaning it applied in using the term "procurement" in the context of the ISDEAA and the Act's plain language makes clear its characteristics exceed the boundaries of a federal procurement laws. Moreover, this Court's decision in *Chippewa Cree Tribe of Rocky Boy's Reservation v. U.S. Dept't of the Interior*, 900 F.3d 1152, 1158 (9th Cir. 2018) recognized the application of the ARRA's whistleblower protections to the Indian Tribe's relied on a section of the ARRA that was not a part of §1553, where the protections are provided. The express reference to ISDEAA contracts cited by the

Court was contained within §1610(b) of the ARRA, which provided for various requirements for the implementation of contract reforms provided by the ARRA including oversight and accountability requirements. Petitioner respectfully submits the provisions of the Act's original legislation[127] also provides for Indian Tribes to be included in its scope in expressly stating Act's requirements apply to "all contracts and grants awarded on or after" the Act's effective date. Petitioner submits the use of a term as comprehensive as "all" includes those contracts and agreements awarded pursuant to the ISDEAA and the lack of evidence presented by Respondent to suggest otherwise is conclusive on the matter. More importantly, Petitioner submits the Court's recognition in *Chippewa Cree Tribe* that:

> "as much as tribal sovereignty "rests in the hands of Congress," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S.Ct. 2024, 2037, 188 L.Ed.2d 1071 (2014), it also rests in the hands of the Tribe. And when the Tribe accepted [federal] funds from the federal government, it agreed to certain procedures for safeguarding the use of those funds."

Chippewa Cree Tribe, 900 F.3d at 1159, is consistent with the U.S. Government's policy of self-determination by Indian Tribes and is equally persuasive in the instant case. Nothing in the Certified Administrative Record suggests the Indian Tribe subject to Petitioner's retaliation complaint was unaware of the conditions imposed by the Act upon their acceptance of federal funds. Petitioner contends

[127] Pub. L. 112–239, div. A, title VIII, §828(b), Jan. 2, 2013, 126 Stat. 1840

Respondents position would absolve Indian Tribe's that are provided federal funds under the ISDEAA from maintaining any accountability to their membership and would only impede the members of Indian Tribes from accessing the benefits contemplated by Congress in enacting the ISDEAA.

V. PETITIONER'S ARGUMENT REGARDING THE APPLICATION OF THE ACT TO THE ISDEAA ARE SUPPORTED BY FEDERAL COURT PRECEDENT IN REVIEWING FEDERAL AGENCY ACTIONS.

As previously demonstrated, the ISDEAA's legislative history and other provisions make clear the Act is not a "federal contracting or cooperative agreement law[] (including regulations)" within the meaning provided by the ISDEAA. Congress's historical refutation of the applicability of federal acquisition and procurement laws applicable to Federal Agencies is the result the BIA incorrectly interpreting ISDEAA contracts to be procurement contracts and subjecting them to the full panoply of federal procurement and acquisition laws that apply to procurement contracts, as defined by the FGCA.[128] Respondent's contention the provisions of the Tribal Transportation Program (TTP) codified at 23 U.S.C. §§ 201-202 fail to account for the context of provisions and language surrounding of 23 U.S.C. §202(b)(6)(A). Specifically, 23 U.S.C. § 202(b)(6)(A) states

> Notwithstanding any other provision of law or any interagency agreement, program guideline, manual, or policy directive, all funds made available through the

[128] See *supra* n. 43-80.

> Secretary of the Interior under this chapter…. shall be made available, upon request of the Indian tribal government, to the Indian tribal government for contracts and agreements for such planning, research, engineering, and construction in accordance with [1] Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.).

Petitioner contends the provision of this section is intended to be interpreted in within the context of the process Congress prescribed for Indian Tribes to request the authority to assume control of a federal program and the subsequent standards applicable to the review and acceptance or declination of the proposal submitted to the Secretary of the U.S. Department of Interior. Read in tandem with the subsequent section (23 U.S.C. §202(b)(6)(B)), which is titled "Exclusion of Agency Participation", which emphasizes:

> All funds, including contract support costs, for programs, functions, services, or activities, or portions of programs, services, functions, or activities, including supportive administrative functions that are otherwise contractible… shall be paid in accordance with subparagraph (A), without regard to the organizational level at which the Department of the Interior has previously carried out such programs, functions, services, or activities.

