

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LOWER BRULE SIOUX TRIBE, a federally
recognized Indian Tribe,

Plaintiff,

v.

HON. DEB HAALAND, Secretary, United
States Department of the Interior, or her
successor in office; the UNITED STATES
DEPARTMENT OF INTERIOR; BRYAN
NEWLAND, Assistant Secretary of the
Interior for Indian Affairs, or his successor in
office; DARRYL LACOUNTE, Director of
the Bureau of Indian Affairs; THE UNITED
STATES BUREAU OF INDIAN AFFAIRS;
KRISSANNE STEVENS, or her successor,
Awarding Official for the Bureau of Indian
Affairs Great Plains Region; and THE
UNITED STATES OF AMERICA.

Defendants.

3:21-CV-03018-RAL

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Defendants submit the following brief in support of their motion for summary judgment.

INTRODUCTION

Plaintiff Lower Brule Sioux Tribe (“the Tribe”) is a federally recognized Indian tribe and fund recipient under the Tribally Controlled Schools Act (“TCSA”). *See* 25 U.S.C. §§ 2501 *et seq.* In fiscal year 2017, the Tribe received TCSA funds to operate its tribal schools. The Tribe, however, used these monies to fund tribal programs and operations other than its schools, which created an unearned revenue deficit. After failing to contest, or timely appeal, the audit findings in FY 2017, collections on the debt owed by the Tribe commenced. The Tribe instituted the current lawsuit claiming the government over collected on said debt.

The Tribe's single remaining allegation regarding the alleged overcollection is without merit. Rather, the Tribe has a current debt balance due to the government of \$1,013,873.36. The Tribe presents no genuine issue of material fact, and as such, summary judgment is warranted, and the Amended Complaint should be dismissed in its entirety.

BACKGROUND

I. Statutory History.

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEAA") to help Indian tribes assume responsibility for educational and social programs that benefit their members. *See* 25 U.S.C. §§ 5301 *et seq.* Under the ISDEAA, a tribe may enter into "self-determination contracts" with federal agencies to take control of a variety of federally funded programs. 25 U.S.C. § 5321.

In 1988, Congress enacted the TCSA to further self-determination in the provision of Indian education by tribal entities. 25 U.S.C. § 2501. The TCSA acknowledges "that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities; and that those needs may best be met through a grant process." 25 U.S.C. § 2501(d)(2)-(3) (numbering omitted). The TCSA allows tribes to use the grant funds to support tribally controlled school programs. 25 U.S.C. §§ 2502 *et seq.*

For each fiscal year in which a tribal organization receives or expends funds pursuant to an ISDEAA contract or TCSA grant, the tribal organization must submit a single-agency audit report. 25 U.S.C. §§ 2507(a)(1) and 5305(f). The audit must be "conducted by an independent auditor in accordance with generally accepted government auditing standards" and submitted to the appropriate agency. 31 U.S.C. § 7502(c). Pursuant to the Single Audit Act, the tribal organization

submits a reporting package, including the auditor’s report, to a Federal clearinghouse. 31 U.S.C. § 7502(h). The designated agency is then required to “assess the quality of the audit[] conducted[.]” 31 U.S.C. § 7504(a)(2). The respective secretary must give notice as to disallowance of costs within three hundred and sixty-five (365) days of receipt of the annual single-agency audit report. 25 U.S.C. §§ 2507(a)(8) and 5325(f).

The Indian Affairs Division of the Internal Evaluation and Assessment (“DIEA”) has been designated as the office to receive Single Audit reports from Indian Tribes and tribal organizations. *See* U.S. Department of the Interior, Bureau of Indian Affairs, Single Audit Report Handbook 5 IAM 2-H, Issued August 26, 2016 at p. 1.¹ The DIEA may designate an amount spent as a “questioned cost” in the event of a “deferred revenue deficit issue.” *Id.* p. 2, K.(4). The Awarding Official issues a written decision—labeled a Findings and Determinations Memorandum—as to “whether the audit findings have been addressed satisfactorily and whether questioned costs have been disallowed (sustained) or reinstated (allowed).” *Id.* p. 1, F. If a questioned cost is “disallowed” then the Awarding Official issues a formal notice letter, attaching a copy of the Findings & Determinations. *Id.* p. 3, 3(b).

The TCSA incorporates provisions of the ISDEAA related to single audits and cost disallowance disputes, which in turn incorporate the Contract Disputes Act (“CDA”). 25 U.S.C. § 2507(e) (incorporating ISDEAA contract dispute provisions found at 25 U.S.C. § 5331); 25 U.S.C. § 2507(a)(8); *see also* 25 C.F.R. § 44.110(a)(4) and (b) (applying 25 C.F.R. part 900, Subpart N to grants under the TCSA). The CDA provides a mandatory administrative exhaustion

¹ Publicly available at https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/5-IAM-2H-Single-Audit-Report-HB_OIMT.pdf.

scheme applicable to disputes between government contractors or grant recipients and the United States.

