IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SANTEE SIOUX NATION,

Plaintiff,

vs.

ROSELYN TSO, in her official capacity as Director of the Indian Health Service, INDIAN HEALTH SERVICE, XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, and UNITED STATES OF AMERICA,

Defendants.

NO. 8:23-CV-530

MEMORANDUM AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS IN PART

Plaintiff Santee Sioux Nation (the Tribe) has brought six claims against various federal defendants (collectively, the Government) regarding a $3,244,061 debt alleged owed to the United States due to a mistaken overpayment. Filing 1. The Tribe seeks to invalidate this debt, which resulted from a Contract Disputes Act (CDA) claim asserted by the Government against the Tribe in 2017. Filing 1 at 23–30 (¶¶ 82–127). Presently before the Court is the Government's Motions to Dismiss in Part, which seeks to dismiss three of the Tribe's claims in whole and parts of the remaining three. Filing 30. Specifically, the Government seeks dismissal of "any and all parts of the Tribe's Complaint that challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States." Filing 31 at 13. The Government asserts that the challenged claims are untimely

under and therefore barred by the CDA's statute of limitations. Filing 31 at 1–2. The Government's Motion is for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or alternatively for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons below, the Court grants the Government's Motion to Dismiss in Part in its entirety.

I. INTRODUCTION

A. Factual Background

The Court considers the following nonconclusory allegations as true for the purposes of ruling on this motion. *See Bauer v. AGA Serv. Co.*, 25 F.4th 587, 589 (8th Cir. 2022) (quoting *Pietoso, Inc. v. Republic Servs., Inc.*, 4 F.4th 620, 622 (8th Cir. 2021)). The Tribe is a federally recognized Indian Tribe located in Knox County, Nebraska. Filing 1 at 3 (¶ 4). Pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), the Tribe contracts with several federal agencies, including Health and Human Services (HHS) and Indian Health Services (IHS), "to provide health care services to the Tribe's members and other Native Americans." Filing 1 at 1 (¶ 1). In 2008, the Tribe and IHS entered into a joint venture agreement to construct a Health and Wellness Center (the Facility) on the Tribe's reservation. Filing 1 at 13 (¶ 41); *see also* Filing 1-1 (joint venture agreement). The "project description" stated,

> [T]he Tribe will participate in the [joint venture] and will construct the Facility and provide the initial equipment. In exchange, . . . the IHS will lease the Facility and the land Incidental thereto under a no-cost lease for a minimum of 20 years thereafter; and include in its annual budget requests funding for staffing and supplies to operate and maintain the Facility.

Filing 1-1 at 2. Under the joint venture, the Tribe was "responsible for the design of the project in accordance with the IHS approved Planning Documents," for the "administ[ration] and

manage[ment of] the design contract," and "for the construction of the project." Filing 1-1 at 5. In exchange, IHS leased the land at no cost to the Tribe and agreed to provide funding for operations, staffing, and supplies for the Facility. Filing 1-1 at 6–9.

In June 2017, the Government issued a CDA Claim against the Tribe to recover an alleged overpayment by the Government. Filing 1 at 18 (¶ 59). The CDA Claim established a $3,782,216 debt owed by the Tribe to the Government. Filing 1-9. The Tribe alleges that "the June 19, 2017 CDA claim letter was never received by the Tribe and the Tribe was unaware of the alleged debt or its amount." Filing 1 at 18 (¶ 59). The Tribe alleges that it "did not receive notice of the 2017 claim until October 3, 2022" when IHS emailed "the Tribe's attorneys a copy of the 2017 [CDA] Claim . . . for the first time." Filing 1 at 19–20 (¶¶ 60, 66). The Tribe alleges that the Government has been offsetting the Tribe's federal funds to repay the debt from the 2017 CDA Claim, which has "prevented the Tribe from using those funds for their intended purposes," thereby injuring the Tribe. Filing 1 at 23 (¶ 79).

