IN THE UNITED STATES DISTICT COURT
FOR THE 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, Acting Assistant Secretary of the Interior for Indian Affairs, or his successor in office; DARRYL LACOUNTE, Director of the 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 **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff above-named, by and through its undersigned counsel of record and respectfully submits the following Response Brief to Defendant's Motion for Summary Judgment.

STANDARD

Defendants correctly state the standard that the Court must apply for summary judgment pursuant to FED. R. CIV. P. 56. *Doc. 63* at pp. 11-12. Plaintiff only writes to add that, when a party moves for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FACTS

The Tribe does not dispute Defendants' rendition of the factual history surrounding the fiscal year 2017 audit and Findings and Determinations, but a few points require elaboration. *Doc. 63* at pp. 6-9; Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts (hereinafter "Pl.'s Resp.") at ¶¶ 2-20. Defendants did respond to the Tribe's FY 2017 audit by sustaining questioned costs in the amount of $3,679,223, which was the amount of the deferred revenue deficit. *Id*. at p. 8. Defendants informed the Tribe that the remedy for these questioned costs would be a payment restriction letter. *Id*. As the Court has previously held, the Tribe did not appeal this finding. *Id*.; *Doc. 27.*

Defendants' decision to sustain these questioned costs marked a departure from the Bureau of Indian Affairs' previous policy concerning the Tribe's justifications for the deferred revenue deficit. *See generally* Ex. 101 (Excerpts from Defs.' Initial Disclosures) to Declaration of John R. Hinrichs (hereinafter "Hinrichs Decl.). That change in policy was embodied by the "Chatmon Memorandum," which directed Defendants to question costs that had not previously been questioned. Ex. 104 (Nies Deposition) to Hinrichs Decl. at 17:8-19:3; Ex. 103 ("Chatmon Memorandum") to Hinrichs Decl. Before the Chatmon memorandum, going back at least to 2012, the awarding officials had accepted the Tribe's justifications for any deferred revenue deficit and reinstated the questioned costs. Ex. 104 to Hinrichs Dec. at 17:12-22; Ex. 101. The awarding official's decision to do so was apparently based upon their recognition that the grants in question were not always provided to the Tribe in a timely fashion. Ex.104 to Hinrichs Decl. at pp. 52:6-56:10.

Since the Findings and Determinations for fiscal year 2017 informed the Tribe that they would be subject to a payment restriction letter—which decision the Tribe did not appeal—the

Tribe had no reason to know that a Bill of Collections would later issue. *Doc. 63* at pp. 6-9. Defendants waited until March 30, 2020, the last possible day that the Tribe could have appealed the FY 2017 Findings and Determinations, to request a Bill of Collections. *Id*. at pp. 7-8.[1] According to the Defendants' documentation, that Bill of Collection and the associated Dunning Notice were not issued until the Tribe could no longer appeal the Findings and Determinations. *Id*. at p. 8.

Collections did not begin until after the Tribe's 2020 fiscal year had concluded. *Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts* at ¶ 21. While preparing the audit for fiscal year 2020, the Tribe confirmed that it was appropriate to apply a prior period adjustment to the Tribally Controlled Schools fund for the years 2010-2019. First, the Tribe consulted with the BIA, who referred the Tribe to their auditor. The auditor included the adjustment in the audit, and the awarding official and BIA accepted the audit with the adjustment. Ex. 102 to Hinrichs Decl. at 47:1-49:24.

ARGUMENT

Contrary to Defendants' assertion, the Tribe's argument in this matter is not inconsistent with the statutory language and purpose of the ISDEAA, TCSA, CDA, or Single Audit Act. *Doc. 63* at p. 16. Those acts do not preclude a grant recipient subject to the Single Audit Act from making prior period adjustments that result in revisions of previous audit calculations. Nor do those acts prohibit the recipient from submitting audits in subsequent years that reflect a change in the entity's financial circumstances. Such occurrences do not "nullify any Findings and Determinations made by the Awarding Official without having to file an appeal under the CDA."

[1] During her deposition, Krissanne Stevens was unable to give an explanation for the delay in issuing the request for Bill of Collections, speculating that it may have been because of the pandemic. Ex. 102 (Stevens Deposition) to Hinrichs Decl. at p. 37.