Under the CDA, the first step is that “[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a). The CDA further provides that “[f]ailure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim” *Id.* § 7103(f)(5). Thereafter, the ISDEAA contractor, or TCSA grant recipient, has the option of appealing a contracting officer’s decision to: (1) the Civilian Board of Contract Appeals (within 90 days of the decision), *id.* § 7104(a), 25 U.S.C. § 5331(d); (2) the United States Court of Federal Claims (within 12 months of a decision), 41 U.S.C. § 7104(b)(1), (3); or (3) a federal district court (within 12 months of a decision), *id.* § 7104(b)(3), 25 U.S.C. § 5331(a). “The 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 as authorized by [the CDA]” 41 U.S.C. § 7103(g).

II. Procedural History.

In October 2021, the Tribe filed its original Complaint, the crux of which disputed the findings and determinations related to the Tribe’s annual audit reports for Fiscal Years 2016, 2017, and 2018. (Doc. 1.) Defendants filed a Motion to Dismiss challenging the Court’s subject matter jurisdiction to entertain the Tribe’s claims. (Docs. 9-12.) Specifically, Defendants argued that the Tribe failed to first exhaust ISDEAA or TCSA claims through the CDA administrative process. (Doc. 10 at 2, 15-18.) In July 2022, the Court held oral argument on Defendants’ Motion to

Dismiss. At argument—and for the first time—the Tribe alleged that the government over collected from it in the amount of approximately \$1 million.

On September 12, 2022, the Court issued its Opinion and Order on Defendants’ Motion to Dismiss. (Doc. 27.) In it, the Court held that “[b]ecause the Tribe did not bring suit within twelve months of receiving the 2016 Report, 2017 Report, and 2018 Report, the Tribe may not bring a claim under 25 U.S.C. § 2507(e) to challenge the decisions in those reports.” (*Id.* at 18.) The Court also allowed the Tribe an opportunity to amend its Complaint to bring claims against Defendants regarding the Tribe’s over collection claim. (*Id.* at 29.)

On December 19, 2022, the Tribe filed an Amended Complaint with a single count alleging overcollection by the BIA. (Doc. 32, ¶¶ 58-66.) In the Amended Complaint, the Tribe claims (1) the amount of debt from the FY 2017 Report should have been fixed at the time collections began, instead of on the date the FY 2017 Report issued, *id.* ¶¶ 52, 59; (2) the BIA violated its trust duties by over collecting on the debt related to the FY 2017 report, *id.* ¶¶ 63-64; and (3) the BIA improperly assessed administrative costs because the Tribe alleges that it did not receive a notice of the bill of collection related to the FY 2017 report until April 2021, *id.* ¶¶ 60-62.

On March 30, 2023, Defendants filed a Motion to Dismiss the Amended Complaint, again challenging the Court’s subject matter jurisdiction. (Doc. 37.) Specifically, Defendants argued that the allegation in the Tribe’s Amended Complaint was an attempted work around to attack the FY 2017 Report, which had become final years prior, and which the Tribe failed to timely appeal. (Doc. 38.) In support of the motion, Defendants included the Declaration of Lynn Stapor, who was the Director of the Accounting Operations Division Indian Affairs under the Department of Interior (“DOI”). (Doc. 39 ¶ 1.) In her Declaration, Ms. Stapor attested that there had not been an

overcollection and the Tribe still had a remaining debt balance of \$1,013,873.36, which was suspended pending litigation. (*Id.* ¶¶ 5, 7.)

On April 24, 2024, the Court denied Defendants’ Motion to Dismiss the Tribe’s Amended Complaint upon a finding that “there is enough alleged in the Amended Complaint to plead a *single claim* concerning whether the federal government has over collected and what amount remains to be repaid, if any” (Doc. 56 at 2-3) (emphasis added.) The Court went onto note that “[i]f [the statement made in the Declaration of Lynn Stapor regarding the Tribe’s remaining debt obligation of \$1,013,873.36] is true, the Tribe’s claim appears to be mistaken and perhaps subject to summary judgment.” (*Id.* at 4.)

UNDISPUTED MATERIAL FACTS

The Tribe is an Indian Tribe operating, in part, under grants from, or contracts with, the BIA under the ISDEAA, and the United States Bureau of Indian Education (“BIE”) under the TCSA. (Defendants’ Statement of Undisputed Material Facts ¶ 1) [hereinafter “SUMF”.]