B. Procedural Background

The Tribe filed a Complaint and a Motion for Temporary Restraining Order on November 29, 2023. Filing 1; Filing 2. Because the Tribe failed to comply with Fed. R. Civ. P. 65(b)(1)'s notice requirements for an *ex parte* TRO, the Court ordered the Tribe to give notice to the Government before ruling on the TRO. Filing 6. Subsequently, the parties filed a joint stipulation to withdraw the TRO, Filing 13, which the Court granted, Filing 17, leaving only the Tribe's Complaint. The Complaint contains six claims for relief, including statutory, constitutional, and regulatory claims. Filing 1 at 23–30 (¶¶ 82–127). The first four claims assert causes of action under the Administrative Procedure Act (APA), including violations of the Fair Debt Collection Practice

Act (FDCPA), unlawful overcollection, failure to implement the settlement agreement, and failure to terminate the debt or collection activity on the debt. Filing 1 at 23–28 (¶¶ 82–111). The fifth claim is for a violation of procedural due process. Filing 1 at 28–29 (¶¶ 112–119). The sixth claim is for a violation of 25 C.F.R. § 900.217, a regulation titled, "Is filing a claim under the CDA our only option for resolving post-award contract disputes?" Filing 1 at 29–30 (¶¶ 120–127). The Tribe seeks several forms of declaratory and injunctive relief. Filing 1 at 30–31 (Wherefore clause ¶¶ 1–8).

The Government filed its Motion to Dismiss in Part on March 1, 2024. Filing 30. The Government seeks dismissal of "the portions of Plaintiff's Complaint challenging IHS's CDA claim or the validity of its debt owed to the United States" for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1), or alternatively for failure to state a claim pursuant to Fed. R. Civ. P 12(b)(6). Filing 31 at 2. Specifically, the Government asks the Court to "dismiss the First, Fifth, and Sixth Claims for Relief" in whole and to "dismiss the Second, Third, and Fourth Claims in part to the extent they challenge IHS's CDA claim or the validity of the Tribe's debt owed to the United States." Filing 31 at 13. The Government clarifies that it "has no intention of over-collecting on the debt owed to it, and the extent to which the Tribe may have repaid its debt, if at all, can be sorted out later." Filing 31 at 2.

II. ANALYSIS

A. Applicable Standards

1. Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a pre-answer motion to dismiss for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). The Eighth Circuit Court of Appeals has explained that on a Rule 12(b)(1) motion,

> The plaintiff bears "the burden of proving the existence of subject matter jurisdiction," and we may look at materials "outside the pleadings" in conducting our review. [*Herden v. United States*, 726 F.3d 1042, 1046 (8th Cir. 2013) (en banc)] (quoting *Green Acres Enters., Inc. v. United States*, 418 F.3d 852, 856 (8th Cir. 2005)). Because of the "unique nature of the jurisdictional question," *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (citation omitted), it is the court's duty to "decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue," *id*. at 730. As such, if the court's inquiry extends beyond the pleadings, it is not necessary to apply Rule 56 summary judgment standards. *Id*. at 729. Rather, the court may receive evidence via "any rational mode of inquiry," and the parties may "request an evidentiary hearing." *Id*. at 730 (quoting *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986)). Ultimately, the court must rule upon "the jurisdictional issue [unless it] is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.'" *Id*. (quoting *Crawford*, 796 F.2d at 928).

Buckler v. United States, 919 F.3d 1038, 1044 (8th Cir. 2019); *Am. Fam. Mut. Ins. Co. v. Vein Centers for Excellence, Inc*., 912 F.3d 1076, 1081 (8th Cir. 2019) ("[A] motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) raises a factual challenge to the court's jurisdiction, and courts may look to evidence outside the pleadings and make factual findings." (citing *Davis v. Anthony, Inc*., 886 F.3d 674, 679 (8th Cir. 2018)).

The *Buckler* decision suggests that a challenge to subject matter jurisdiction pursuant to Rule 12(b)(1) is always "factual," but "facial" challenges are also possible:

> In deciding a motion under Rule 12(b)(1), the district court must distinguish between a facial attack—where it looks only to the face of the pleadings—and a factual attack—where it may consider matters outside the pleadings. *Osborn v.*

> *United States*, 918 F.2d 724, 729 n.6 (8th Cir.1990). In a factual attack, the "non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.* If the jurisdictional issue is "bound up" with the merits of the case, the district court may "decide whether to evaluate the evidence under the summary judgment standard." *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir.2018). This court is bound by the district court's characterization of the Rule 12(b)(1) motion. *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir.2016) ("The method in which the district court resolves a Rule 12(b)(1) motion—that is, whether the district court treats the motion as a facial attack or a factual attack—obliges us to follow the same approach.").

