

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

OSAGE NATION,

Plaintiff,

v.

DEPARTMENT OF INTERIOR, et al.,

Defendants.

Civil Action No. 24-0679 (PLF)

**DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER  
JURISDICTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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Pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(1), and 12(h)(3), Defendants the United States Department of the Interior (the “Department”) and Deb Haaland, in her official capacity as Secretary of the Interior (collectively, “Defendants”), respectfully move for dismissal for lack of subject-matter jurisdiction. Defendants have not waived their sovereign immunity because Plaintiff never submitted a “final offer” under 25 U.S.C. § 5366(c)(6)(A)(iii). In the alternative, Defendants move for summary judgment because the Court lacks subject-matter jurisdiction or Defendants are entitled to judgment as a matter of law if submitting a “final offer” is merely an element of Plaintiff’s claim. Accompanying this motion is a statement of undisputed material facts, an affidavit, an exhibit list, exhibits, and a proposed order.

### **INTRODUCTION**

The Indian Self-Determination and Education Assistance Act (the “Act”) allows Indian Tribes to enter into agreements to assume responsibility for the performance of programs, services, functions, and activities that the Bureau of Indian Affairs (the “Bureau”) otherwise provides for them. As spelled out in comprehensive regulations, Tribes and the Bureau must first negotiate the programs, services, functions, and activities that the Tribe wishes to assume. After negotiations are complete, and if the parties are in agreement, the Tribe and the Bureau execute a written funding agreement (or an amendment to an existing funding agreement) that specifies the programs, services, functions, and activities that the Tribe will assume and the amount of funding that will be transferred from the Bureau to the Tribe to perform them.

If the Tribe and the Bureau are unable to agree on the terms of a funding agreement upon completion of negotiations, the Tribe may submit a “final offer” to the Bureau. Upon receipt of the final offer, the Bureau has sixty days to make a determination. If the Bureau rejects the final offer, the Act waives the United States’ sovereign immunity, and the Tribe may challenge the basis of the Bureau’s rejection. Because a Tribe cannot submit a final offer with respect to programs,

services, functions, and activities that it did not negotiate, the waiver is predicated on the Tribe and the Bureau engaging in the required negotiations process to allow a Tribe to submit a Final Offer.

In 2022, the Osage Nation (“Plaintiff”) and the Bureau commenced negotiations regarding two programs that the Bureau provides to Plaintiff: the Probate program and part of the Minerals program. Within the first day of negotiations, Plaintiff requested to assume only one of the five branches of the Minerals program—the Branch of Field Operations. Plaintiff did not pursue negotiations regarding the Probate program or the other branches of the Minerals program. The day before what would turn out to be the last day of negotiations, Plaintiff submitted a draft amendment to its existing funding agreement that proposed to assume the programs, services, functions, and activities of Field Operations. Issues regarding the effective date of the amendment and the logistics of how Field Operations employees would be transitioned to Plaintiff remained unresolved and a follow-up negotiations meeting was scheduled to resolve these issues and finalize the amendment.

Less than a week before the follow-up meeting was scheduled, however, Plaintiff unilaterally and indefinitely postponed it. Plaintiff then submitted requests for information about the other branches of the Minerals program. When asked whether the requests for information meant it would assume all the branches or just Field Operations, Plaintiff said it had not made a decision and was still evaluating its options. After being provided with the requested information, Plaintiff did not make its intentions clear, did not request to resume negotiations, and did not propose an amendment to its funding agreement to include additional programs beyond the Osage Agency’s Branch of Field Operations of the Minerals program.

Then, on October 23, 2023, more than one year since the last negotiation meeting and more than six months since being provided responses to its requests for information, Plaintiff submitted a letter (the “October 23, 2023, Letter”) that was styled as a “final offer” to assume not just the programs, services, functions, and activities of Field Operations, but all programs, services, functions, and activities that the Bureau provides, including programs, services, functions, and activities that Plaintiff never requested to negotiate and that had not been confirmed as available for negotiation by the Office of Self-Governance.

Plaintiff never completed negotiations regarding any programs, services, functions, and activities of the Bureau and thus never reached the point of disagreement at which it could submit a “final offer” with respect to any programs, services, functions, and activities. Again, the only program Plaintiff had proposed to assume in negotiations was the Branch of Field Operations, and those negotiations were also incomplete. With respect to every other program, Plaintiff either did not request to negotiate them or did not meaningfully pursue negotiating them, as evidenced by the draft amendment to Plaintiff’s funding agreement which only proposed assuming Field Operations and Plaintiff’s disinterest in rescheduling the negotiations that it had terminated. Because there was no final offer, Defendants were not required to make a determination and, pursuant to the statute, Plaintiff cannot challenge Defendants’ response. The statute waives sovereign immunity to suit only for a challenge to a rejection of a final offer. The Court therefore lacks subject-matter jurisdiction and should dismiss the Complaint.