FY 2017 Audit Report:

On November 21, 2018, the Tribe submitted its annual audit report for Fiscal Year Ended September 30, 2017 (Report No. ARTT 2017-6175) to the Federal Audit Clearinghouse. (*Id.* ¶ 2.) On December 3, 2018, the DIEA, issued a memorandum to the BIA Great Plains Regional Director regarding the Tribe’s FY 2017 audit report. (*Id.* ¶ 3.)² On March 8, 2019, the Great Plains Regional Director sent a notice of audit findings to the Tribe advising that the total amount of Indian Affairs unearned (advanced) funds that were not covered by a sufficient amount of cash was \$3,679,223 and requesting the Tribe provide an update on the finding with supporting

² A copy of the DIEA memorandum is attached as Exhibit 1 to the Declaration of Krissanne Stevens in Support of Defendants’ Motion for Summary Judgment [hereinafter “Stevens Decl. – MSJ”].]

documentation. (*Id.* ¶ 4.)³ On March 20, 2019, the BIA, Great Plains Regional Office, issued its Fiscal Year 2017 Findings and Determination with respect to the Tribe’s audit report for Fiscal Year Ended September 30, 2017, Report No. ARTT 2017-6175 (“FY 2017 Report”). (*Id.* ¶ 5.)⁴

The FY 2017 Report was mailed to the Honorable Boyd Gourneau, Chairman of the Lower Brule Sioux Tribe. (*Id.* ¶ 6.) The mailing was sent via Certified Mail with a Return Receipt requested. (*Id.* ¶ 7.) The return receipt indicates the mailing was received by the Tribe in March 2019 and signed for by Trish Lundell. (*Id.* ¶ 8.)⁵ The cover letter accompanying the FY 2017 Report highlighted the Tribe’s “right to dispute any information contained in the Awarding Official’s final decision” by appealing to the (1) Civilian Board of Contract Appeals within 90 days of receipt or (2) the Court of Federal Claims within 12 months of receipt. (*Id.* ¶ 9.)⁶ Assuming the mailing was received on March 31, 2019, the respective appeal dates would have run on approximately July 1, 2019, for appeal to the Civilian Board of Contract Appeals, and March 31, 2020, for appeal to the Court of Federal Claims. (*Id.* ¶ 10.)

The FY 2017 Report sustained questioned costs in the amount of \$3,679,223 because the Tribe “used forward funded grant monies to fund other programs and general fund activities.” (*Id.* ¶¶ 12-13.)⁷ The Tribe did not appeal the FY 2017 Report. (*Id.* ¶ 11.)⁸ Rather, Debra Nies, the Tribal Comptroller, responded on behalf of the Tribe: “There is no disagreement with this finding. The Tribe’s management is working towards rectifying the continued overspending of funds that result in the deficient fund balances. Management will strive to maintain the funds for federal

³ A copy of the March 8, 2019, letter is attached as Exhibit 2 to Stevens Decl. – MSJ.

⁴ A copy of the FY 2017 Report is attached as Exhibit 3 to the Stevens Decl. – MSJ.

⁵ A copy of the return receipt is attached as Exhibit 3 to the Stevens Decl. – MSJ.

⁶ See Exhibit 3 attached to the Stevens Decl. – MSJ.

⁷ See Exhibit 3 attached to the Stevens Decl. – MSJ.

⁸ See Exhibit 2 (Tribe’s Discovery Responses) and Exhibit 3 (Deposition of Debra Nies) attached to the Declaration of Alexis A. Warner [hereinafter “Warner Decl.”]

programs in the restricted savings account and transfer as needed to cover expenditures.” (*Id.* ¶ 14.)⁹ In the “Awarding Official’s Determination,” the FY 2017 Report concluded that “[s]ince the Tribe could not provide any documentation of cash on hand, my determination is to sustain the questioned costs of \$3,679,223. In addition, the Regional Office will be issuing a payment restriction letter to remedy the repeat finding.” (*Id.* ¶ 15.)¹⁰

On or about March 30, 2020, the BIA, Great Plains Regional Office, requested that the DOI’s Interior Business Center issue a Bill of Collection to the Tribe, with instructions to credit for collection the sum of \$3,679,223. (*Id.* ¶ 16.)¹¹ The request for a bill of collection incorrectly referenced two BIA lines of accounting. That error was corrected in the June 10, 2020, bill of collection which reflects a single BIE line of accounting. (*Id.* ¶ 17.)

On June 10, 2020, the DOI issued a Bill of Collection to the Tribe related to the FY 2017 Report (Bill No. 1801914086) for the sum of \$3,679,223. (*Id.* ¶ 18.)¹² On August 10, 2020, the DOI issued a “1st Dunning Notice” (aka late notice) to the Tribe for Bill No. 1801914086. (*Id.* ¶ 19.)¹³ The Dunning Notice stated, in part, “If payment is not received within 30 days of this notice, or our office has not been notified of the circumstances delaying payment, further collection action will be initiated, such as referral to the Department of Treasury for collection.” (*Id.* ¶ 20.)

On December 9, 2020, the DOI referred Bill No. 1801914086 to the Department of Treasury for collection. The Department of Treasury, Fiscal Service, conducted approximately forty-seven (47) offsets against federal monies owed to the Tribe to satisfy the debt arising out of

⁹ See Exhibit 3 attached to the Stevens Decl. – MSJ; *see also* Exhibit 3 attached to the Warner Decl.