Croyle by & through *Croyle v. United States*, 908 F.3d 377, 380–81 (8th Cir. 2018).

In this case, the Government does not designate its challenge to subject matter jurisdiction as facial or factual. Filing 31; Filing 37. However, because the Court only needs to consider the allegations contained in the Complaint, the Court treats the Government's Motion to Dismiss in Part as a facial challenge to subject matter jurisdiction. *See Croyle*, 908 F.3d at 380–81 (explaining that the appellate court is bound by the district court's characterization of the motion as a facial or factual challenge). Under these circumstances, the Tribe is entitled to Rule 12(b)(6) "safeguards." *Croyle*, 908 F.3d at 380.

2. Rule 12(b)(6)

The typical grounds for Rule 12(b)(6) motions are the insufficiency of the factual allegations offered to state claims. To state a claim, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Nevertheless, "'threadbare recitals of the elements of a cause of action' cannot survive a [Rule 12(b)(6)] motion to dismiss." *Du Bois v. Bd. of Regents of Univ. of Minnesota*, 987 F.3d 1199, 1205 (8th Cir. 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Instead, as the Eighth Circuit Court of Appeals has explained, "A claim survives a Rule 12(b)(6) motion to dismiss only if the complaint's nonconclusory allegations, accepted as true, make it not just 'conceivable' but

'plausible' that the defendant is liable." *Mitchell v. Kirchmeier*, 28 F.4th 888, 895 (8th Cir. 2022) (quoting *Iqbal*, 556 U.S. at 680-83). To put it another way, a court "must determine whether a plaintiff's complaint 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Far E. Aluminium Works Co. v. Viracon, Inc.*, 27 F.4th 1361, 1364 (8th Cir. 2022) (quoting *Braden v. WalMart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)). Thus, "[a] claim is plausible when 'the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Christopherson v. Bushner*, 33 F.4th 495, 499 (8th Cir. 2022) (quoting *Iqbal*, 556 U.S. at 678). In contrast, "'[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility." *Id.* (internal quotation marks and citations omitted). The Eighth Circuit Court of Appeals has cautioned that "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden*, 588 F.3d at 594.

In ruling on a Rule 12(b)(6) motion, a court must "accept 'the facts alleged in the complaint as true and draw[ ] all reasonable inferences in favor of the nonmovant.'" *Bauer v. AGA Serv. Co.*, 25 F.4th 587, 589 (8th Cir. 2022) (quoting *Pietoso, Inc. v. Republic Servs., Inc.*, 4 F.4th 620, 622 (8th Cir. 2021)). On the other hand, "[m]ere conclusory statements and factual allegations lacking enough specificity to raise a right to relief above the speculative level are insufficient to support a reasonable inference that the defendant is liable." *Richardson v. BNSF Ry. Co.*, 2 F.4th 1063, 1068 (8th Cir. 2021) (internal quotation marks and citations omitted). A court also need not accept a pleader's "legal conclusions drawn from the facts." *Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751, 755 (8th Cir. 2021).

Rule 12(b)(6) also permits dismissal when a claim is not cognizable under applicable law. See, e.g., *Couzens v. Donohue*, 854 F.3d 508, 517 (8th Cir. 2017) (dismissal was appropriate where Missouri did not recognize a claim for false light invasion of privacy); *Thomas v. Bd. of Regents of Univ. of Nebraska*, No. 4:20CV3081, 2022 WL 1491102, at *18 (D. Neb. May 11, 2022) (agreeing with defendant that the plaintiffs had failed to state a claim, because a disparate-impact claim is not cognizable under the Equal Protection Clause); *Freeney v. Galvin*, No. 8:19CV557, 2020 WL 229996, at *2 (D. Neb. Jan. 15, 2020) (finding the plaintiff failed to state a § 1983 claim against the manager of his private place of employment because such a claim is not cognizable where a private person is not a state actor or engaged in joint action with the state or its agents). In such cases, the plaintiff failed to state a claim that was legally cognizable as opposed to factually plausible.