## **BACKGROUND**

### **I. Negotiating Funding Agreements Under the Act**

“Congress enacted the Indian Self-Determination and Education Assistance Act to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes’ members.” *Navajo Nation v. Dep’t of Interior*, 852 F.3d 1124, 1126 (D.C.



Cir. 2017). The “programs, services, functions, and activities” for which the Tribe assumes responsibility and the funds the Tribe will receive to perform them are memorialized in a “written funding agreement.” 25 U.S.C. § 5363(a), (b)(1). Before the Tribe and the Secretary (whose authority is delegated to the Office of Self-Governance, an office within the Department of the Interior)<sup>1</sup> “enter into a written funding agreement,” the Secretary “shall . . . negotiate” “on the request of [the] Tribe.” *Id.*

To “negotiate” the funding agreement, the Bureau and the Tribe follow the “Negotiation Process for Annual Funding Agreements” promulgated at 25 C.F.R. Part 1000, Subpart G. *See* 25 C.F.R. § 1000.160 (“This subpart provides the process and timelines for negotiating a self-governance compact with the Department and an [annual funding agreement] with any bureau.”); *Office of the Assistant Secretary-Indian Affairs; Tribal Self-Governance*, 65 Fed. Reg. 78,688, 78,695 (Dec. 15, 2000) (“This subpart establishes the process and time lines for a newly selected or participating Tribe/Consortium wishing to negotiate either an initial or a successor [annual funding agreement] with any [Department] bureau.”); 25 C.F.R. §§ 1000.160–182. The Tribe must submit a written request to negotiate a funding agreement for a specific Bureau program to the Office of Self-Governance. *See* 25 C.F.R. § 1000.173(a) (“To initiate the negotiation phase, an authorized official of the newly selected Tribe/Consortium submits a written request to negotiate an [annual funding agreement] . . . [f]or a . . . [Bureau] program[.]”); *see also* 25 C.F.R. § 1000.2 (“Office of Self-Governance . . . means the office within the Office of the Assistant Secretary–

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<sup>1</sup> *See* 25 C.F.R. § 1000.2 (the Secretary’s “designee [is] authorized to act on the behalf of the Secretary”); *see also* 3 Indian Affairs Manual 9 (delegating “authority to approve Self-Governance Funding Agreements and Amendments negotiated under [ISDEAA]” to the Director, Office of Self-Governance), *available at* [https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/3\\_IAM\\_9\\_Delegation\\_Authority\\_Director\\_Office\\_Self\\_Governance\\_508\\_OIMT.pdf](https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/3_IAM_9_Delegation_Authority_Director_Office_Self_Governance_508_OIMT.pdf).

Indian Affairs responsible for the implementation and development of the Tribal Self-Governance Program.”).

Under the governing regulations, negotiation meetings are scheduled which “must address at a minimum” seven specific issues. 25 C.F.R. § 1000.176. If “negotiations have been successfully completed, the [Bureau] and the [Tribe] . . . prepare and either execute or disapprove” a funding agreement. 25 C.F.R. § 1000.175(c). The funding agreement must include certain mandatory provisions, including specifying the programs, services, functions, and activities that the Tribe will perform and the programs, services, functions, and activities the Bureau will continue to perform. *See* 25 U.S.C. § 5363(m)(2)(A)–(C) (stating that “[a] funding agreement shall specify” the services and functions to be provided under the funding agreement and the Tribe and Secretary’s respective responsibilities); *see also* 25 C.F.R. § 1000.87(a)–(b) (“The [funding agreement] must specify in writing the services, functions, and responsibilities to be assumed by the [Tribe] and the functions, services, and responsibilities to be retained by the Secretary.”).