¹⁰ See Exhibit 3 attached to the Stevens Decl. – MSJ.

¹¹ A copy of the request is attached as Exhibit 5 to the Stevens Decl. – MSJ.

¹² A copy of the Bill of Collection related to the FY 2017 Report (Bill No. 1801914086) is attached as Exhibit 2 to the Declaration of Tamela Fletcher [hereinafter “Fletcher Decl.”]

¹³ See Exhibit 3 attached to the Fletcher Decl.

Bill No. 1801914086, one of which was reversed. (*Id.* ¶ 21.)¹⁴ The offset of \$1,400,218 on or about April 30, 2021, which funds represented Indian Health Services CARES Act funding granted to the Tribe, was reversed and refunded to the Tribe on or about June 14, 2021. (*Id.* ¶ 22.)¹⁵

The following amounts have been collected to partially satisfy the debt arising out of the FY 2017 Report:

\$2,665,349.64	Collected posted to principal
\$441,626.71	Collected posted to interest, administrative fees, and penalties
<u>\$667.35</u>	<u>Collected for Treasury fees</u>
\$3,107,643.70	Total amount collected

(*Id.* ¶ 23.)¹⁶ The principal unpaid balance arising from the FY 2017 Report is \$1,013,873.36. (*Id.* ¶ 24.)¹⁷ The FY 2017 debt is currently recalled/suspended because of the current litigation. (*Id.* ¶ 25.) Because of its suspended/recalled status, no interest or fees are accruing. (*Id.* ¶ 26.)

FY 2018 Audit Report

On July 2, 2019, the Tribe submitted its annual audit report for Fiscal Year Ended September 30, 2018 (Report No. ARTT 2018-6075) to the Federal Audit Clearinghouse. (*Id.* ¶ 27.) On November 5, 2019, the BIA, Great Plains Regional Office, issued its FY 2018 Findings and Determination with respect to the Tribe's FY 2018 single audit report (Report No. ARTT 2018-6507) ("FY 2018 Report"). (*Id.* ¶ 28.)¹⁸

On November 5, 2019, the FY 2018 Report was mailed to the Honorable Clyde J.R. Estes, Chairman of the Lower Brule Sioux Tribe. (*Id.* ¶ 29.) The mailing was sent via Certified Mail

¹⁴ Exhibit 1 attached to the Fletcher Decl. is a 5-tabbed Excel spreadsheet reflecting Indian Affairs records as it pertains to the Tribe and FY 2017 and FY 2018. Exhibit 1 has been provided in hard copy to the Court via thumb drive.

¹⁵ See Exhibit 1, tab 3 to the Fletcher Decl.

¹⁶ See Exhibit 1, tab 1 to the Fletcher Decl.

¹⁷ See Exhibit 1, tab 3 to the Fletcher Decl.

¹⁸ A copy of the FY 2018 Report is attached as Exhibit 6 to the Stevens Decl. – MSJ.

with a Return Receipt requested. (*Id.* ¶ 30.) Documentation indicates the mailing was received by the Lower Brule Sioux Tribe on November 8, 2019, and signed for by Trish Lundell. (*Id.* ¶ 31.)¹⁹ The cover letter accompanying the Findings and Determination highlighted the Lower Brule Sioux Tribe’s “right to dispute any information contained in the Awarding Official’s final decision” by appealing to: (1) the Civilian Board of Contract Appeals within 90 days of receipt or (2) the Court of Federal Claims within 12 months of receipt. (*Id.* ¶ 32.)²⁰ Given the receipt date of November 8, 2019, the respective appeal dates would have run on approximately February 6, 2020, for appeal to the Civilian Board of Contract Appeals, and November 9, 2020, for appeal to the Court of Federal Claims. (*Id.* ¶ 33.)

The BIA’s FY 2018 Report sustained questioned costs in the amount of \$3,552,860 because the Tribe “used forward-funded grant monies to fund other program and general fund activities.” (*Id.* ¶¶ 35, 37.)²¹ The Tribe did not appeal the FY 2018 Report. (*Id.* ¶ 34.) Rather, the Tribe responded that it would “continue to look for ways to improve the oversight over accounting records for all parts of the Tribe as a whole.” (*Id.* ¶ 36.)²²

On June 10, 2020, the DOI issued a Bill of Collection related to the FY 2018 Report to the Tribe (Bill No. 1801914087) for the sum of \$3,552,860. (*Id.* ¶ 38.)²³ The DOI referred Bill No. 1801914087 to the Department of the Treasury, Fiscal Service for offsets. (*Id.* ¶ 39.) The Department of Treasury, Fiscal Service conducted eighteen (18) offsets against federal monies

¹⁹ A copy of the return receipt is attached as Exhibit 7 to the Stevens Decl. – MSJ.

²⁰ See Exhibit 6 to the Stevens Decl. – MSJ.

²¹ See Exhibit 6 to the Stevens Decl. – MSJ.

²² See Exhibit 6 to the Stevens Decl. – MSJ.