As previously discussed, implementation of the ISDEAA was hindered by various practices implemented by the BIA and the U.S. Department of Interior, including the proposal process that Indian Tribes engaged in to assume responsibility for a federal program. As discussed in the Senate Select Committee on Indian Affairs

report to the 1988 amendment[129], the Senate Report addresses the amendments including language that "Restated in the amendments is important language regarding the contractibility of programs which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208)[130] and any Act subsequent thereto." (Senate Report 100-274 at 23). The Senate Report explained the restatement in this section in stating:

> The purpose of restating this language is to clarify that the Secretary is not to consider any program or portion thereof to be exempt from self-determination contracts. Tribes have the right to contract for BIA Agency functions, IHS Service Unit functions, and BIA and HIS Area Office functions…The tribes also have the right under the Indian Self-Determination Act to work with the Secretary to redesign BIA and IHS Area Office, Field Office, Agency and Service Unit functions to better meet the needs of the tribes served directly by such offices.[131]

The necessity of these restatements is stated to result from:

> The current practice of Federal agencies that impose "threshold criteria" on a self-determination contract application is clearly inconsistent with the intent of the Indian Self-Determination Act. Furthermore, it is contrary to the intent of the Indian Self-Determination Act for a Federal agency simply to fail to enter into a contract without providing to the tribal organization a formal notice of declination that states the grounds for declination and provides an opportunity and procedures for an appeal hearing within sixty days of receipt of a proposal to contract. The ninety day and the sixty-day time

[129] Senate Report 100-274 (1987)
[130] Pub. L. No. 68-175, 42 Stat. 208 (1921)
[131] Senate Report 100-274 (1987) at Pg. 22.

> frames for approval or declination of the contract both begin simultaneously upon receipt of the proposal.[132]

Thus, in addition to abolishing the use of "threshold criteria" to proposals submitted by Indian Tribes to contract Federal Programs under the ISDEAA, the 1988 Amendment sought to further increase tribal participation by providing a hearing to contest the declination of the proposal:

> Section 102 and 103 of the Indian Self-Determination Act now require that, whenever an application by a tribal organization is declined by the Bureau of Indian Affairs or the Indian Health Service, the Federal agency must provide the applicant with a hearing to contest. The intent of the Indian Self-Determination Act is to assure that a tribal organization receives a hearing "on the record" in accordance with the requirements of the Administrative Procedures Act.[133]

The 1988 Amendments were also intended to clarify Congress's intent under the ISDEAA to maximize the ability for Indian Tribes to use ISDEAA contracts to administer a Federal Program regardless of the geographic location of the program by the Bureau of Indian Affairs:

> This section clarifies that tribes are eligible to contract for any program or function operated by either Secretary for the benefit of tribes, regardless of whether such specific programs or functions are operated locally. For example, a tribe may need to conduct a natural resources planning and management program under a self determination contract. The fact that natural resources planning and management is not operated locally by the Bureau of

[132] *Id.* at Pg. No. 24
[133] *Id.*

> Indian Affairs agency office should not prevent the Secretary from entering into a contract with that tribe.[134]

The 1988 Amendment further clarified the right of Indian Tribe's to administer a Federal Program under the ISDEAA irrespective of any particular allocation method employed by the Secretary of the U.S. Department of the Interior:

> Furthermore, the fact that the Secretary has decided to allocate funds to a local agency in a particular manner should not bar the tribe from contracting for functions, such as criminal investigation, for which funds have not been allocated to that particular agency.[135]

Additionally, the 1988 Amendment established objective criteria that limited the circumstances under which the Secretary would be authorized to decline a proposal submitted by an Indian Tribe and provided for specific actions that must be taken in the event of the declination to provide the Indian Tribe with information about their rights under the ISDEAA:

> In addition, the practice of simply failing to enter into a contract, when the tribal organization has submitted an application for a self-determination contract, is contrary to the Act. The Secretary may decline to enter into a self-determination contract only if the Secretary utilizes the declination criteria and procedures outlined in Section 201, and provides the tribal organization with a statement of declination in writing within sixty days of thereceipt of the application. The Secretary must inform a tribe in writing of its opportunity for a hearing. Such hearing should be a due process hearing "on the record" conducted

