UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

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

Plaintiff,

v.

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

UNITED STATES INDIAN HEALTH SERVICE;

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

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

THE UNITED STATES OF AMERICA.

Defendants.

8:23-CV-00530-BCB-MDN

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN PART

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APA	Administrative Procedures Act
BIA	Bureau of Indian Affairs
CDA	Contract Disputes Act
CFO	Chief Financial Officer
CO	Contracting Officer
EEOC	Equal Employment Opportunity Commission
EMS	Emergency Medical Services
FDCPA	Fair Debt Collection Practices Act
HHS	Health and Human Services
HUBZone	Historically Underutilized Business Zone
IBC	Interior Business Center
ICS	Indirect Cost Services
IDC	Indirect Cost
IHM	Indian Health Manual
IHS	Indian Health Service
ISDEAA	Indian Self-Determination and Education Assistance Act
JVCP	Joint Venture Construction Program
JVCPA	Joint Venture Construction Program Agreement
SAMSHA	Substance Abuse and Mental Health Services
TANF	Temporary Assistance for Needy Families
TOP	Treasury Offset Program

INTRODUCTION

Defendants' Motion to dismiss is primarily founded on a single, untrue statement: that, "On June 23, 2017 Deb Castillo, *a representative of the Tribe*, signed the USPS Certified Mail Receipt" for the June 19, 2017 Contract Disputes Act ("CDA") claim that Defendants maintain forms the basis for three of the Tribe's Claims (and unspecified portions of the Tribe's other three Claims). Defendants' Brief in Support of Defendants' Motion to Dismiss Plaintiff's Complaint in Part ("Def's Brief"), ECF No. 31 at 9 (emphasis added). As set forth herein and supported by Declarations of persons with personal knowledge, Deb Castillo was not a "representative of the Tribe" on June 23, 2017 or at any other time. Ms. Castillo has never been authorized to act as a representative of the Tribe or its Chairman in any capacity whatsoever. In fact, Deb Castillo was (and is) an employee of the federal government, whose office was not located where the CDA claim was addressed, but at an office located more than a half mile away. Furthermore, Defendants' claim that the doctrine of equitable tolling does not apply is unsupported by the facts or the law. Notably, on August 8, 2023 the United States Department of Health and Human Services ("HHS") provided the Tribe with a "Case Reconstruction Summary" representing that the Tribe had, in fact, more than repaid the Indian Health Service ("IHS") principal amount of the CDA claim, thereby equitably tolling any limitation period that may otherwise apply. Moreover, the United States Supreme Court has held that the CDA's limitation period for presenting a claim is subject to equitable tolling. For these reasons, and for other reasons set forth herein, Defendants' Motion to Dismiss must be denied.

COUNTER-STATEMENT OF FACTS

I. THE SANTEE SIOUX NATION

The Santee Sioux Nation is a federally-recognized Indian tribe, organized under Section

16 of the Indian Reorganization Act of 1934 and governed by its Constitution as approved, with amendments, by the Secretary of the Interior on August 30, 2002. Compl. ECF No. 1 ¶ 16. The Santee Sioux Reservation, located in rural Northeast Nebraska, has always been ill-suited for farming, and what little arable land that existed on the reservation was flooded by the federal government in order to provide hydroelectric power to surrounding non-Indian communities. *Id.* at ¶ 18. The Santee Sioux Reservation is severely economically depressed, and has been designated by the federal government as a Historically Underutilized Business Zone, or "HUBZone." *Id.*; Small Business Administration, HUBZone Map, (July 2023) https://maps.certify.sba.gov/hubzone/map.

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

The Nation relies almost exclusively on treaty and statutorily based federal funding to provide life-sustaining health and social service programs and services to its members. *Id.* ¶ 20. The Tribe also contracts with IHS and Bureau of Indian Affairs ("BIA") to provide treaty and statutory-based federal programs and services to its members. *Id.*

II. IHS AND THE TRIBE ENTER INTO AGREEMENT TO SETTLE DEBT RESULTING FROM IHS MISGUIDANCE

A. IHS ADVISES THE TRIBE TO USE DEPRECIATION TO FINANCE ITS

HEALTH CARE FACILITY CONSTRUCTION BONDS

The Tribe contracts with IHS to provide health care to its members. *Id*. ¶ 20. IHS is an agency within the Department of Health and Human Services, and is responsible for providing federal health services to American Indians and Alaska Natives. *Id.*; Indian Health Service, About IHS, (last visited Nov. 20, 2023), https://www.ihs.gov/aboutihs/. The contracts are governed by the Indian Self Determination and Education Assistance Act ("ISDEAA"). 25 U.S.C. §§ 5301, *et seq.* The ISDEAA allows Tribes and tribal organizations to contract with the IHS and BIA to plan, conduct, and administer one or more individual programs, functions, services, or activities, or portions thereof, that the federal agencies would otherwise provide for the Tribe or tribal organization to carry out treaty and statutory obligations. *See* 25 U.S.C. § 5321. The ISDEAA mandates that the Secretary of HHS contract with the Tribe to provide direct program funding to carry out HHS's treaty and statutory obligations to provide health care services to the Tribe's members, referred to as the "secretarial amount," representing "the amount the Secretary would have expended had the government itself [continued to] run the program." *Id*.; *see Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1298-99 (Fed. Cir. 2010), *vacated on other grounds*, 567 U.S. 930 (2012); 25 U.S.C. § 5325(a)(1).

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

ISDEAA defines contract support costs more specifically as follows:

> The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include costs of reimbursing each tribal contractor for reasonable and allowable costs of –
>
> 1. Direct program expenses for the operation of the Federal program that is the subject of the contract, and
>
> 2. Any additional administrative or other expenses related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section."

25 U.S.C. § 5325(a)(3)(A). Expenses in subparagraph (1) are generally referred to as "direct contract support costs" and are attributable directly to the contract at issue. Expenses in subparagraph (2) are generally referred to as "indirect contract support costs" which are costs attributable to more than one contract objective. Compl. ECF No. 1 ¶ 24.