If, however, the Bureau and the Tribe are “unable to agree . . . on the terms of a . . . funding agreement (including funding levels), the [Tribe] may submit a final offer to the Secretary.” 25 U.S.C. § 5366(c)(1). Specifically, “[i]f the Tribe/Consortium and bureau representatives do not reach agreement during the negotiation phase by the mutually agreed to date for completing negotiations, the Tribe/Consortium and the bureau may each make a last and best offer to the other party.” 25 C.F.R. § 1000.179(a). Such “last and best offer” may be submitted only with respect to a “requested program.” 25 C.F.R. § 1000.179(b). Within sixty days of receiving the final offer, the Secretary must “make a determination with respect to the final offer.” 25 U.S.C. § 5366(c)(2). The Secretary may “reject[] a final offer” on one or more of six bases. 25 U.S.C. § 5366(c)(6)(A)(i)(I)–(VI).

If the “final offer”—the Tribe’s proposed funding agreement prepared after the completion of negotiations—is disapproved, the Tribe can file an administrative appeal. *See* 25 C.F.R. § 1000.179(c); 25 U.S.C. § 5366(c)(6)(A)(iii). Alternatively, “the Indian Tribe may, in lieu of filing such appeal, directly proceed to initiate an action in a United States district court under section 5331(a) of this title.” 25 U.S.C. § 5366(c)(6)(A)(iii).

## **II. The Bureau and Plaintiff Entered Into a Multi-Year Agreement**

The Bureau is the default provider and operator of several programs, services, functions, and activities for Tribes. *See* 25 U.S.C. § 13 (“The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States” for identified “purposes”). The Bureau provides programs, services, functions, and activities for Plaintiff through its Osage Agency, an office located in Pawhuska, Oklahoma. *See Osage Agency*, Bureau of Indian Affairs, <https://www.bia.gov/regional-offices/eastern-oklahoma/osage-agency> (last visited Sept. 9, 2024). The Osage Agency is one of six agencies located within the Eastern Oklahoma Region, which is overseen by the Eastern Oklahoma Regional Office (the “Regional Office”) within the Bureau. *See Eastern Oklahoma Region – Agencies*, Bureau of Indian Affairs, <https://www.bia.gov/regional-offices/eastern-oklahoma/agencies> (last visited Sept. 9, 2024). The programs, services, functions, and activities at issue in this case are “Executive Direction,” Energy and Minerals (also called “Minerals” or “Minerals and Mining”), “Probate,” “Real Estate Services,” and “Trust Services.” Compl. Ex. 1 at 6, ECF No. 1-1, at 6.

The Bureau and Plaintiff have previously negotiated and executed funding agreements whereby the Bureau transferred numerous programs, services, functions, and activities to Plaintiff. In 2019, Plaintiff and the Secretary negotiated and executed a multi-year funding agreement for

the fiscal years 2020-2025. *See* Ex. 1 (Multi-Year Funding Agreement for FY 2020–2025 Between the Osage Nation and the United States of America) (hereafter, the “2020–2025 Agreement”). The 2020–2025 Agreement identifies the programs, services, functions, and activities for which Plaintiff agreed to assume responsibility from the Bureau’s Osage Agency. *See id.* § 2. Attached to the 2020-2025 Agreement is a Reprogramming Request which shows the amount of funding to be transferred or “reprogrammed” to Plaintiff each year for the performance of the programs, services, functions, and activities it has assumed. *See id.* (Reprogramming Request). Under that Agreement, Plaintiff received more than \$2.7 million annually. *See id.* (Reprogramming Request) at 3. As is relevant, the 2020–2025 Agreement included Real Estate Services, but did not include Executive Direction, Trust Services, Probate or Energy and Minerals. *Id.* § 2; *see also id.* § 4 (“Any program, service, function, or activity not listed as transferred to the Nation shall be assumed to be a retained function of the Secretary. . . . Functions retained by the [Bureau] include Minerals Management consisting of Accounting, Sub-Surface, Field Operations, and Lease Management. and Probate.”). Indeed, the Reprogramming Request attached to the 2020–2025 Agreement lists \$0 as the amount to be reprogrammed to Plaintiff for the Probate and Minerals programs. *Id.* (Reprogramming Request at Line 155, 186). The 2020–2025 Agreement further provides that “the parties shall negotiate an amendment incorporating the annual reprogramming requests into the Multi-Year Funding Agreement by July 1 of each year.” *Id.* § 23.