[134] *Id.* at Pg. No. 25.
[135] *Id.*

> in accordance with the requirements of the Administrative Procedures Act.[136]

As previously discussed, these measures were in response to the Indian Tribes' inability to contract with the BIA to administer Federal Programs under the ISDEAA as a result of the establishment contracting bureaucracy within the BIA. Intentionally or unintentionally, BIA leadership and personnel were incentivized to limit the amount of ISDEAA contracts to award to Indian Tribes because doing so jeopardized the amount of appropriations funds available to fund the operations of BIA personnel and operations at regional and area offices. Clearly, these practices contradicted the purpose of the ISDEAA, so Congress enacted various amendments to remove the many impediments Indian Tribes faced in assuming control of Federal Programs that benefit Indian Tribes. It is within this context that the language of 23 U.S.C. § 202(b)(6)(A) and the following provision under §202(b)(6)(B) becomes a much clearer articulation of Congress's intent. These provisions clarify the right of Indian Tribes to contract with the Secretary of the U.S. Department of Interior or the Federal Highways Administration ("FHWA") Federal Lands Highway Office ("FLH") to access the funds appropriated to the U.S. Department of Transportation to operate transportation programs on Indian lands. As such, the provisions of Title 23 cited by Respondent reflect Congress's

[136] *Id.* at Pg. No. 26.

intent for Indian Tribes to have the same ability to administer the TTP program in accordance with the same requirements that facilitate their ability to implement ISDEAA programs. The appropriate meaning to be attributed to the phrase "in accordance with the ISDEAA" is to constrain Federal Agencies from impeding Indian Tribes from assuming control of the TTP program. Respondent's position that "in accordance with the ISDEAA" should be interpreted to exclude the funds provided under TTP agreements to be different than the "federal funds" identified by 41 U.S.C. §4712(a)(1) defies established principles of statutory construction. Petitioner submits nothing in this language reflects Congress's intent to confer any additional authority for the U.S. Department of Interior or the U.S. Department of Transportation to waive a statutorily enacted right available to the class of individuals identified by the Act, by denying a claim for relief pursuant to an independently operating provision of law that appears nowhere in the United States Code's TTP provisions.

Petitioner's arguments in the Opening Brief regarding the differences between the Tribal Transportation Program and the ISDEAA agreements were in response to the BIA Director Darryl LaCounte's Order denying relief under §4712(c)[137]. The BIA Director's Order justifies the determination to deny relief on the basis that the Act did not apply to agreements made under the ISDEAA.

[137] 1-CAR-36.

Notably, the BIA Director's Order did not explain why the Act did not apply to agreements made under the ISDEAA or which provision granted the BIA Director authority to categorically exclude ISDEAA agreements from the Act. Petitioner's response is premised upon the Supreme Court's recognition that "[a]n agency, after all, "literally has no power to act"—including under its regulations—unless and until Congress authorizes it to do so by statute. *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 301, 142 S. Ct. 1638, 1649, 212 L. Ed. 2d 654 (2022). Contrary to the information contained in the BIA Director's Order, the provisions of the TTP Agreements between the BIA and Petitioner's former employer clearly cite the authority for entering the agreement as "Chapter 2 of Title 23, United States Code"[138], not the ISDEAA. Moreover, the TTP agreements references to the ISDEAA, limits its applicability to the purposes of "Tort Claims Act Coverage and application of the Prompt Payment Act."[139]. No provisions of the Tort Claims Act or the Prompt Payment Act authorize the Director of the BIA to waive otherwise applicable federal laws that apply to agreements for federal financial assistance.

Petitioner argument in the Opening Brief were intended to illustrate the disparity between the source of authority relied upon by the BIA Director for denying Petitioner relief under the Act and the Congressionally authorized source

[138] 1-CAR-214.
[139] *Id.*

of authority from which the agreements between Petitioner's former employer and the BIA was created. Petitioner's references to the model agreement and the regulations governing the Tribal Transportation Program under 25 C.F.R. 170 provide evidence to refute the BIA Director's Order deriving the authority to deny Petitioner relief based on the assertion it was an ISDEAA agreement. 25 U.S.C. § 5329(a)(1) requires "Each self-determination contract entered into under this chapter shall…contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section." If the TTP agreement was an agreement entered into under the ISDEAA, as the BIA Director's Order states, the TTP agreement would conform to requirements of 25 U.S.C. § 5329(a)(1).