Approximately sixteen years ago, the Santee Sioux Nation explored the possibility of constructing a Health and Wellness Center on the Santee Sioux Reservation to provide health care services to its members and others eligible in the surrounding communities. *Id*. ¶ 37. At the time, the nearest IHS health care facility was located approximately 51 miles from the Santee Sioux Reservation. *Id*. The health status of the Santee Sioux members and American Indians residing in the Santee Sioux Service Area was typical of an economically depressed and medically underserved area. *Id*. ¶ 36. Residents of the service area were dying from unintentional accidents and diseases at rates exceeding those of the general population in the United Sates. *Id*. ¶ 37.

To address these conditions, the Tribe and IHS made a determination of need for a health care facility in Santee ("Facility"), and IHS certified that the Facility "is consistent with the applicable IHS Area Health Facilities Master Plan and that the Aberdeen Area IHS supports and recommends the proposed project." *Id*. ¶ 41. The Tribe worked with IHS throughout the process

of planning, designing, constructing, equipping, leasing, and operating the Facility. *Id*. ¶ 42.

Around 2008, the Tribe was concerned with its ability to carry the debt proposed in the construction of the Facility. Decl. of John H. Banks, Managing Director, D.A. Davidson & Co., ECF No. 1-3 ¶ 12. It raised those concerns with IHS officials at both the area and central office level. *Id*. ¶ 13. In response, IHS officials advised the Tribe to include depreciation in calculating its ISDEAA indirect contract support cost payments, in order to fund repayment of the bonds that would be necessary to finance construction of the Facility. IHS assured the Tribe that such indirect contract support cost payments would be available over the life of the Joint Venture Construction Program Agreement ("JVCPA") entered into between that Tribe and IHS to finance the planning and construction of the Facility. *Id*. ¶ 8-10. Further, throughout the bond placement process, the Tribe was repeatedly assured by IHS officials that that Facility revenue (which included depreciation payments from IHS) would be sufficient to repay the debt. *Id*. ¶ 12. Based on these explicit directions and repeated assurances by IHS, the Tribe placed bonds for sale with investors. *Id*. ¶ 6-17. These bonds would not have been placed, and investors would not have purchased them, had the Tribe and its investors known that IHS would renege on its advice a mere five years into the project, and to claim, long after multi-million-dollar commitments had been made by the Tribe, that the use of depreciation payments to finance construction of the Facility would be disallowed. *Id*. ¶ 17.

B. THE TRIBE AND IHS SETTLE THE TRIBE'S CONTRACT SUPPORT COST CLAIMS IN 2016

The Tribe finished construction and the grand opening of the Facility was held in 2011. Compl. ¶ 43. On September 25, 2012, the Tribe submitted to IHS a CDA claim for unpaid contract support costs for fiscal years 2006 -2011. *Id*. ¶ 44; Sept. 25, 2012 CDA Claim, ECF No. 1-3. Thereafter, the Tribe engaged continuously and regularly with IHS in negotiating a settlement for

the next four years. Compl. ¶ 43. These settlement communications involved dozens of emails and paper correspondence with agency officials and IHS attorneys, telephone calls, and at least one in-person meeting in Aberdeen, South Dakota. *Id*. ¶ 45. Throughout these four years of communication, the Tribe's attorneys were regularly copied on correspondence received from IHS. *Id*. ¶¶ 46-47. Throughout these four years of communication, the primary issue was IHS's after-the-fact decision that depreciation was not reimbursable to the Tribe as a contract support cost. *Id*. ¶ 48.

In 2016, IHS contracting officer Carol Diaz denied the Tribe's contract support cost shortfall claims. CDA Claim Denial Decision, ECF No. 1-4. The Tribe's attorney was copied on that denial. *Id*. The Tribe appealed the denial, and parties agreed to stay the claim pending settlement discussions. Compl. ¶ 48; Appeal Letter, ECF No. 1-5.

After four years of negotiations, the settlement agreement was reached, and contained the following language:

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

Settlement Agreement, ECF No. 1-6, 3 of 4 (emphasis added).

To credit depreciation payments back to IHS pursuant to the Settlement Agreement, in 2016 and 2017 the Tribe entered into negotiations with the Department of Interior, Interior

Business Center ("IBC"), in order to perform paragraph 7 of the Settlement Agreement. Decl. of Jerry Noonan ("Noonan Decl."), ECF No. 1-16 ¶ 7.[1] In December 2016, the Tribe submitted to IBC an Indirect Cost ("IDC") Rate Proposal ("IDC Proposal"). *See* Second Decl. of Jerry Noonan ("Second Noonan Decl.") ¶ 5, *attached as* Ex. 1; IDC Proposal attached as Ex. 1A to Second Noonan Decl. The IDC Proposal discusses the 2016 Settlement Agreement, and states that the Proposal is being made, "In order to comply with [Section 7] of the Agreement . . .," and further states, "In order to carry out the provisions of this Section 7 summaries of the balance sheets and schedule of indirect cost reimbursements and indirect cost expenditures have been incorporated into this proposal to assist the ICS and the Nation in arriving at a *4 year reduction in the Indirect Cost Pool* . . .." *See* Second Noonan Decl. ¶ 5; Ex. 1A, IDC Proposal, 2-4. Exhibit A to the IDC Proposal contains a line item labeled, "*Per Section 7 of the Settlement Agreement (4 year Pay Back of Excess IDC Reimbursements*)," and a "Proposed Indirect Cost rate *with* Section 7 Pay Back Adjustment." *See* Second Noonan Decl., Ex. 1A, IDC Proposal. The "Proposed Indirect Cost rate with Section 7 Pay Back Adjustment" reflects a proposed FY 2016 IDC rate of 14.37% and a FY 2017 IDC rate reduced from 16.78% to 14.61%. *Id.*