²³ A copy of the Bill of Collection related to the FY 2018 Report (Bill No. 1801914087) is attached as Exhibit 4 to the Fletcher Decl.

owed to the Tribe to satisfy the debt arising out of the FY 2018 Findings and Determination, totaling \$671,794.92. (*Id.* ¶ 40.)²⁴

On April 30, 2021, the BIA, Great Plains Regional Office, issued a Revised FY 2018 Findings and Determination, in which the BIA determined that the questioned costs identified in Finding #2018-004 were a duplication of the FY 2017 questioned costs, therefore the questioned costs in the amount of \$3,552,860 were reinstated. (*Id.* ¶ 41.)²⁵ The collection made against the FY 2018 debt was refunded in the amount of \$671,794.92 and then applied to the Bill related to FY 2017 debt on June 15, 2021. (*Id.* ¶ 42.)²⁶

FY 2020 Audit Report:

For its FY 2020 audit report, the Tribe made what the Tribe called “prior period adjustments” for its TCSA fund. (*Id.* ¶ 43.) To justify these adjustments, the Tribe claimed that it did not attribute indirect costs to the School fund since FY 2010. (*Id.* ¶ 44.) The Tribe used the indirect costs rates for the respective fiscal year to account for expenses incurred by the Tribe that related to its administration of its schools. (*Id.* ¶ 45.) The Tribe thereby purported to reduce its deferred revenue balance for the School fund financial statement. (*Id.* ¶ 46.) The “prior period adjustments” were made retroactively beginning with FY 2010. (*Id.* ¶ 47.) The Tribe submitted its FY 2020 audit to the Federal audit clearinghouse on December 30, 2021. (*Id.* ¶¶ 48-49.)²⁷

STANDARD OF REVIEW

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving

²⁴ See Exhibit 1, tab 4 to the Fletcher Decl.

²⁵ A copy of the Revised FY 2018 Findings and Determinations is attached as Exhibit 8 to the Stevens Decl. – MSJ.

²⁶ See Exhibit 1, tab 4 to the Fletcher Decl.

²⁷ A copy of the Tribe’s FY 2020 annual report is attached as Exhibit 9 to the Stevens Decl. – MSJ.

party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party to establish there is a genuine issue to be determined at trial. *Prudential Ins. Co. v. Hinkel*, 121 F.3d 364, 366 (8th Cir. 1997).

The nonmoving party may not rest merely upon the allegations in its pleadings. *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). Rather, the nonmoving party must substantiate its allegations “with sufficient probative evidence that would permit a finding in [its] favor based on more than mere speculation, conjecture, or fantasy.” *Mann v. Yarnell*, 497 F.3d 822, 825 (8th Cir. 2007) (internal quotations omitted). “The basic inquiry is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376 (8th Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

ARGUMENT

The Tribe’s accounting and reasoning on its overcollection claim is incorrect as a matter of law. The financial record in this case, and the laws which support it, reflect that the Tribe still owes \$1,013,873.36 in principal on its FY 2017 debt to the United States.²⁸ Other than its own self-serving allegations, which are insufficient to overcome summary judgment, the Tribe has

²⁸ In its Amended Complaint, the Tribe claims that “[i]t is unclear whether administrative costs, interest, and penalties were collected in connection with the 2018 deficit and, if so, what happened to those funds.” (Doc. 32 ¶ 49.) As indicated, funds collected by the Department of Treasury attributable to the FY 2018 Report (\$671,794.92) were recalled/cancelled because it was found that it was duplicative of FY 2017. (SUMF ¶ 42, Fletcher Decl. ¶ 17, Exh. 1, tab 4.) The collections instituted on the FY 2018 Report were refunded to the Tribe and then applied to the FY 2017 debt. (*Id.*) As such, the FY 2017 Report is the only agency decision that created debt that is in question in this litigation.

presented no evidence that justifies its position that the debt fluctuated based on the Tribe's subsequent years' financial statements and the retroactive "prior period adjustments" that it applied in FY 2020. Summary judgment should issue.

1. The Tribe's debt arising from the FY 2017 Report was a final debt on its date of issuance.

As outlined above, cost disallowance disputes under the TCSA are governed by provisions of the ISDEAA, which in turn incorporate the CDA. 25 U.S.C. § 2507(e) (incorporating ISDEAA contract dispute provisions found at 25 U.S.C. § 5331); 25 U.S.C. § 2507(a)(8); *see also* 25 C.F.R. § 44.110(a)(4) and (b) (applying 25 C.F.R. part 900, Subpart N to grants under the TCSA). Under the CDA, agency decisions regarding contracts are "final and conclusive" unless timely appealed. *See* 41 U.S.C. § 7103(g).

Here, it is undisputed that the Tribe did not appeal the FY 2017 Report during the appeals period. (SUMF ¶ 11.) Rather, the Tribe, via Tribal Comptroller Debra Nies, agreed with the finding and committed to "rectifying the continued overspending of funds that result in the deficient fund balances." (*Id.* ¶ 14.) After appropriate notice and time to appeal, the FY 2017 Report became a final decision and a debt owed to the United States in the amount of \$3,679,223. (*Id.* ¶¶ 11-15.)