Contrary to Respondent's position that "nothing in the Indian Self-Determination Act requires the agency to use a model contract for all programs."[140], Congress mandated the use of the model agreement for every contract entered into under the ISDEAA. This requirement was included in the 1994 amendments to the ISDEAA as stated in the accompanying Senate Committee Report: "Section 3 of the bill, as reported, sets forth model contract language for all self-determination contracts. These mandatory provisions are also codified and made a part of the statute."[141] It follows that, if the TTP agreement at

[140] Answering Brief at 20.
[141] Senate Report 103-374 at Pg. No. 10.

issue in Petitioner's whistleblower retaliation complaint did not contain or incorporate by reference, the model agreement required pursuant to 25 U.S.C. § 5329(a)(1), then it does not satisfy the requirements set forth by Congress as a defining characteristic of an ISDEAA contract. Since the TTP Agreement does not conform to these requirements, it follows that the ISDEAA cannot be the source from which the BIA Director can lawfully deny Petitioner's claim for relief under the Act.

The regulations for the Tribal Transportation Program under 25 C.F.R. 170 further demonstrate the difference between ISDEAA contracts and "program agreements". The TTP agreement between Petitioner's former employer and the BIA is a "program agreement", which the TTP regulations differentiate from ISDEAA contracts in 23 separate provisions of the TTP regulations. The distinction between ISDEAA contracts and TTP agreements was articulated as one of the benefits for choosing not to utilize an ISDEAA contract to administer the TTP program in the informational material provided to Petitioner's former employer by the BIA.[142] to the Indian Tribe that formerly employed the Petitioner. Lastly, 25 U.S.C. § 5328(a)(1) prohibits the Secretary of the U.S. Department of the Interior from promulgating any regulations or imposing any nonregulatory requirements

[142] See attachment Pg. No. 4-17.

for any ISDEAA agreements within 20 months of October 25, 1994[143]. The regulations promulgated in conformance with this requirement are located under 25 C.F.R. 900. Since the TTP Agreement subject to the instant case was not subject to these regulations, it again follows that it is not an ISDEAA contract, or the exception pronounced in the BIA Director's Order was not promulgated in conformance with any authority conferred by Congress. Under 25 U.S.C. § 5328(e), the Secretary of the U.S. Department of the Interior is deprived the authority to waive or make any exception for a contract entered into under the ISDEAA that is "contrary to statutory law". Accordingly, even if the TTP agreements in the instant case were ISDEAA contracts, neither the Secretary of the U.S. Department of the Interior nor the BIA Director have the authority to waive the statutory requirements of the Act to deny Petitioner's the relief and remedies available under §4712(c).

Respondent's position that "[t]he agency's decision to deny the complaint on threshold, legal grounds did not require an extensive explanation or a review of the facts or legal merits of petitioner's complaint"[144] contradicts the well-established manner in which Federal Court's review agency actions under the arbitrary and capricious standard. The Administrative Procedures Act's ("APA")[145] judicial

[143] 25 U.S.C. § 5328(a)(2)(b).
[144] Answering Brief at Pg. 21.
[145] 5 U.S.C. § 706(2)(A)

review provisions require "agencies to engage in "reasoned decision-making," *Michigan* v. *EPA*, 576 U.S. 743, 750, 135 S.Ct. 2699, 192 L.Ed.2d 674 (2015) (internal quotation marks omitted), and directs that agency actions be "set aside" if they are "arbitrary" or "capricious," 5 U.S.C. § 706(2)(A)."*Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905, 207 L. Ed. 2d 353 (2020). The agency action subject to the Court's review in the instant case has far-reaching consequences for the federal funds provided to Indian Tribes and the degree of protection afforded to those funds and individuals employed by them from fraud, waste, and abuse.