As a result of the negotiations with IBC, and to credit back to IHS the depreciation payments pursuant to the Settlement Agreement, the Tribe agreed to a reduction in its IHS ISDEAA indirect contract support cost payments. *Id.* In fact, in an email to the Tribe's leadership and legal counsel dated March 27, 2017, Elena Chan, Auditor/Negotiator for IBC confirmed that

[1] In their Brief, Defendants misleadingly assert that, "instead of negotiating a separate agreement with IHS, [the Tribe] instead negotiated a reduced indirect cost rate with IBC [Interior Business Center] . . .." At the same time, however, Defendants admit that indirect cost rates must be negotiated with IBC, and that IBC is an agent of IHS in that capacity. Def's Brief, ECF No. 31 at 4 (quoting Interior Business Center, Customer Central, Indirect Cost Rate Negotiation Services, https://perma.cc/SBF9-XMXQ, "We [IBC] review and approve (or countersign) indirect rate agreements for non-federal entities *on behalf of our client agencies* . . ..) (emphasis added).

the negotiated rate reduction was to carry out paragraph 7 of the Settlement Agreement, stating, "*The reason for the [rate reduction] is because we have agreed to provide to IHS the amount of the IHS overfunding*." *See* Mar. 27, 2017 Email from E. Chan to J. Noonan, attached as Ex. 1B to Second Noonan Decl. (emphasis added).

The negotiations resulted in a final Indirect Cost Negotiation Agreement, signed by the parties on May 2, 2017. *See* Second Noonan Decl. ¶ 7; Negotiated Indirect Cost Rate Agreement, attached as Ex. 1C to Second Noonan Decl. The Negotiated Indirect Cost Rate Agreement contains reduced indirect cost rates of 12.97% for FY 2016 and 14.91% for FY 2017. As a result of the Negotiated Indirect Cost Rate Agreement, the Tribe believed that it had fully performed Section 7 of the 2016 Settlement Agreement. *See* Second Noonan Decl. ¶ 7.

III. 2016—CONTRACT MODIFICATION 33 COLLECTS AN ALLEGED OVERPAYMENT FROM THE TRIBE

Meanwhile, on November 16, 2016, less than two months after entering into the 2016 Settlement Agreement, which made both parties equally responsible to *negotiate the amount of the repayment,* and provided that such repayment would occur "*over not less than four (4) fiscal years*," IHS claims that it sent the Tribe a letter regarding the Tribe's FY 2015 ISDEAA agreement, stating that, due to an administrative oversight, the Tribe was "overpaid by $3,244,061 on indirect [Contract Support Cost] funding" due to "depreciation in Tribe's indirect cost (IDC) pool that is related to the separate joint venture agreement" and demanding that the Tribe "remit a check payable to the 'Indian Health Service' in the amount of $3,244,061 *by January 15, 2017 . . .*," which was less than 60 days from the date of the letter. Nov. 16, 2016 Letter from J. Bearheels to R. Trudell, ECF No. 1-7. Significantly, neither the Tribe nor its attorneys received this letter at the time, and would not become aware of it until many years later. Compl. ¶ 53; *See* Decl. of Roger Trudell ("Trudell Decl."), ECF No. 1-18 ¶ 16; Decl. of Ben Fenner ("Fenner Decl."), ECF No. 1-

15 ¶ 4; Decl. of Patty Marks ("Marks Decl.") ECF No. 1-17 ¶ 4. Even if the letter had been received, it violates the express terms of Paragraph 7 of the 2016 Settlement Agreement, which required that IHS *negotiate the amount of the repayment* by the Tribe, and further that the negotiated repayment would occur "*over not less than four (4) fiscal years*." Settlement Agreement, ECF No. 1-6 at 3 of 4 (emphasis added).

On that same date, IHS issued Modification 33, decreasing the Tribe's total FY 2015 ISDEAA contract amount "in the amount of $3,244,061 from $27,812,322.00 to $24,568,261.00. . . ." Noonan Decl., ECF No. 1-16 ¶¶ 6-8. Again, This amount was not negotiated with the Tribe, in violation of the 2016 Settlement Agreement. Moreover, ***this resulted in the Tribe effectively over-paying the same alleged debt:*** first through reducing its indirect contract support cost rates going forward for four years, effectively repaying a negotiated amount to IHS in the amount of $2,357,787.00, and second by IHS's unilateral issuance of Modification 33, which had the effect of reducing the Tribe's IHS funding agreement amounts in subsequent contract years. *Id*.

IV. 2017—IHS ATTEMPTS TO BRING A CONTRACT DISPUTES ACT CLAIM AGAINST THE TRIBE

On June 19, 2017, IHS allegedly asserted a claim under the Contract Disputes Act, 41 U.S.C. §§ 7101 et seq., demanding an immediate *an additional payment* of $3,782,216. ("2017 Claim") Compl. ¶ 59. IHS's main justification for this claim was that IHS had paid the Tribe for depreciation as indirect support costs in contracts entered into between FY 2010 and 2015. June 19, 2017 CDA Claim, ECF No. 1-10, 3-4. Like its November 16, 2016 letter (*supra*), the June 19, 2017 CDA Claim was never received by the Tribe. *Id.*; Trudell Decl. ¶ 4. Defendants falsely claim that, "On June 23, 2017, Deb Castillo, *a representative of the Tribe*, signed the USPS Mail Receipt" for the CDA claim. Def's Brief, ECF No. 31 at 9. However, as set forth more fully below, Deb Castillo was not a "representative of the Tribe." In fact, Ms. Castillo was a federal employee

who was never employed by the Tribe or authorized to act for the Tribe in any capacity, including the receipt of the Tribe's certified mail. *See* Second Decl. of Roger Trudell ¶¶ 4-5, *attached as* Ex. 2 ("Second Trudell Decl."). Further, Ms. Castillo did not work in the Tribal offices where the CDA claim was addressed, but worked in her federal government office that was located more than a half mile away. *Id.* ¶ 5.