B. The Statute of Limitations Provided by the CDA Applies to the Tribe's CDA-Related Claims

1. The Challenged Claims

The Government moves to dismiss the Tribe's first, fifth, and sixth causes of action as relating to "IHS's [2017] CDA Claim or the validity of the Tribe's debt owed to the United States." Filing 31 at 13. The Tribe's first cause of action is characterized as a violation of the APA for the Government's alleged noncompliance with the FDCPA. Filing 1 at 23–25 (¶¶ 82–89). This cause of action includes an allegation stating,

> By not serving the Tribe and not including the Tribe's attorneys on the 2017 Claim, the IHS failed to provide notice to the Tribe of the claim being brought against it and failed to provide the Tribe with notice of its appeal rights in violation of the FDCPA and the Indian Health Manual.

Filing 1 at 24 (¶ 86). The Tribe asserts that the Government's alleged failure to properly give notice of the 2017 CDA Claim "made it impossible for the Tribe to file an appeal to the Civilian Board of Contract Appeals or federal court within the time specified in the CDA." Filing 1 at 24 (¶ 87). The Tribe's fifth and sixth causes of action stem from the same allegedly defective notice as the first claim, but instead assert violations of procedural due process, Filing 1 at 29 (¶ 114) ("Defendants' failure to provide the Tribe with notice of the 2017 Claim denied the Tribe the opportunity to object to or appeal this illegitimate claim, denied the Tribe its right to due process, and denied the Tribe its right to exercise its appeal rights."), and 25 C.F.R. § 900.217, Filing 1 at 30 (¶ 125) ("IHS made no attempt to contact the Tribe's attorneys related to this matter from November 16, 2016, through June 19, 2017, the date of IHS's contract disputes act claim against the Tribe."), respectively.

2. The Parties' Arguments

The Government contends that the CDA and its one-year statute of limitations govern the Tribe's first, fifth, and sixth claims. Filing 31 at 15 ("This Court should dismiss all portions of the Tribe's Complaint challenging the validity of the debt assessed in IHS's CDA Claim because the time for the Tribe to appeal the IHS contracting officer's decision in federal court has passed.") In response, the Tribe argues that its first cause of action states a claim under the APA, which has a six-year statute of limitations, 28 U.S.C. § 2401(a), rather than the CDA, with its one-year statute of limitations, 41 U.S.C. § 7104(b)(3). Filing 32 at 27 (arguing that "the Tribe's First Claim arises under the [APA], asserting violations of the [FDCPA], as incorporated into the IHS Manual. As such this claim arises under the six-year statute of limitations."). The Tribe does not make any similar arguments regarding its fifth and sixth causes of action, stating only that "the First, Fifth

and Sixth Claims . . . are not barred by the CDA statute of limitations." Filing 32 at 30. In reply, the Government contends that "the Tribe cannot use the six-year statute of limitations applicable to APA claims as an end-run around the CDA's twelve-month limit on appealing a contracting officer's decision." Filing 37 at 14. The Government argues instead "that the CDA provides the exclusive remedy for obtaining judicial review of a contracting officer's decision." Filing 37 at 14. The Government explains that "the CDA itself [ ] provides an 'adequate remedy,'" rendering the APA inapplicable. Filing 37 at 14. Accordingly, the Court must determine which statute—the CDA or the APA—governs the Tribe's first, fifth, and sixth causes of action.

3. Applicable Standards

The Contract Disputes Act, 41 U.S.C. §§ 7102, *et. seq.*, "applies to any express or implied contract . . . made by an executive agency for . . . the procurement of construction, alteration, repair, or maintenance of real property." 41 U.S.C. § 7102(a). The Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 5301, *et. seq.*, incorporates the CDA for "self-determination contracts." 25 U.S.C. § 5331(d) (providing that "Chapter 71 of Title 41 [the CDA] shall apply to self-determination contracts"). The "[t]ime for submitting claims" to a "contracting officer" under the CDA is "within 6 years after the accrual of the claim." 41 U.S.C. § 7103. However, the time for filing an appeal of the decision of a contracting officer in federal court is "within 12 months from the date of receipt of a contracting officer's decision." *Id.* § 7104(b)(3); *see also* 25 U.S.C. § 5331 (providing federal district courts with concurrent original jurisdiction over CDA claims arising under the ISDEAA). In addition, "[t]he contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or

Federal Government agency, unless an appeal or action is timely commenced." 41 U.S.C. § 7103(g).