Petitioner contends the BIA Director's Order fails to comport with the APA's requirements for agencies to engage in "reasoned decision-making" when compared to the 34 pages of legal review and analysis conducted by the Solicitor of the U.S. Department of the Interior's decision in the *Chippewa Cree Tribe* case. The BIA Director's failure to provide citations to any particular provision of the ISDEAA that conferred him the authority to categorically waive a requirement imposed by Congress is arbitrary and capricious because it is not in accordance with the Act or any other Federal Law. Petitioner respectfully submits this Court should not accept Respondent's efforts to retroactively justify the BIA Director's action because they were not articulated in the BIA Director's Order. Supreme Court precedence requires "the courts may not accept… *post hoc* rationalizations

for agency action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443(1983). Similarly, the BIA Director's internal memorandum satisfies the requirements of a final agency action under the standard pronounced by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). Were it not for Petitioner's continued efforts to obtain the relief required by the Act, it is irrefutable that "legal consequences [would] flow" *Id.* from the determination articulated by the BIA Director in the memorandum. As stated in Petitioner's Opening Brief[146], the Office of the Inspector General for the U.S. Department of the Interior ("DOI OIG") closed any investigation of Petitioner's retaliation complaint as a direct consequence of the information contained in the BIA Director's memorandum.

Moreover, the BIA Director's Memorandum explicitly invokes "the BIA[] policy not to interfere with the governance of tribes allowing them to utilize their own processes"[147]. It is from this policy that the BIA Director's subsequent recommendation that take "no further action regarding this allegation."[148]

[146] Opening Brief at Pg. 50.
[147] Opening Brief Dkt. Entry No. 40-1 at Pg. No. 85.
[148] *Id.*

Additionally, the BIA Director's Memorandum is not "preliminary or internal advice"[149]. If the BIA Director's Memorandum was in fact preliminary or represented an internal deliberation, Petitioner expects it would not have been provided under the Freedom of Information Act's "deliberative process privilege, which covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 2, 121 S. Ct. 1060, 1062, 149 L. Ed. 2d 87 (2001) (quoting *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). 5 U.S.C. § 552(b)(5).

Applying the criteria pronounced by the Supreme Court in *Spear*, the BIA Director's Memorandum address six different allegations included in Petitioner's whistleblower complaint and, based on a BIA policy, provided a response to the DOI OIG that resulted in the Petitioner's whistleblower complaint not being investigated. While the analysis contained in the BIA Director's Memorandum may not be as extensive as the U.S. Department of Interior's decision in the *Chippewa Cree Tribe* case, it is far more comprehensive than what the BIA Director provided in the Order subject to the Court's review in this case. In this regard, the BIA Director's discussion of Petitioner's allegation in the Memorandum "mark[s] the

[149] Answering Brief at Pg. No. 22.

consummation of the agency's decisionmaking process" *Bennett v. Spear*, 520 U.S. 154, 178, 117 S. Ct. 1154, 1168, 137 L. Ed. 2d 281 (1997). As previously discussed, the legal consequences resulting from the BIA Director's Memorandum satisfies the second prong of the Supreme Court's finality test. Accordingly, the grounds articulated in the memorandum qualify as a pronouncement of the BIA Director's rationale for the resulting final agency action of Petitioner's whistleblower claim being foreclosed from consideration for relief by the Agency Head.

Thus, it is appropriate for this Court to compare the December 5, 2022, Order to the BIA Directors Memorandum to determine whether they reflect the consistent application of an agency policy for the exact same set of underlying facts. Petitioner submits the determination by the BIA Director are inconsistent based on the Memorandum citing a undefined policy as the justification for its decision and the arguments presented in the Answering Brief cite provisions of the ISDEAA as the justification for its decision. In doing so, Respondents ground the exact same agency action resulting from the exact same set of facts in two different sources of authority. Respondents explanation has thus far not fulfilled their obligation that an "agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 2126, 195 L. Ed.

2d 382 (2016). Consequently, Petitioner submits this "unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars LLC*, 579 U.S. at 222 (quoting *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 981–982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (internal quotation marks and alterations omitted.)