Also, the Tribe's attorneys responsible for negotiating the 2016 Settlement Agreement were not copied on the CDA claim and did not receive it. Fenner Decl., ECF No. 1-15 ¶ 4; Marks Decl., ECF No. 1-17 ¶ 4. Yet James M. Cribari and Melissa A. Jamison, the two IHS attorneys responsible for negotiating the 2016 Settlement Agreement, were copied on the 2017 Claim. CDA Claim, ECF No. 1-9 at 8. Over the following five years, no one from IHS, including its legal counsel, ever contacted the Tribe or its legal counsel to notify them or discuss this incredibly massive (and illegitimate) claim – a claim that had already been overpaid by the Tribe. Fenner Decl., ECF No. 1-15 ¶ 6.

V. 2022 UNLAWFUL TREASURY OFFSETS AND HHS' 2023 "CASE RECONSTRUCTION SUMMARY" SHOWING THAT THE CDA CLAIM HAS BEEN FULLY PAID.

After over five years of silence, on September 14, 2022, the HHS Debt Collection Center sent the Tribe a "final demand for payment" of the June 19, 2017 CDA claim. Sept 14, 2022 Final Demand, ECF No. 1-10. The Final Demand did not contain a copy of the CDA claim, but merely stated that the Tribe owed a debt, "that pertains to disallowed costs incurred by your organization and owed to . . . HHS," and that the Tribe owed HHS principal in the amount of $3,782,216 plus interest in the amount of $1,967,788.52, for a total of $5,750,004.52. *Id*. The Tribe was shocked to receive the Final Demand, as it was unaware that IHS had pursued a CDA claim, and understood that the Tribe had repaid the CDA claim amount by negotiating and carrying out a repayment

agreement with IHS (through its agent, IBC), wherein the Tribe received reduced indirect cost reimbursements from HHS for fiscal years 2015 through 2018. *See* Sept. 14, 2022 Email from J. Noonan to D. Dawkins, ECF No. 1-11 at 2 of 3; Oct. 6, 2022 Email from B. Fenner to J. Cribari, ECF No. 1-12 at 3 of 4. On October 7, 2022, IHS legal counsel Jamie Whitelock sent the Tribe's legal counsel a copy of the June 19, 2017 CDA Claim. *See* Second Decl. of Ben Fenner ¶ 2, *attached as* Ex. 3 ("Second Fenner Decl."); Oct. 7, 2023 Email from J. Whitlock to B Fenner, attached as Ex. 3A to Second Fenner Decl.; Oct. 7, 2022 from IHS legal counsel J. Whitelock to B. Fenner, ECF No. 1-12, 2 of 4. *This was the very first time that the Tribe or its legal counsel received a copy of the June 19, 2017 CDA Claim*. Compl. ¶ 66.

Despite being provided with documents demonstrating that the Tribe had carried out the 2016 Settlement Agreement by negotiating reduced indirect costs over a period of four years, IHS nonetheless proceeded to enforce its CDA claim through private collections and treasury offsets of the Tribe's ISDEAA contract payments for its health care program, in violation of 31 U.S.C. § 3716(c)(3)(B). *See* Treasury Offset Program, Payments Exempt from Offset by Disbursing Officials, (last visited Nov 15, 2023), https://fiscal.treasury.gov/files/debt-management/dmexmpt.pdf, *4 (listing Tribal Law 93-638 [ISDEAA] Contract/Compact payments as exempt from Treasury offset).[2] The first round of unlawful offsets of the Tribe's ISDEAA health care payments occurred in November 2022 and totaled $5,665,335. Compl. ¶ 72. Although those offsets were reversed on or about March 23, 2023, the Tribe was unable to access funding needed to operate its health care programs for its tribal members for over four months. *Id*.

In the interim, and continuing at least until August 4, 2023, the Tribe, through its legal

[2] Defendants admit that, "the Tribe's debt was incorrectly offset against ISDEAA contract payments." Def's Brief, ECF No. 31 at 10.

counsel and CFO Jerry Noonan, engaged in dozens of email communications and phone calls with the Nebraska Congressional Delegation, email communications with the U.S. Department of Treasury, and email communications, phone calls, and video conferences with IHS/HHS legal counsel, IHS Deputy Area Director Daniel Davis, and even engaged in a videoconference with IHS personnel, including IHS Director (and Defendant) Roselyn Tso, in order to resolve the matter. *See* Second Fenner Decl. ¶ 3.

On May 5, 2023, IHS Deputy Area Director Davis sent the Tribe's legal counsel an email offering "technical assistance" to resolve the matter. *See* May 5, 2023 Email from D. Davis to B. Fenner, attached as Ex. 3B to Second Fenner Decl. The technical assistance offered consisted of "asking the Secretary of HHS to waive the interest" pursuant to 45 C.F.R. § 30.18(g), "asking the Secretary of HHS to compromise the debt" pursuant to 45 C.F.R. § 30.21(b), and "requesting a repayment plan" pursuant to 45 C.F.R. § 30.22(b) and 45 C.F.R. § 30.2. *Id*. The Tribe responded through its legal counsel on June 6, 2023, pointing out that the technical assistance offered was unacceptable, because the Tribe had already repaid the alleged debt, and demanding, *inter alia*, that IHS remove the Tribe from the Treasury offset program and confirm that the debt had been fully paid. *See* June 6, 2023 Letter from B. Fenner to D. Davis, attached as Ex. 3C to Second Fenner Decl. In the following weeks, Deputy Area Director Davis and the Tribe's legal counsel exchanged email correspondence, which concluded with an email from Mr. Davis in which he stated that he, "will look at this again." *See* June 21, 2023 Email from D. Davis to B. Fenner, attached as Ex. 3D to Second Fenner Decl. On July 28, 2023, the Tribe's legal counsel emailed Mr. Davis requesting a response to the June 6, 2023 letter. Following this correspondence, on August 8, 2023, the Tribe's CFO received a "Case Reconstruction Summary," dated August 4, 2023, from HHS Accountant Doreen Dawkins, *which showed that the Tribe had in fact more than*