The DOI subsequently referred the Tribe's debt to the Department of Treasury for collection, and, per the Accounting Operations Indian Affairs records, there currently remains a debt balance of \$1,013,873.36 in principal left on the FY 2017 debt:

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St	Reference	Inv. ref.	DocumentNo	Rev. with	Type	Doc. Date	Pstng Date	Clrng doc.	LC amnt	Arrear	RCD	Text	
●	DC17-6175	1801914086	1801914086		DR	06/10/2020	06/10/2020		3,679,223.00	456	TOC	CSNG 13814456 Lower-2017-6175	
●	91348596	1801914086	1405226317		DU	04/01/2021	04/06/2021		421,711.93-	221	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91349591	1801914086	1405091261	1405394248	DU	05/06/2021	05/10/2021	1405394248	1,368,487.74-	48	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91350374	1801914086	1404064857		DU	06/03/2021	06/07/2021		57,403.84-	158	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91350614	1801914086	1405389324		DU	06/10/2021	06/14/2021		2,294.67-	151	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91350774	1405394248	1405394248	1405091261	DU	06/17/2021	06/23/2021	1405394248	1,368,487.74	48	TOC	CSNG 13814456 Lower-2017-6175 TR pull back funds	
■	91351154	1801914086	1405381246		DU	07/01/2021	07/07/2021		715,332.77-	130	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91351376	1801914086	1405416998		DU	07/08/2021	07/12/2021		33,462.71-	123	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91352168	1801914086	1405380345		DU	08/05/2021	08/09/2021		51,541.56-	95	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91352406	1801914086	1405528113		DU	08/12/2021	08/24/2021		1,399.87-	88	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91352632	1801914086	1405497808		DU	08/19/2021	08/25/2021		7,180.87-	81	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91352983	1801914086	1405286636		DU	09/02/2021	09/08/2021		1,257,408.70-	67	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91353213	1801914086	1405466509		DU	09/09/2021	09/10/2021		4,901.07-	60	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91353449	1801914086	1405570210		DU	09/16/2021	09/20/2021		150.17-	53	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91353920	1801914086	1405571940		DU	10/07/2021	10/14/2021		61,693.60-	32	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91354382	1801914086	1405634959		DU	10/21/2021	10/25/2021		23,909.67-	18	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
■	91354734	1801914086	1405530252		DU	11/04/2021	11/05/2021		26,958.21	4	TOC	CSNG 13814456 Lower-2017-6175 partial pymt	
*									1,013,873.36				

(*Id.* ¶¶ 21, 23-24, Fletcher Decl., Exh. 1, tab 3 (“DC17 Bill Recon”).)

The Tribe’s opportunity to contest the FY 2017 Report’s findings was through an appeal within the statutory framework of the CDA. Because the Tribe did not appeal, the Tribe’s debt became final and fixed on the date of issuance.

2. The Tribe cannot change the debt owed.

The Tribe’s rationale for its over-collection claim is its purported ability to change or revise the FY 2017 debt on a running basis based on its deferred revenue balance in each subsequent year’s financial statements with “prior period adjustments.” (*Id.* ¶¶ 43-49.) This rationale is legally untenable. There are no provisions in the CDA which allow the Tribe to unilaterally change the final decision of the BIA, including the amount of debt owed, when it failed to appeal the FY 2017 Report. *See United States v. Lodge Constr., Inc.*, 2018 WL 11456197 (M. D. Fla. Apr. 11, 2018) (denying motion to stay a collection action by the United States because the contractor could not challenge the merits of a contracting officer’s decision in any forum where the contractor did not appeal the decision); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1107 (D.N.M. 2006); *Bowman Constr. Co. v. United States*, 154 Fed. Cl. 127 (Fed. Cl. 2021) (finding Plaintiff’s appeal time-barred when outside one-year timeframe outlined in the CDA); *Balbach v. United*

States, 119 Fed. Cl.681 (Fed. Cl. 2015) (dismissing claim brought outside the CDA’s one year statute of limitations). Accepting the Tribe’s position to the contrary would be legally incorrect, and would wholly frustrate not only the CDA, which required the Tribe to timely appeal these findings, but also the ISDEAA and Single Audit Act.

First, the ISDEAA requires the DOI to issue findings on disallowed costs (with appeal rights) within one year of receiving the Tribe’s audit report. *See* 25 U.S.C. § 5305(f); 25 U.S.C. § 5325(f). The Tribe’s position, if accepted, would essentially render this provision meaningless because a tribe could unilaterally change a finding by submitting an audit report with different financial figures in the subsequent year(s). There would be no finality and would create a never-ending cycle of the DOI having to revisit prior years’ findings and disallowed costs.