Review of these matters by this Court is consistent with the Supreme Court's requirement that "an agency changing its course…is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (1983). Respondent's failure to provide the required reasoned analysis in the instant case represents another demonstration of the arbitrary and capricious manner of Respondent's disposition of Petitioner's whistleblower retaliation complaint which Petitioner respectfully urges this Court to set aside for failing to conform to the requirement of §4712(c)(5) of the Act. Finally, Respondent's argument that "Agency heads routinely delegate authority to resolve Section 4712 disputes" does not absolve the requirement that "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise

would be required" *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S. Ct. 1055, 1074, 39 L. Ed. 2d 270 (1974). The U.S. Department of Interior has clearly prescribed procedures for delegating authority conferred to the Secretary by Congress.[150] Respondent's failure to provide this Court with evidence substantiating their conformance with the U.S. Department of Interior's self-imposed internal delegation procedures is an additional example of the arbitrary and capricious manner of Respondent's conduct in this matter.

VI. CONCLUSION

As articulated above, Federal Appropriations Law principles and provisions of the United States Code have established meaning for the terms "procurement" and "grants", and Congress's use of these terms in drafting legislation in similar contexts has been recognized by the Supreme Court as a valid articulation of Congress's intent for the same meaning and associated concepts to apply. The legislative history of the ISDEAA makes clear that, despite the use of the naming convention "self-determination contract", the cluster of ideas associated with the use of the term "procurement" was explicitly recognized by Congress in the context of the ISDEAA. Nothing in the plain language of the Act nor its location in the United States Codes reflects Congress's intent for the scope of the Act to be limited to procurement contracts and a construction of the Act to that effect would

[150] Opening Brief at Pg. 54.

contradict the rationale underlying Congress's intent in enacting the ISDEAA and jeopardize the opportunities of Indian Tribes and their membership from maximizing the benefit of utilizing federal funds provided under the ISDEAA to promote their capacity to attain the self-determination and autonomy envisioned by the trust relationship between the U.S. Governments and Indian Tribes and the policy enacted thereof. For these reasons, Petitioner respectfully submits this Court should set aside the BIA Director's Order and order Respondent's to grant Petitioner the relief afforded to him by Congress.

Respectfully Submitted,

Samuel James Kent

[Comments on Interior's Methods for Awarding Contracts Under P.L. 93-638]

B-222665
Published: Jul 02, 1986. Publicly Released: Jul 02, 1986.

Highlights

Pursuant to a congressional request, GAO reviewed the Department of the Interior's use of contract instruments to award funds to Indian tribes, under the Indian Self-Determination and Education Assistance Act, for the purchase of food, clothing, construction, and other items and services. The review focused on whether: (1) the use of a grant or cooperative agreement would be more appropriate; and (2) Interior had violated any law or regulation by its use of contracts. The Indian Self-Determination Act directs Interior to enter into a contract with any tribal organization to administer programs to benefit Indians; however, the Federal Grant and Cooperative Agreement Act provides that a grant or cooperative agreement should be used when the principal purpose is to transfer anything of value to the recipient for the public purpose of federal support. GAO found that P.L. 98-250, which amended the Indian Self-Determination Act in 1984, authorizes Interior to identify the instruments it uses

to obligate funds under the Indian Self-Determination Act as contracts rather than grants or cooperative agreements.

View Decision

B-222665, JUL 2, 1986

INDIAN AFFAIRS - CONTRACTS - BUREAU OF INDIAN AFFAIRS - INDIAN SELF DETERMINATION ACT - COMPLIANCE DETERMINATION DIGEST: UNDER THE INDIAN SELF-DETERMINATION ACT, WHICH IS TITLE I OF PUB.L. NO. 93-638, JANUARY 4, 1975, THE DEPARTMENT OF INTERIOR USED CONTRACTS WITH INDIAN TRIBES TO GIVE MONEY, PROPERTY AND SERVICES FOR THE NEEDS OF THE RESPECTIVE TRIBES. UNDER THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977, 31 U.S.C. SEC. 6301 ET SEQ., WHEN THE PRINCIPAL PURPOSE OF A RELATIONSHIP WITH A RECIPIENT IS THE TRANSFER OF MONEY, PROPERTY OR SERVICES FOR THE SUPPORT OF THE RECIPIENT, A GRANT OR COOPERATIVE AGREEMENT IS TO BE USED, AND NOT A CONTRACT. BY VIRTUE OF PUB.L. NO. 98-250, APRIL 3, 1984, THIS ASSISTANCE UNDER THE INDIAN SELF DETERMINATION ACT IS NOT SUBJECT TO THE REQUIREMENTS OF THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT, AND THEREFORE, THE DEPARTMENT OF INTERIOR MAY CONTINUE TO USE THE CONTRACT FORM OF AGREEMENT.