repaid the entire CDA claim amount of $3,782,216. *See* Second Noonan Decl. ¶ 8; Aug. 8, 2023 Email from D. Dawkins and Aug. 4, 2023 Case Reconstruction Summary, attached as Ex. 1D to Second Noonan Decl. Thereafter, on August 17, 2023 Mr. Noonan sent an email to IHS Deputy Area Director Davis attaching the HHS Case Reconstruction Summary. Second Noonan Decl. ¶ 9; Aug. 17, 2023 Email from J. Noonan to D. Davis, attached as Ex. 1E to Second Noonan Decl. In the email, CFO Noonan stated, "[I] would like to personally thank you for all your efforts and good work in getting this claim resolved and the Santee Sioux Nation out of the TOP [Treasury Offset Program]." *Id*. Thus, due to HHS's production of the Case Reconstruction Summary showing that the Tribe had fully paid the CDA claim, the Tribe had every reason to believe that the 2017 CDA claim had been fully "resolved," particularly in light of the fact that Defendants did not dispute that conclusion. Second Noonan Decl. ¶¶ 8-10.

VI. OCTOBER 2023 TREASURY OFFSETS AND INITIATION OF LITIGATION

Despite Defendants' production of the August 4, 2023 HHS Case Reconstruction Summary showing that the Tribe had fully repaid the 2017 CDA claim, on October 12, 2023 HHS caused Treasury to unlawfully offset the Tribe's ISDEAA contract payments in the amount of $5,930,155.72. Compl. ¶ 73.[3] Although those funds were partially reimbursed to the Tribe on or about October 27, 2023, the Tribe was unable to access funding needed to operate its health care programs for its tribal members for over two weeks. *Id*. IHS also caused Treasury to offset at least $755,119.00 of the Tribe's non-ISDEAA federal grant and program funding in October 2023 – funding that was essential to provide necessary social services for its members. *Id*. ¶ 74. The federal funds that were offset included funds intended for the Nation's Elderly Nutrition program, Daycare program, Emergency Medical Services ("EMS") program, Temporary Assistance for

[3] Defendants also admit that this offset was, "improper." Def's Brief, ECF No. 31 at 10.

Needy Families ("TANF") program, HeadStart program, Substance Abuse and Mental Health Services ("SAMSHA") program, Independent Living program, Child Welfare Social Services program, Behavior Health program, Tribal Youth Suicide & Early Prevention program, and Community Health Services program. *Id*.

After further failed efforts to convince Defendants to reimburse the non-ISDEAA program offsets and cease further offsets, Fenner Decl. ECF No.1-15 ¶ 7, on November 29, 2023, the Tribe filed its Complaint in this matter. On the same date the Tribe also filed a Motion for Temporary Restraining Order seeking to enjoin Defendants from further offsets of the Tribe's federal funds while this case is pending. Motion for TRO, ECF No. 2; Brief in Support of Mot. For Emergency TRO and Prelim Inj., ECF No. 3. Shortly thereafter, the Tribe agreed to withdraw its TRO motion without prejudice in return for Defendants' agreement, during the pendency of this litigation, to recall the alleged debt from Treasury and return the non-ISDEAA program offsets. See Jt. Stip. To Withdraw Emergency Mot. For TRO and Prelim Inj., ECF No. 13; Order on Jt. Stip., ECF No. 17.

STANDARD OF REVIEW

In deciding a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the court assumes as true all factual allegations of the complaint. *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 914 (8th Cir. 2001). "A plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *K.T. v. Culver-Stockton College,* 865 F.3d 1054, 1057 (8th Cir. 2017) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (internal citations omitted)). The complaint must allege facts that when taken as true raise more than a speculative right to relief. *Twombly* at 1965.

A court reviewing a motion to dismiss pursuant to Fed. R. Civ. P.12(b)(6) traditionally only considers the factual allegations in the complaint. *Riley v. St. Louis County of Mo.*, 153 F.3d 627, 629 (8th Cir. 1998). When the motion to dismiss includes materials beyond the Complaint filed as a basis for the motion, a district court "has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." *Stahl v. USDA*, 327 F.3d 697, 701 (8th Cir. 2003) (internal citation and quotation marks omitted). Fed. R. Civ. P.12(d) provides:

> "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. . . ."

"Rule 12(b) is not permissive." *BJC Health System v. Columbia Casualty Co.*, 348 F.3d 685, 687-88 (8th Cir. 2003). "Most courts ... view 'matters outside the pleading' as including any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings." *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir.1992) (quoting Wright & Miller, Federal Practice and Procedure § 1366). Courts have required strict compliance with the rule that a motion to dismiss must be converted to a motion for summary judgment if a party and the court rely on materials outside the pleadings. *Country Club Estates, L.L.C. v. Town of Loma Linda*, 213 F.3d 1001, 1005 (8th Cir. 2000); *Brooks v. Midwest Heart Group*, 655 F.3d 796, 800 (8th Cir. 2011); *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2011).

ARGUMENT

I. THE JUNE 19, 2017 CONTRACTING OFFICER'S DECISION WAS NOT PROVIDED TO, OR ACTUALLY RECEIVED BY, THE TRIBE UNTIL OCTOBER 7, 2022

In their Motion, Defendants correctly recite the CDA regulations, which provide that the

contracting officer, "shall furnish a copy of the decision by the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt." Def's Brief, ECF No. 31 at 17 (quoting 48 C.F.R. § 33.211(b)). Defendants also correctly state that, "the CDA only requires that a written decision *be accepted on the contractor's premises by a party authorized to do so*." *Id*. at 18 (citations omitted) (emphasis added). The Federal Circuit has interpreted receipt by a contractor to mean "actual physical receipt of that decision by the contractor [or his representative]." *Riley & Ephriam Const. Co., Inc. v. U.S.*, 408 F.3d 1369, 1372 (Fed.Cir. 2005) (quoting *Borough of Alpine v. United States*, 923 F.2d 170, 172 (Fed.Cir. 1991)).