Conversely, the APA provides for judicial review of "final agency action[s] for which there [are] no other adequate remed[ies] in a court." 5 U.S.C. § 704. "Claims arising under the APA are subject to a six-year statute of limitations." *N. Dakota Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 639 (8th Cir. 2022) (citing 28 U.S.C. § 2401(a)), *cert. granted sub nom. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 478 (2023). The provision of law governing the statute of limitations under the APA provides, "Except as provided by chapter 71 of title 41 [the Contracts Dispute Act], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

4. Application

The Court agrees with the Government that the CDA offers a procedure through which the Tribe could obtain (or could have obtained, had it filed its action within the applicable statute of limitations period) an "adequate remedy in court." 5 U.S.C. § 704. The 2017 CDA Claim was a "final decision" issued by a "contracting officer." Filing 1-9; *see also* 41 U.S.C. § 7104(b)(3). The Tribe's first, fifth and sixth causes of action all relate to the validity of the debt that resulted from the 2017 CDA Claim. *See* Filing 1 at 29 (¶ 114) ("Defendants' failure to provide the Tribe with notice of the 2017 Claim denied the Tribe the opportunity to object to or appeal this illegitimate claim, denied the Tribe its right to due process, and denied the Tribe its right to exercise its appeal rights."). The CDA statute permits an aggrieved contractor to "bring[ ] an action de novo in Federal Court," 41 U.S.C. § 7104(b)(3), which undoubtedly constitutes an "adequate remedy in court," 5

U.S.C. § 704, meaning the APA is inapplicable. In addition, by its plain language, the provision governing the statute of limitations for APA claims explicitly does not apply to CDA claims. 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41 [the Contracts Dispute Act], every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). Accordingly, because the Tribe's first, fifth, and sixth claims are governed by the CDA, the CDA's one-year statute of limitations applies instead of the six-year statute of limitations applicable to APA claims.

C. The Tribe Is Not Entitled to Equitable Tolling on Causes of Action Related to the 2017 CDA Claim

The Government argues that "the Tribe does [not] claim that it is entitled to equitable tolling [in the Complaint], much less allege facts suggesting that it could satisfy the strict prerequisites of such relief." Filing 31 at 21. In its Brief opposing dismissal, the Tribe argues that it "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." Filing 32 at 24. However, the Tribe failed to allege in the Complaint that its CDA-related claims were tolled. *See generally* Filing 1. Rather, the Tribe raised numerous factual allegations in its Brief opposing dismissal. *See* Filing 32 at 24–27.[1] In reply, the Government reiterates its position that the Tribe

[1] Regarding "diligence" in pursuing its rights, the Tribe explains,

> [T]he 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. 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. The Tribe's legal counsel declined "technical assistance" offered by IHS because the Tribe had already paid the alleged debt. 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. 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.

failed to "allege that it is entitled to equitable tolling, much less allege any facts suggesting that it could satisfy the strict prerequisites of such relief" and "cannot amend its Complaint to now assert an equitable tolling claim by filing a brief in opposition to Defendants' motion to dismiss." Filing 37 at 10. The Court agrees with the Government.

The Court cannot consider the factual allegations related to tolling contained in the Tribe's Brief opposing dismissal because none were alleged in the Complaint. *See generally* Filing 1; *see also Glick v. W. Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019) ("[Plaintiff] presented additional facts in his oppositions to the motions to dismiss [but] those factual allegations were not included in his amended complaint and, thus, cannot be considered on a motion to dismiss.");

Filing 32 at 25. Regarding "extraordinary circumstances" that prevented timely filing, the Tribe explains,

> 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.

Filing 32 at 26. According to the Tribe, these factual allegations are relevant because:

> [E]ven 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 suit was timely filed under the CDA statute of limitations (assuming that it even applies to the Tribe's Claims).

Filing 32 at 26–27.

Croyle, 908 F.3d at 380–81 (explaining that on a "facial attack" to subject matter jurisdiction, the district court "looks only to the face of the pleadings" (quoting *Osborn*, 918 F.2d at 729 n.6)). The Tribe does not allege in the Complaint that its CDA-related claims were tolled nor any facts that could support such a contention. *See generally* Filing 1. Thus, because the Tribe failed to allege that it is entitled to equitable tolling on its CDA-related claims, equitable tolling is inapplicable in this case.