Id. However, such adjustments should compel an awarding official to modify any corrective action so that it more accurately reflects the latest available audit findings.

It is undisputed that the Tribe's deferred revenue deficit decreased between submission of the FY 2017 and FY 2020 audits. *Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts* at ¶¶ 4, 12, 35, 41. It is also undisputed that the Tribe's audit for FY 2020 further changed the calculation of the Tribe's deferred revenue deficit from 2017, by applying a prior period adjustment to the calculations in the 2010 through 2019 audits. *Id*. at ¶¶ 43-49; *Doc. 64-9* at p. 41 (Bates stamped LBST000052). This prior period adjustment was approved by the BIA via the self-determination specialist who reviewed the audit and the awarding official, Krissanne Stevens, who signed the Findings and Determinations for the FY 2020 audit. Ex. 102 (Stevens Deposition) to Hinrichs Decl. at pp. 47:17-49:24.[2]

During her deposition, Debra Nies, Comptroller for the Lower Brule Sioux Tribe testified that she was able to calculate the amount that Defendants had over collected via the Treasury Offset Program. Ex. 104 to Hinrichs Decl. at 22:3-24:7. During this colloquy, Defendants' counsel and Ms. Nies referred to a spreadsheet prepared by Ms. Nies, which Defendants have placed into the record as Doc. 66-1. As demonstrated by that spreadsheet, Ms. Nies concluded that the Tribally Controlled School Grant deferred revenue deficit as of FY 2020—when collection began—was $1,981,756. Ex. 105 (FY20 Financial Statements) to Hinrichs Decl.; Doc. 66-1. Therefore, by the time collection stopped, Defendants had over-collected $699,840.53 if one does not take into account the prior period adjustment. Ex. 104 to Hinrichs Decl. at pp. 22:3-24:7; Doc. 66-1.

[2] During her deposition, Ms. Stevens did deny that a prior period adjustment could cause a change in the deferred revenue deficit, but that assertion is contradicted by Ms. Nies. Ex. 102 to Hinrichs Decl. at 68:12-23; Ex. 104 to Hinrichs Decl. at 24:21-25:3.

However, as Ms. Nies testified, if the prior period adjustment is taken into account, the deferred revenue deficit was actually $859,890, and the overcollection would be even larger: more than $2.1 million dollars. Ex. 104 to Hinrichs Decl. at pp. 50:10-51:7; Ex. 106 to Hinrichs Decl.; *Pl.'s Resp. to Defs.' Statement of Undisputed Material Facts* at ¶¶43-48.

Ms. Nies's testimony and supporting documentation demonstrates a genuine issue of material fact regarding the amount of the purported debt owed by the Tribe at the time collection commenced. *Pl.'s Statement of Disputed Material Facts.* That factual dispute—and the remedy due to the Tribe—is best resolved at trial. *First Nat'l. Bank of Ariz. V. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592 (1968) ("It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.").

Defendants in this matter are not entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Beard v. Banks*, 548 U.S. 521, 553 (Ginsburg, J. dissenting) ("[T]here is more to the summary judgment standard than the absence of any genuine issue of material fact; the moving party must also show that he is 'entitled to a judgment as a matter of law.'") (citations omitted). Defendants have not identified any legal authority establishing a right or obligation to collect a purported debt based upon its balance at one point in time, when that balance has decreased before collection ensues. *See generally* Doc. 63 at pp. 12 *et. seq.* Indeed, as Ms. Nies pointed out in her deposition, when the deferred revenue balance increases, Defendants seek to collect the increased amount. Ex. 104 to Hinrichs Decl. at 26:15-27:6.

CONCLUSION

Because genuine issues of material fact exist, and because Defendants are not entitled to judgment as a matter of law, Plaintiff respectfully asks the Court to deny the Motion for Summary Judgment.

Dated this 20th day of December, 2024.

HEIDEPRIEM, PURTELL,
SIEGEL, HINRICHS & TYSDAL, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document was filed with the Clerk of Court and served on the following individual(s) via the Court's electronic filing system.

Alexis J. Warner
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Attorney for Defendants

Dated this 20th day of December, 2024.

/s/ John R. Hinrichs
John R. Hinrichs