Defendants assert that IHS satisfied these requirements, submitting a copy of the certified mail receipt showing that, on June 23, 2017, the contracting officer's decision was signed for by Deb Castillo, who Defendants claim (without support) was a "representative of the Tribe." Def's Brief, ECF No. 31 at 9; Davis Decl., ECF No. 31-2.[4] However, contrary to Defendants' assertions, the contracting officer's decision was not accepted on the contractor's premises, nor was it accepted by a party authorized to do so.

With this Reply the Tribe has submitted the Second Declaration of Roger Trudell, who was Chairman of the Santee Sioux Nation Tribal Council from 2001 through 2022. Mr. Trudell testifies that on June 23, 2017, Deb Castillo was *not* an employee or representative of the Tribe. *See* Second Trudell Decl. ¶¶ 4-5. Instead, Ms. Castillo was an employee of the United States Department of the Interior, Bureau of Indian Affairs. *Id*. Further, Mr. Trudell testifies that neither he nor the Tribal Council (the governing body of the Tribe), ever authorized Ms. Castillo to act as a representative of the Tribe in any capacity, much less to sign for or receive certified mail for the Tribe or its

[4] Defendants had not provided the Tribe with a copy of the Certified Mail Receipt prior to attaching it to their Motion to Dismiss. Moreover, the Declaration of Daniel Davis that was filed with the Court is not executed. ECF No. 31-2 at 2.

Chairman. *Id*. ¶¶ 6-9. The Tribe has also submitted the Declaration of Sidney Tuttle, the Tribe's Human Resources Director, *attached as* Ex. 4 ("Tuttle Decl."). Mr. Tuttle also testifies that the Tribe has no record of Ms. Castillo ever being employed by the Tribe. Tuttle Decl. ¶ 4. Thus, far from being a "representative of the Tribe," as Defendants nakedly assert, Deb Castillo was in fact a representative of Defendant United States of America.

Mr. Trudell further testifies that Ms. Castillo's place of employment was not located at the Tribal Council Headquarters building (where the CDA claim was addressed), but instead was located in a BIA office located approximately one-half mile away. *Id*. ¶ 5. Thus, Defendants have not demonstrated that the contracting officer's decision was received, "on the contractor's premises." In sum, Defendants have not – and cannot – demonstrate that the contracting officer's decision was received by the Tribe (or an authorized representative thereof) on June 23, 2017, as they assert. Indeed, the Tribe did not actually receive the government's 2017 CO's decision, if at all, until October 7, 2022 when the IHS emailed a copy of the decision to the Tribe's attorneys. ECF No. 1-12.[5]

II. THE CDA DOES NOT BAR THE TRIBE'S CLAIMS UNDER THE DOCTRINE OF EQUITABLE TOLLING

To the extent that Defendants suggest that the CDA's statute of limitations in 41 U.S.C. §

[5] Defendants argue that, even if the Tribe did not receive the CO's decision on June 23, 2017, the Tribe received "actual notice of the debt" on September 14, 2022. Def. Brief, ECF No. 31 at 19. However, the "actual notice of the debt" consisted of a letter from HHS demanding payment of the debt, but did *not* contain the CO's decision itself. ECF No. 1-10 (Sept 14, 2022 IHS payment demand). As such, it does not satisfy the requirements of 48 C.F.R. 33.211(a)(4), which contains detailed requirements for the contents of a contracting officer's decision. Thus, the September 14, 2022 IHS letter cannot constitute the date upon which the Tribe received "actual notice" of the contracting officer's decision, and consequently cannot constitute the date upon which the twelve-month limitation period contained in 41 U.S.C. § 7104(b)(3) began. Instead, it was not until October 7, 2022 that IHS legal counsel emailed the Tribe's legal counsel a copy of the June 19, 2017 CO's decision. Oct. 7, 2022 from IHS legal counsel J. Whitelock to B. Fenner, ECF No. 1-12 at 2.

7104(b)(3) is jurisdictional and not subject to equitable tolling, they are incorrect. The Supreme Court has held that there is a presumption that equitable tolling is available in suits against the Government, which can only be overcome by showing that Congress made the statute of limitations jurisdictional through evidence that Congress opted to forbid equitable tolling. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *US v. Wong*, 575 U.S. 402, 408 (2015). However, given that finding a statute of limitations is jurisdictional completely bars a Plaintiff's claims from being heard, the Government must "clear a high bar" to rebut the presumption. *Id*. at 409.

The Supreme Court has also repeatedly held that time bars prevent a court from exercising jurisdiction over a case only if Congress has "clearly state[d]" as much. *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). "[A]bsent such a clear statement, ... 'courts should treat the restriction as nonjurisdictional.'" *Auburn Regional*, 568 U.S., at 153-154 (quoting *Arbaugh*, 546 U.S. at 516). In applying this clear statement rule, the Supreme Court has found most time bars nonjurisdictional, "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." *Wong* at 410. This is so "however emphatic[ally]" expressed those terms may be. *Henderson v. Shinseki*, 562 U.S. 428, 439 (quoting *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81 (2009)). Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and thus prohibit a court from tolling it. *Wong* at 410.

Here, § 7104(b)(3) provides: "[a] contractor shall file any action . . . within 12 months from the date of receipt of a contracting officer's decision. . .." 41 U.S.C. § 7104(b)(3). Courts have interpreted other statutes with an analogous level of definiteness as not inconsistent with the

presumption that equitable tolling applies. *See Irwin* (requiring filing "within thirty days of receipt of final action taken by the [EEOC]"); *Brice v. Secretary of Dept. of Health and Human Services*, 36 Fed.Cl. 474 (1996) (establishing a definite date of expiration of the statute of limitations under the Vaccine Act "36 months after the occurrence of the first symptom or manifestation of onset.").