THE HONORABLE PARREN J. MITCHELL:

CHAIRMAN, COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

YOUR LETTER OF MARCH 19, 1986, QUESTIONS THE USE OF CONTRACT INSTRUMENTS BY THE DEPARTMENT OF THE INTERIOR (INTERIOR) TO MAKE AWARDS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT, PUBLIC LAW 93-638. YOU INDICATE THAT UNDER THIS ACT INTERIOR GIVES MONEY TO INDIAN TRIBES FOR THE PURCHASE OF

FOOD, CLOTHING, CONSTRUCTION AND OTHER ITEMS AND SERVICES NEEDED BY THE RESPECTIVE TRIBES. IN VIEW OF THE PURPOSES FOR WHICH THESE FUNDS ARE USED, IT APPEARS TO YOU THAT THE USE OF A CONTRACT INSTRUMENT IS INAPPROPRIATE. ACCORDINGLY, YOU REQUEST OUR OPINION AS TO WHETHER IT IS MORE APPROPRIATE TO USE EITHER A GRANT OR COOPERATIVE AGREEMENT AS THE VEHICLE FOR OBLIGATING THESE FUNDS AND WHETHER INTERIOR HAS VIOLATED ANY LAW OR REGULATION BY ITS PAST AND CONTINUED USE OF CONTRACTS.

UNDER THE INDIAN SELF-DETERMINATION ACT, WHICH IS TITLE I OF PUB.L. NO. 93-638, JANUARY 4 1975, 88 STAT. 2206, THE SECRETARY OF THE INTERIOR IS DIRECTED, UPON THE REQUEST OF AN INDIAN TRIBE, TO ENTER INTO A CONTRACT WITH ANY TRIBAL ORGANIZATION TO PLAN, CONDUCT AND ADMINISTER PROGRAMS WHICH THE SECRETARY IS AUTHORIZED TO ADMINISTER FOR THE BENEFIT OF INDIANS (SEC. 102(A)).

THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977, PUB.L. NO. 95-244, 92 STAT. 3, NOW CODIFIED AT 31 U.S.C. SEC. 6301 ET SEQ. (1982) PROVIDES THAT WHENEVER THE PRINCIPAL PURPOSE OF THE RELATIONSHIP WITH A RECIPIENT IS THE TRANSFER OF ANYTHING OF VALUE TO THE RECIPIENT FOR THE PUBLIC PURPOSE OF SUPPORT OR STIMULATION AUTHORIZED BY A FEDERAL STATUTE, RATHER THAN THE ACQUISITION OF PROPERTY OR SERVICES FOR THE DIRECT BENEFIT OR USE OF THE FEDERAL GOVERNMENT, AND NO SUBSTANTIAL INVOLVEMENT IS ANTICIPATED BETWEEN THE FEDERAL GOVERNMENT, AND THE RECIPIENT, THEN A GRANT AGREEMENT SHOULD BE USED. 31 U.S.C. SEC. 6304. IF SUBSTANTIAL INVOLVEMENT IS ANTICIPATED, THEN A COOPERATIVE AGREEMENT IS TO BE USED. 31 U.S.C. SEC. 6305.

IN AN APRIL 28, 1981, OPINION, THE INTERIOR DEPUTY SOLICITOR REVIEWED BOTH OF THESE ACTS. HE CONCLUDED THAT INTERIOR'S

Read less

Request File

Indian Reservation Roads

Government to Government Agreements
(G-2-G)

Overview

- Authority
- Why?
- Separation of Duties
- Risk Assessment
- Disputes
- Oversight
- Administrative Funding
- Advantages

Authority

- ". . . under the authority granted by 23 U.S.C. § 204(b) (2), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59 (SAFETEA-LU), 119 Stat. 1144 (August 10, 2005), and the Delegations of Authority set forth in 49 CFR Part 1.48(b)(29)."