Further, the Tribe’s argument is contrary to the Single Audit Act. For each fiscal year in which a tribal organization receives or expends funds pursuant to an ISDEAA contract or TCSA grant, the tribal organization must submit a single-agency audit report. 25 U.S.C. §§ 2507(a)(1) and 5305(f). The audit must be “conducted by an independent auditor in accordance with generally accepted government auditing standards” and submitted to the appropriate agency. 31 U.S.C. § 7502(c). Pursuant to the Single Audit Act, the tribal organization submits a reporting package, including the auditor’s report, to a Federal clearinghouse. 31 U.S.C. § 7502(h). The designated agency is then required to “assess the quality of the audit[] conducted[.]” 31 U.S.C. § 7504(a)(2). The respective secretary must give notice as to disallowance of costs within three hundred and sixty-five (365) days of receipt of the annual single-agency audit report. 25 U.S.C. §§ 2507(a)(8) and 5325(f). The Awarding Official then issues a written decision—labeled a Findings and Determinations Memorandum—as to “whether the audit findings have been addressed satisfactorily and whether questioned costs have been disallowed (sustained) or reinstated

(allowed).” *Id.* p. 1, F. If a questioned cost is “disallowed” then the Awarding Official issues a formal notice letter, attaching a copy of the Findings & Determinations. *Id.* p. 3, 3(b). Here, using the Tribe’s rationale would render the above-outlined audit review process meaningless because it would allow a Tribe to simply adjust, decrease, or fluctuate its deferred revenue balances in the subsequent years’ audits and nullify any Findings and Determinations made by the Awarding Official without having to file an appeal under the CDA.

Finally, any argument by the Tribe that the amount of debt from the report should have been fixed at the time collections began, instead of on the date the FY 2017 Report was issued, is equally untenable. The statutory language, and purpose, of the ISEDEAA, TCSA, CDA, and Single Audit Act preclude the Tribe’s claim.

3. There has not been an overcollection on the FY 2017 debt. The Tribe has failed to create a genuine issue of material fact regarding the alleged overcollection claim.

The Tribe does not dispute the amount of questioned costs in the FY 2017 F&D, nor does it dispute the amount of offsets performed by the Department of Treasury on behalf of the DOI to partially satisfy Bill No. 1801914086. (SUMF ¶¶ 11, 21.) In discovery, the Tribe provided the following spreadsheet:

Lower Brule Sioux Tribe Analysis of Deferred Revenue-Treasury Offset November 1, 2022					
Date	Description	Amounts	Principal Amounts		
3/20/2019	FY17 Findings & Determinations	\$ 3,679,223.00	\$ 3,679,223.00		
11/8/2019	FY18 Findings & Determinations	\$ 3,552,860.00	\$ 3,552,860.00		
6/15/2021	FY18 F&D Duplicate-Payments Transferred to FY17 F&D	\$ (3,552,860.00)	\$ (3,552,860.00)		
10/19/2021	Total Collected through Treasury Offset	\$ (4,504,262.20)	\$ (4,033,837.38)		
2/28/2022	IHS Offset Refunded	\$ 1,400,218.00	\$ 1,368,487.74		
		\$ 575,178.80	\$ 1,013,873.36		

	Principal Amounts	Interest on Principal Overcollected	Penalty on Principal Overcollected	TOP Fee on Principal Overcollected	Total Overcollected
FY20 Findings & Determinations	\$ 1,981,756.00	\$ -	\$ -	\$ -	\$ 1,981,756.00
Total Collected through Treasury Offset	\$ (4,033,837.38)	\$ (6,105.92)	\$ (10,037.16)	\$ (103.81)	\$ (4,050,084.27)
IHS Offset Refunded	\$ 1,368,487.74	\$ -	\$ -	\$ -	\$ 1,368,487.74
Amount Overcollected	\$ (683,593.64)	\$ (6,105.92)	\$ (10,037.16)	\$ (103.81)	\$ (699,840.53)

Amounts Offset in Error-Health Services Funds	\$ 1,578,446.00
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(Warner Decl. ¶ 3, Exh. 1.) Notably, the final principal amount reflected on the top chart (\$1,013,873.36) matches the principal amount from the records of the Accounting Operations Indian Affairs (\$1,013,873.36):