Section 7104(b)(3) only speaks to a claim's timeliness, not to a court's power. The Supreme Court has explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional. See *Henderson*, 562 U.S., at 439-440; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164-165, (2010); *Arbaugh*, 546 U.S., at 515; *Zipes v. Trans World Airlines*, 455 U.S. 385, 393-394 (1982). Here, while the CDA, at § 7104(b)(3), contains the statute of limitations, the jurisdictional grant to district courts to hear this civil action appears in a completely different statute: the ISDEAA, at 25 U.S.C. § 5331(a) ("The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this chapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this chapter."). As a result, there are no special characteristics of § 7104(b)(3) that suggest Congress intended the statute of limitations to be jurisdictional.

Because the statute of limitations in § 7104(b)(3) is not jurisdictional, the Tribe is entitled to equitable tolling because (1) the Tribe has been pursuing its rights diligently, and (2) extraordinary circumstances stood in its way and prevented timely filing. *N. Dakota Retail Assn. v. Board of Governors of the Federal Reserve System*, 55 F.4th 634 (8th Cir. 2022); *Menominee Indian Tribe of Wisconsin v. U.S.*, 577 U.S. 250 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Defendants suggest that the Supreme Court in *Menominee Indian Tribe of Wisconsin*

assumed, but did not decide, that equitable tolling applies to CDA claims. Def's Brief, ECF No. 31 at 21. However, the Court's assumption was that the *Holland* test for equitable tolling in *habeas corpus* cases is to be applied to CDA claims cases. *Menominee Indian Tribe*, 57 U.S. at 256-57, fn. 2. In so doing, the Court declined to decide whether, "an even stricter test" or a "more generous test" might apply outside of the *habeas* context. *Id*. The Court did not question whether the doctrine of equitable tolling applies to CDA claims, as Defendants suggest. Clearly the Court concluded that it does. And, as Defendants admit, the Eighth Circuit has not ruled on whether the CDA's limitation period is jurisdictional, Def's Brief, ECF No. 31 at 21, fn. 7, case law in the Federal Circuit favors the application of equitable tolling, *Id*. at 20-21, and the Supreme Court has set forth a clear test for determining whether a statute of limitations is jurisdictional. *See Auburn Regional*, 568 U.S. at 153; *Arbaugh*, 546 U.S. at 515. That test has not been met in this case.

As shown in the Second Declaration of Ben Fenner, the Tribe had been diligently pursuing its rights regarding the 2017 CDA claim once the Tribe's legal counsel received the claim, more than five years after it was allegedly issued, via email. *See* Second Fenner Decl. The Tribe, through its legal counsel or CFO, was in regular contact with the Nebraska Congressional Delegation, U.S. Department of Treasury, and IHS/HHS legal counsel and personnel attempting to resolve the issue. *Id.* ¶ 3. The Tribe's legal counsel declined "technical assistance" offered by IHS because the Tribe had already paid the alleged debt. *Id.* ¶¶ 4-5. On August 8, 2023, the Tribe's CFO received the Case Reconstruction Summary from HHS confirming that the Tribe had overpaid the debt alleged in the 2017 CDA claim. Second Noonan Decl. ¶ 8. At this point, the Tribe reasonably believed that the debt had been paid off, and IHS/HHS had not advised the Tribe, its CFO or its legal counsel otherwise. *Id.* ¶ 11.

The HHS Case Reconstruction Summary, which belatedly concluded that the Tribe had

overpaid the 2017 CDA claim/debt, was outside of the Tribe's control. The Tribe justifiably relied on the HHS Case Reconstruction Summary, and thus reasonably believed that it did not have standing to challenge the 2017 CDA claim or the offsets of its federal funds, which at that time, had been reimbursed. The Tribe reasonably believed that the Defendants had internally resolved their failure to terminate the alleged debt in the 2017 CDA Claim, understanding that the offsets should have never taken place pursuant to the adjustments made in Modification 33 and the negotiated reduced indirect cost rates with IHS, in performance of the 2016 Settlement Agreement. The Tribe could not have had any involvement in the decision-making behind the offsets, reimbursements, or the August 4, 2023 Case Reconstruction Summary, as they were all carried out solely by Defendants. Therefore, the Case Reconstruction Summary, which concluded that the Tribe had paid off the debt resulting from the 2017 CDA claim, was an extraordinary circumstance outside the Tribe's control. As a result, even if the CDA's statute of limitations applies, it began to run, at the earliest, on October 7, 2022, when the Tribe first received the CDA claim, and was tolled, at the latest, beginning on August 8, 2023, when the Tribe received the Case Reconstruction Summary.

The tolling period ended when the Tribe received notice of the October 12, 2023 second round of (admittedly) unlawful offsets of the Tribe's ISDEAA payments. This second round of unlawful offsets reinstated the Tribe's ability to bring a challenge to the 2017 CDA Claim. The time that elapsed between the Tribe's receipt of the Case Reconstruction Summary on August 8, 2023 and the occurrence of the second unlawful offset on October 12, 2023 was two months and three days. The tolling for this period extended the statute of limitations period to, at earliest, December 11, 2023.[6] The Tribe filed this suit on November 29, 2023, and therefore, the Tribe's

[6] The statute of limitations under § 7104(b)(3) is calculated as 12 months, rather than 365 days.

suit was timely filed under the CDA statute of limitations (assuming that it even applies to the Tribe's Claims). Accordingly, Defendants' Motion to Dismiss should be denied.

III. THE TRIBE'S FIRST CLAIM ARISES UNDER THE APA FOR VIOLATIONS OF THE FDCPA AS INCORPORATED INTO THE IHS'S MANUAL, AND IS NOT BARRED BY THE CDA STATUTE OF LIMITAITONS

Defendants' assertion that the CDA's statute of limitations bars the Tribe's First Claim for Relief assumes that such claim arises under the CDA. It does not. Instead, the Tribe's First Claim arises under the Administrative Procedures Act ("APA"), asserting violations of the Fair Debt Collection Practices Act ("FDCPA"), as incorporated into the IHS Manual. As such this claim arises under the six-year statute of limitations. 28 U.S.C. § 2401(a).

The FDCPA, 15 U.S.C.A. § 1692c, "Communication in connection with debt collection" (part of the Fair Debt Collection Practices Act) states as follows:

> Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—
>
> (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.