Authority

- Not "638" agreements
- However, these Government to Government agreements afford the same protections as "638" agreements, i.e: "and are made.....as authorized by the Indian Self-Determination and Education Assistance Act Pub. L. 93-638, as amended (25 U.S.C. §§ 450, et seq.), ***for purposes of Federal Tort Claims Act coverage.***

Why

- SAFETEA-LU made it possible for tribes to enter into agreements directly with Federal Lands Highways – approx. 70 tribes representing 23% of the total IRR program now work directly with FLH

- The FLH agreements greatly streamlined the process, allowed the tribes to receive their funds much quicker.

- As a result, Tribes left BIA and some Regional Offices had to initiate RIFs within their Transportation Offices.

Why

- We investigated if the FLH agreements could be implemented within BIA and upon solicitor's review, it has been determined that the Bureau has similar authority (23 U.S.C., 204 (b)(2)) to utilize the same agreements as FLH
- Not meant to replace title I contracts or title IV agreements. Simply another option for tribes to choose for delivery of their IRR Program funds. This agreement will allow the Bureau to award and distribute funds much more quickly and efficiently.
- The option will also save many Bureau Roads staff. Without it, we fear that the Bureau will suffer significant RIFs
- We see this option allowing BIA to maintain a higher level of technical assistance that our tribes deserve.

Separation of Duties

- **Technical Expert/Point of Contact (TEPOC)**
  - Technical Assistance
  - Pre-construction meetings (as requested)
  - Periodic Project oversight
  - Final Inspections
  - Review semi-annual progress statements
- **Regional Road Engineer (RRE)**
  - Performs risk assessment
  - Negotiates RFA
  - Provides Technical Assistance
  - Administers Program Reviews
  - Reviews/makes recommendations on disputes

Separation of Duties

- **Regional Director (RD)**
  - Signs RFA
    - RFA will be signed by Director during first year
  - First-level decision maker on disputes
- **Director**
  - Signs multi-year agreement
  - Second-level decision maker on disputes
- **Division of Transportation (BIADOT)**
  - Verifies risk assessment
  - Maintains consistency
  - Fund obligation

Risk Assessment

- Review of annual "single-audit"
- Review of current Self-Determination "Risk" status
- Review of Tribal Program capabilities
- Review of Tribal financial tracking procedures
- Review of Tribal contracting/procurement procedures

Disputes

- ". . . in the event of a dispute arising under this Agreement, the Tribe and the Director agree to use mediation, conciliation, arbitration and other dispute resolution procedures authorized under 25 CFR § 170.934.The goal of these dispute resolution procedures is to provide an inexpensive and expeditious forum to resolve disputes. The Director agrees to attempt to resolve disputes at the lowest possible staff level and by consent whenever possible."

Oversight

- Pre-assessment
- Technical Expert/Point of Contact - periodic site visits/oversight
- Semi-annual progress reports
- Final Inspections
  - Acceptance of Projects
- Annual Program reviews

Administrative Funding

- Administration responsibilities will continue to fall under Program Management & Oversight (PMO) and Project Related Administrative Expenditures (PRAE)
- Adjustments to the PMO/PRAE distribution formula will be made if necessary

Advantages

- Tribal Administration of Program
  - More control @ tribal level
  - Flexibility between projects/activities
- Less Administrative paper shuffle between entities
  - No more payment requests
    - 100% Lump sum payment
  - No more modifications
    - Funds can be expended on any activity on an approved TIP
- Create Consistency Across BIA
  - Administration same/similar to FLH
  - Administration should be similar to OSG

Advantages

- Quicker Obligation of Funds
  - Consolidated under one office
    - Fewer budget transactions required
    - Ability to get funds to tribes as quickly as FLH
    - Ability to get funds to tribes quicker than OSG
    - BIA now in position to provide local program/funding/project support for tribes
- Less Red Tape
  - No involvement from awarding officials
  - Fewer government reps to work through/with
  - Local program support/program reviews from BIA staff
- BIA can still provide direct service
  - Direct Service Agreements
- Will free-up BIA staff to provide additional technical assistance
- Chapter 1 Title 23 USC funds can be put into these agreements (not available under FHWA Agreements)