### **III. The Parties Begin Negotiating the Probate and Part of the Minerals Programs**

On January 26, 2021, Plaintiff submitted a written request to the Office of Self-Governance to begin incurring pre-award costs necessary to plan, prepare for, and assume operation of the Probate and Minerals programs. *See* Ex. 2 (Approval of Pre-Award costs) at 2; *see also* 25 U.S.C. § 5325(a)(5)(A) (requiring the Department to award certain “startup costs”). On April 23, 2021, the Office of Self-Governance approved Plaintiff’s request. *See id.*

In 2021, Plaintiff and the Bureau engaged in negotiations about transferring the Probate program to Plaintiff. *See* Ex. 3 (Nov. 20, 2023, Initial Response) at 2; *see also* Compl. Ex. 1, ECF No. 1-1, at 24 (Probate negotiations occurred on August 2, 2021). During negotiations, the Bureau explained that the funding for the Probate program needed to be retained by the Bureau for the performance of inherent Federal functions. *Id.*; *see also* Ex. 4 (May 6, 2021, Probate Response) (detailing the inherent Federal functions within the Probate program). “[I]nherent Federal function[s]’ . . . may not legally be delegated to an Indian tribe.” 25 U.S.C. § 5361(6); *see also* 25 U.S.C. § 5366(c)(6)(A)(i)(II) (Secretary may reject a final offer if “the program that is the subject of the final offer is an inherent Federal function”). Plaintiff did not propose an amendment to its 2020–2025 Agreement to assume any functions of the Probate program and it did not submit a final offer. *See* Ex. 3 (Nov. 20, 2023, Initial Response) at 3–4 (explaining that Plaintiff “did not submit a proposal to compact functions of the Probate program”); *see also* Ex. 6 (Sept. 2, 2022, Pre-Award Costs Letter) at 1 (admitting that “we have not been able to successfully conclude our negotiations started in 2021”).

On August 17, 2022, the Office of Self-Governance sent a letter to Plaintiff confirming negotiations for August 23–24, 2022. The letter confirmed that Plaintiff had requested negotiations for Real Estate Services, Probate, and Minerals programs. *See* Ex. 7 (Aug. 17, 2022, Negotiations Confirmation). Because the Real Estate Services program was already the subject of administrative litigation, however, only the Probate and Minerals programs would be negotiated. *Id.*

On August 23–24, 2022, the Bureau and Plaintiff began negotiations for the Probate and Minerals programs. *See* Compl. Ex. 1, ECF No. 1-1, at 24 (“Negotiation Dates”); Ex. 7 (Aug. 17, 2022, Negotiations Confirmation) (confirming negotiations). With respect to the Probate program, the Bureau and Plaintiff began discussions with the Bureau’s May 6, 2021, letter

explaining why the programs, services, functions, and activities of the Probate program are inherent Federal functions that cannot be assumed by Plaintiff. *See* Ex. 4 (May 6, 2021, Probate Response): Affidavit of Tracie Williamson (“Williamson Aff.”) ¶ 5. Plaintiff noted that one of its employees spends time receiving and processing applications for approval of inter vivos trusts by Osage tribal members. Williamson Aff. ¶ 6. Plaintiff inquired whether this was a function of the Probate program and, if so, what amount of funding it could receive for the performance of that function. *Id.* Plaintiff requested further detail about what functions of the Probate program were inherent Federal functions but conceded that many of the functions likely were inherent Federal functions that would require congressional legislation before they could be assumed by Plaintiff. *Id.* In a September 2, 2022, letter, Plaintiff recognized that “remedial legislation is most likely necessary to accomplish the Nation’s goal with respect to the Probate program[.]” Ex. 8 (Sept. 2, 2022, Probate Letter) at 2. No further discussions were resumed in the negotiation meetings regarding Probate functions or the Osage Agency Probate program funding. Williamson Aff. ¶ 8.

After discussing Probate, discussions shifted to the Minerals program. *Id.* ¶ 9 The Bureau and Plaintiff discussed the different branches of the Minerals program, and Plaintiff announced that it wished to assume only the Branch of Field Operations of the Minerals program for fiscal year 2023. *Id.* ¶¶ 9–10. The remainder of the negotiations on August 23, as well as the negotiations on August 24, 2022, focused exclusively on the logistics of Plaintiff assuming the Branch of Field Operations, including whether Plaintiff could assume the functions and funding of the Branch of Field Operations mid-fiscal year, on April 1, 2023, and what would happen to existing Branch of Field of Operations employees—whether they would be hired directly by Plaintiff as tribal

employees or be assigned to Plaintiff pursuant to an Intergovernment Personnel Agreement. *Id.* ¶ 12.

Prior to the start of the second day of negotiations on August 24, 2022, the Office of Self-Governance provided a draft Reprogramming Request for Plaintiff and the Bureau to use to identify the programs Plaintiff was assuming and specify the amount of funding that would be reprogrammed from the Bureau to Plaintiff as required by the 2020–2025 Agreement. *See* Ex. 9 (August 24, 2022, Email re: Negotiations).