15 U.S.C.A. § 1692c.

While an officer or employee of the United States attempting to collect a debt in performance of his official duties is not a "debt collector" as that term is defined under the FDCPA, the Indian Health Service, through its Indian Health Manual, has bound its employees to certain

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See Quillen v. U.S., Fed.Cl.2009, 89 Fed.Cl. 148. ("Period under Contracts Dispute Act (CDA) to dispute decision of contracting officer in federal court had to be calculated as 12 calendar months, instead of 365 days."); *Minasyan v. Mukasey*, 553 F.3d 1224, 1228 (9th Cir. 2009). This date was calculated to include the three days of tolled time, even though the statute of limitations period is counted by months.

sections of the FDCPA, including the section on communicating with debtors.

Self-adopted agency rules, like those contained in the Indian Health Manual, may be enforceable against an agency where such rules affect a party's rights, even where such rules have not been published in the Federal Register. *See, e.g., Morton v. Ruiz,* 415 U.S. 199, 235 (1974) ("[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.3d 707 (8th Cir. 1979) (agencies must follow internal procedures even if the procedures are more rigorous than otherwise would be required). This principle is based on "the concept of fair play and in abhorrence of unjust discrimination, and its ambit is not limited to rules attaining the status of formal regulations." *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 712 (D.C. Cir. 1985).

The Indian Health Manual ("IHM"), by its own terms, constitutes the "reference for IHS staff regarding IHS-specific policy and procedural information. Permanent policies, procedures, and operating standards specific and unique to IHS administrative and program operations are maintained" in the IHM. Indian Health Services, Indian Health Manual § 1-1.2, (available at https://www.ihs.gov/ihm/pc/) ("IHM").

The IHS procedures for debt collection are found in Part 9, Chapter 4. Specifically, Section 9.4.3 adopts IHS policies for debt management. That section opens with a discussion of Due Process, stating, "Due process must be given to the debtor for the outstanding debt to be legally enforceable. For a debtor to be given due process, notice must be given that a debt is owed, and the debtor must be given the opportunity to dispute." IHM, § 9-4.3B. The Manual goes on to provide that the "Notice" must "inform the debtor of the . . . amount and type of debt [and] . . . action the Agency might take to collect debt." *Id*. at 9-4.3C.

To effectuate due process, IHS makes certain provisions of the FDCPA rule of debt

collection applicable to its employees. Section 9-4.3L, "Communicating with Debtors," provides:

> Contact with the debtor is essential because contact provides the debtor with notification of the existence of the debt and the amount if the debtor is otherwise unaware of such elements. It also provides the debtor with the opportunity to repay the debt in full or to work out a satisfactory arrangement with the IHS. Contact with the debtor also provides the debtor with information on IHS policies regarding interest, penalties and administrative costs.
>
> It also provides written evidence of the due process in compliance with demand letters advising the debtor of the intent to use certain debt collection tools. This allows the debtor to exercise any rights to avoid the use of the debt collection tools. Although Federal agencies are not subject to the Fair Debt Collection Practices Act (FDCPA), the regulations provide valuable guidance in communicating with debtors. ***The following FDCPA rules of debt collection shall be followed by IHS employees.***
>
> …
>
> (2) ***Do not contact the debtor directly if you know the debtor is represented by an attorney***.

IHM § 9-4.3L (emphasis added).

Here, the Tribe's attorneys responsible for negotiating the Settlement Agreement were not copied on the 2017 CDA claim and did not receive it, despite working with Ms. Diaz (who signed the claim) and the HHS/IHS attorneys (who were copied on the claim) over the four-year period from 2012-2016 in the course of settling the central focus of the claim: the inclusion of depreciation in the Tribe's indirect cost pool. Fenner Decl. ¶ 4; Marks Decl. ¶ 4.

The Tribe's First Claim for Relief thus states a claim under the APA, and Defendant's Motion to Dismiss this claim should be denied.

IV. THE COURT SHOULD DENY DEFENDANT'S REQUEST TO PARTIALLY DISMISS THE TRIBE'S SECOND, THIRD AND FOURTH CLAIMS

The Court should deny Defendants' request that the Court, "dismiss the Second, Third and Forth Claims in part to the extent that they challenge IHS' CDA claim or the validity of the debt owed to the United States." None of these claims are CDA claims. The Second Claim is an APA

claim asserting that that Defendants have fully paid the debt that is the subject of IHS' CDA claim, and that Defendants have overcollected on the debt via its indirect contract support cost rate reduction and corresponding shortfalls in the Tribe's indirect support cost reimbursements in fiscal years 2015 through 2018. Compl. ECF No. 1 ¶¶ 90-95. The Third Claim is an APA claim asserting that IHS has violated the terms of the 2016 Settlement Agreement, resulting in an overpayment of the debt that was the subject of that agreement (and the IHS CDA claim). *Id.* ¶¶ 96-102. The Fourth Claim asserts that the Tribe has fully paid the debt at issue, and that Defendants violated the APA by failing to terminate the debt or their collection activity on the debt. *Id.* ¶¶ 103-111.

However, should the Court conclude that these claims, "challenge IHS's CDA Claim or the validity of the debt owed to the United States," the Court should deny Defendants' request to dismiss these claims for the same reasons that the Court should deny Defendants' request to dismiss the First, Fifth and Sixth Claims – i.e., that the claims are not barred by the CDA statute of limitations, as set forth herein.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court deny Defendants' Motion to Dismiss.

Dated: March 22, 2024

SANTEE SIOUX NATION,
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CERTIFICATE OF COMPLIANCE

Pursuant to NECivR 7.1(d)(3), I hereby certify this brief complies with the requirements of NECivR 7.1(d)(1). Relying on the word count function of Microsoft Office Word, this document contains 9,559 words. The word count function was applied to all text including the caption, headings, footnotes and quotations.

s/ Aidan Graybill
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CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of March 2024, I electronically filed the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN PART with the Clerk of Court using the EM/ECF System, and thereby served the same upon the following attorneys of record:

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