D. Whether the Tribe's Claims Accrued in June 2017 or in October 2022 Is Immaterial

The Government issued a final decision by a contracting officer on the 2017 CDA Claim on June 19, 2017. Filing 1-9. The Tribe avers that it was not aware of the 2017 CDA Claim until October 2022. Filing 1 at 19 (¶ 60). The Tribe filed its Complaint in this Court on November 29, 2023, challenging the validity of its debt under the 2017 CDA Claim. *See generally* Filing 1. Assuming without deciding that the Tribe's claims did not accrue until October 2022 when it had actual notice of the CDA Claim, the Tribe's claims are nevertheless untimely under the CDA's one-year statute of limitations. 41 U.S.C. § 7104(b)(3). The Tribe commenced this litigation more than one year after October 2022 and, as discussed above, equitable tolling does not apply in this case. Thus, even if the Tribe is correct that its claim did not accrue until October 2022, its CDA-related claims are still barred by the statute of limitations.

E. The Tribe's Claims Concerning the Validity of the 2017 CDA Claim and Resulting Debt Are Dismissed

The Government moved for dismissal of the Tribe's CDA-related claims for lack of subject matter jurisdiction and for failure to state a claim. Filing 30. Whether the CDA's statute of limitations is jurisdictional is unsettled. *See Menominee Indian Tribe of Wisconsin v. United States,*

577 U.S. 250, 255 (2016) (noting without resolving a circuit split regarding whether the statute of limitations period under the CDA is jurisdictional). The question is not dispositive in this case, as the Government is entitled to dismissal of these claims because they are untimely under the CDA's statute of limitations, jurisdictional or not. However, "[s]ubject matter jurisdiction is a threshold matter that [courts] are obligated to address at the outset," *Sianis v. Jensen*, 294 F.3d 994, 997 (8th Cir. 2002). Thus, if the CDA's statute of limitations is jurisdictional, the Government is entitled to dismissal of the CDA-related claims for lack of subject matter jurisdiction. Alternatively, if the CDA's statute of limitations is not jurisdictional, the Government is entitled to dismissal of the CDA-related claims for failure to state a claim. Either way, the "complaint's nonconclusory allegations, accepted as true," fail to make it "plausible" that the Tribe's CDA-related claims are timely. *Mitchell*, 28 F.4th at 895.

III. CONCLUSION

The Government's Motion to Dismiss in Part only concerns the Tribe's "First, Fifth, and Sixth Claims for Relief" and "the Second, Third, and Fourth Claims in part [only] to the extent they challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States." Filing 31 at 13. The Court concludes that the Tribe's first, fifth, and sixth causes of action concern the validity of the 2017 CDA Claim and the resulting debt and are therefore subject to the CDA's one-year statute of limitations. Because the Tribe commenced this suit over one year after its claim accrued, and because the Tribe is not entitled to equitable tolling, those causes of action are barred by the statute of limitations and thus dismissed. In addition, to the extent that the Tribe's second, third, and fourth claims for relief are also related to the validity of the 2017 CDA Claim and the resulting debt, they are dismissed. These claims all appear to relate to alleged overcollection or

improper collection of the Tribe's debts by the Government. *See* Filing 31 at 2 (the Government clarifying it "has no intention of over-collecting on the debt owed to it, and the extent to which the Tribe may have repaid its debt, if at all, can be sorted out later"). To the extent the second, third, and fourth claims for relief do not concern the validity of the 2017 CDA Claim and the resulting debt, but instead to the Government's alleged overcollection, these claims survive. Accordingly,

IT IS ORDERED:

1. The Government's Motion to Dismiss in Part, Filing 30, is granted in its entirety; and

2. The Tribe's First, Fifth, and Sixth Claims for Relief are dismissed;

3. The Tribe's Second, Third, and Fourth Claims for Relief are dismissed in part to the extent these claims challenge IHS's CDA Claim or the validity of the Tribe's debt owed to the United States, but these claims survive to the extent they relate to the alleged overcollection or improper collection of the Tribe's debts by the Government.

Dated this 20th day of June, 2024.

BY THE COURT:

Brian C. Buescher
United States District Judge