Negotiations did not conclude on August 24, 2022, and the Reprogramming Request was not updated, because the Bureau and Plaintiff had not come to an agreement on the logistics of Plaintiff assuming the Branch of Field Operations. *See* Ex. 10 (Sept. 1, 2022, “Osage Negotiations” Email) (“We have had internal discussions and would like to schedule a brief (1 hour) meeting with the Osage Nation regarding the proposal to transfer operations mid-year (6months on April 1).”); *id.* (noting that the parties needed to “meet briefly” with respect to a “Mid-year determination”). The Office of Self-Governance also requested a follow-up meeting with Plaintiff to discuss the issue a recent change to the law requiring Plaintiff to execute a self-governance compact in addition to an amendment to its funding agreement. *See id.* (“To clarify, Osage is operating under a Title IV [annual funding agreement] without entering into a compact. Under regulation 1000.164 (below) that WAS allowed. . . . Please be advised that under [the Act], as amended by the PROGRESS Act (§ 5364 below), a compact is required.”).

On September 2, 2022, Plaintiff sent three letters as a follow-up to the August 23–24 negotiation meetings.

First, Plaintiff requested “additional information” including “an updated detailed list of inherent federal functions in each branch of the Mineral program,” extensive detail about the Osage

Agency and the Regional Office, and still more granular detail about “the Minerals Branch of Field Operations.” Ex. 11 (Sept. 2, 2022, Minerals Letter) at 1–2. The Field Operations branch is one of the five branches of the Minerals program. *See Osage Agency, Bureau of Indian Affairs*, <https://www.bia.gov/regional-offices/eastern-oklahoma/osage-agency> (“The Branch of Minerals has five divisions: Lease Management, Accounting, Subsurface Leasing, Enforcement and Lease Compliance, and Field Operations.”) (last visited Sept. 9, 2024).

While Plaintiff said it needed that information to allow it “to contract all non-inherently federal functions,” it did not request to assume any particular functions and did not request the same level of detail about other branches within Minerals. Ex. 11 (Sept. 2, 2022, Minerals Letter) at 2.

Second, Plaintiff also sent a letter following up on negotiations with respect to Probate. *See* Ex. 8 (Sept. 2, 2022, Probate Letter). The September 2 Probate Letter did not request to assume any of the functions of the Probate program in fiscal year 2023 or to execute a Reprogramming Request transferring any funds of the Probate program. Instead, the letter requested additional information about “the intake process for initiation of revocable trusts.” *Id.* at 1. Further, while Plaintiff expressed an interest in “assum[ing] as much of the Probate program as possible,” it conceded there would be inherent Federal functions that would have to be left with the Bureau and noted that it “underst[ood] that remedial legislation is most likely necessary to accomplish the Nation’s goal with respect to the probate problem[.]” *Id.* at 2.

Finally, Plaintiff sent a letter regarding pre-award costs it originally requested in 2021. Ex. 6 (Sept. 2, 2022, Pre-Award Costs Letter). Plaintiff admitted it had not successfully concluded the 2021 negotiations but requested an extension of pre-award costs from the Office of Self-Governance. *Id.* at 1 (“[W]e have not been able to successfully conclude our negotiations started



in 2021[.]”). The letter stated the programs Plaintiff “anticipate[d]” assuming were “Minerals and Mining and Probate” but Plaintiff was not sure if it would assume the programs in their entirety or “some portions of these programs.” *Id.* at 1.

A meeting to discuss the unresolved issues from the August 23–24 negotiation meetings was scheduled for September 15, 2022. *See* Ex. 12 (Sept. 15, 2023, Agenda) (“Mid-year transfer determination.”); *id.* (“Region/Agency and [Office of Self-Governance] requests sent on 9/2”); Compl. Ex. 1, ECF No. 1-1, at 24. After that meeting, further negotiations were understood to be necessary. *See* Ex. 12 (Sept. 15, 2023, Agenda) (“Next negotiation meeting scheduled for 9/26 at 1:00pm CST.”).

The Bureau responded to Plaintiff’s September 2 letters about Probate and about Minerals in detail on September 23, 2022, and September 28, 2022, respectively. *See* Ex. 13 (Sept. 23, 2022, Probate Letter); Ex. 14 (Sept. 28, 2022, Minerals Letter).