Customer name		6000000741 LOWER BRULE SIOUX TRIBE										
St	Reference	Inv. ref.	DocumentNo	Rev. with	Typ	Doc. Date	Pstng Date	Clrng doc.	LC amnt	Arrear	RCd	Text
	DC17-6175	1801914086	1801914086		DR	06/10/2020	06/10/2020		3,679,223.00	456	TOC	CSNG 13814456 Lower-2017-6175
	91348596	1801914086	1405226317		DU	04/01/2021	04/06/2021		421,711.93-	221	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91349591	1801914086	1405091261	1405394248	DU	05/06/2021	05/10/2021	1405394248	1,368,487.74-	48	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91350374	1801914086	1404064857		DU	06/03/2021	06/07/2021		57,403.84-	158	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91350614	1801914086	1405389324		DU	06/10/2021	06/14/2021		2,294.67-	151	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91350774	1405394248	1405394248	1405091261	DU	06/17/2021	06/23/2021	1405394248	1,368,487.74	48	TOC	CSNG 13814456 Lower-2017-6175 TR pull back funds
	91351154	1801914086	1405381246		DU	07/01/2021	07/07/2021		715,332.77-	130	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91351376	1801914086	1405416998		DU	07/08/2021	07/12/2021		33,462.71-	123	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91352168	1801914086	1405380345		DU	08/05/2021	08/09/2021		51,541.56-	95	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91352406	1801914086	1405528113		DU	08/12/2021	08/24/2021		1,399.87-	88	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91352632	1801914086	1405497808		DU	08/19/2021	08/25/2021		7,180.87-	81	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91352983	1801914086	1405286636		DU	09/02/2021	09/08/2021		1,257,408.70-	67	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91353213	1801914086	1405466509		DU	09/09/2021	09/10/2021		4,901.07-	60	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91353449	1801914086	1405570210		DU	09/16/2021	09/20/2021		150.17-	53	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91353920	1801914086	1405571940		DU	10/07/2021	10/14/2021		61,693.60-	32	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91354382	1801914086	1405634959		DU	10/21/2021	10/25/2021		23,909.67-	18	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
	91354734	1801914086	1405530252		DU	11/04/2021	11/05/2021		26,958.21-	4	TOC	CSNG 13814456 Lower-2017-6175 partial pymt
*									1,013,873.36			

(SUMF ¶¶ 21, 23-24, Fletcher Decl., Exh. 1, tab 3 (“DC17 Bill Recon”).)

The Tribe’s argument that there has been an overcollection cannot overcome summary judgment here. Again, in its Amended Complaint, the Tribe challenges the merits of the FY 2017 Report by alleging that the amount of debt from the report should have been fixed at the time collections began, instead of on the date the FY 2017 Report was issued. (Doc. 32 ¶¶ 52, 59.) To support this argument, the Tribe made “prior period adjustments” in its FY 2020 audit report in an attempt to decrease the deferred revenue balance in its Tribally Controlled Schools fund. (SUMF ¶¶ 43-49.) The Tribe relies on these “prior period adjustments”—made in the FY 2020 audit submitted to the Department on December 30, 2021—for its overcollection arguments. The Tribe could have timely appealed the FY 2017 Report and provided information to the DOI regarding these prior period adjustments, but failed to do so.

Not only did the Tribe fail to make these “prior period adjustments” before the debt became fixed and final, but the Tribe failed to uncover anything in discovery that contradicts the undisputed

financial records of the Accounting Operations Indian Affairs—which reflect a more than one-million-dollar debt balance that the Tribe still owes. For example, during discovery, Defendants disclosed seven individuals likely to have discoverable information relevant to the remaining overcollection claim in the case. (Warner Decl. ¶ 2.) Of those seven individuals, six of them were individuals from the DIEA and Accounting Operations Division Indian Affairs with knowledge related to the financial transactions and resulting debt and debt repayment activities of the Tribe. (*Id.*) The Tribe chose not to depose any of those individuals, and instead took the deposition of Krissanne Stevens, Self-Determination Officer for the BIA, Great Plains Region. (*Id.* ¶ 5.) While Ms. Stevens is knowledgeable about the Tribe’s grants, audit findings, and the disallowed costs that are the subject of this litigation, she has no knowledge about collection on the debt, or the accounting of such, following debt referral. (SUMF ¶ 2, n.1.)

As such, the undisputed—and uncontroverted—fact remains that the Tribe still owes \$1,013,873.36 in principal on the FY 2017 debt.²⁹

CONCLUSION

The sole issue remaining in this case is a math problem that can be solved by looking at the undisputed financial records of the Accounting Operations Indian Affairs. The DOI has not over collected on the debt created by the FY 2017 Report, but rather the Tribe owes over a million dollars. The Tribe’s allegations to the contrary are conclusively in error. Not only are there no

²⁹ The Tribe’s other allegation, that it did not receive the Bill of Collection related to the FY 2017 F&D until April 2021 and therefore interest and penalties should not have been incurred until that date (*see* Doc. 32 ¶¶ 61-62), is also without merit. Rather, the undisputed facts show that not only did the DOI mail a Bill of Collection to the Tribe on June 10, 2020, the DOI mailed a “1st Dunning Notice” (aka late notice) to the Tribe on August 10, 2020. (SUMF ¶¶ 18-20, Fletcher Decl., Exhs. 2-3.) Accordingly, interest and penalties were properly assessed by the Department.

disputes of material fact, but the Tribe's arguments regarding the "prior period adjustments" would pervert the statutory purpose of the ISDEAA, CDA, and Single Audit Act.

Summary judgment should issue in favor of Defendants.

Dated this 7th day of November, 2024.

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