On September 29, 2022, a further negotiation follow-up meeting was held to “discuss the [Office of Self-Governance] decision of the Pre-Award start date” and the requests for information sent to the Plaintiff to the Bureau on September 2. Ex. 15 (Sept. 29, 2022, Negotiations Agenda); Compl. Ex. 1, ECF No. 1-1, at 24 (“Negotiation Dates”). The Office of Self-Governance did not yet have an answer on the issue of whether the functions and funding of the Field Operations Branch could be assumed mid-year, and what effect that would have on Plaintiff’s request for the extension of its pre-award costs. *See* Williamson Aff. ¶¶ 12–15. The Bureau and Plaintiff discussed the amount of funding the Bureau would transfer to Plaintiff if Plaintiff assumed the Field Operations Branch. Williamson Aff. ¶ 14. The Office of Self-Governance requested that Plaintiff draft a proposed amendment to its 2020–2025 Agreement to specify the Branch of Field Operations and the amount of funding it was requested. *Id.*

On October 5, 2022, the Bureau and Plaintiff held what would end up being their final negotiation meeting. *See* Compl. Ex. 1, ECF No. 1-1, at 24 (“Negotiation Dates”). At that meeting, Plaintiff and the Bureau continued to discuss the “timeline/activities for transition of [Field Operations] employees.” *See* Ex. 16 (Oct. 5, 2022, Negotiations Agenda).

At the October 5 negotiations meeting the Bureau and Plaintiff also discussed a “draft . . . amendment” (the “Draft Amendment”) to the 2020–2025 Agreement that Plaintiff had prepared. *Id.* The Draft Amendment proposed that the Nation would “assume[] responsibility for the [Bureau] Osage Agency Branch of Field Operations.” Ex. 17 (Draft Amendment). The Draft Amendment did not discuss any other part of the Minerals program or any other program. *Id.* The Draft Amendment essentially conceded that other parts of the Minerals program had not been negotiated when it stated that “[t]he Nation also reserves the right to negotiate to include other Minerals programs in its [2020–2025 Agreement].” *Id.*

The Draft Amendment was not executed on October 5, 2022, because unresolved issues remained, including the effective date of the amendment that was left blank in the draft and the dispute about whether Plaintiff could take over the function mid-year as noted above. *Id.* Additionally, the parties had not yet resolved whether Bureau employees of the Branch of Field Operations would be hired by Plaintiff pursuant to an Intergovernment Personnel Act agreement or directly brought on as tribal employees. *See* Ex. 18 (Oct. 17, 2022, Email re: Questions) (discussing options).

#### **IV. After Submitting an Incomplete Draft Amendment Only with Respect to Field Operations, Plaintiff Breaks Off Negotiations**

A follow-up meeting to address these outstanding issues was scheduled for October 25, 2022, but, on October 19, 2022, Plaintiff unilaterally cancelled the October 25 follow-up meeting, stating, “This meeting is being postponed to a later date to be determined within the next few

weeks.” Ex. 19 (Oct. 19, 2022, Canceled Calendar Invitation). But Plaintiff did not propose any date to resume negotiations.

An Office of Self-Governance employee sent an e-mail to a director for Plaintiff, requesting a date for the rescheduled negotiations meeting: “I have not heard anything since the cancelation of the 10/25 meeting. I am just following up on the status. It is my understanding that the region has responded to the tribal requests.” Ex. 20 (Nov. 1, 2022, Email). Shortly after, Plaintiff responded: “[W]e are still developing our request and transition plan, as well as reviewing the last [Regional Office] response. We hope to have something ready in the next two weeks.” *Id.*

Surprisingly, on November 2, 2022, Plaintiff sent a letter stating that it “intends to assume all branches available at the Osage Agency under Minerals and Mining.” Ex. 21 (Nov. 2, 2022, Minerals Letter). The November 2 Letter “request[ed] additional information,” but did not address the Branch of Field Operations, did not propose a date to reschedule the October 25 meeting that Plaintiff had cancelled, did not include a proposed amendment to the 2020–2025 Agreement, and did not include a completed reprogramming request for Plaintiff to assume any programs, services, functions, and activities or funding. *Id.*

By email on November 30, 2022, the Office of Self-Governance told Plaintiff that Plaintiff’s November 2 Letter “has caused confusion about next steps in the [fiscal year] 2023 negotiations.” Ex. 22 (Dec. 1, 2022, Email re: Negotiations). The Office of Self-Governance requested that Plaintiff clarify and make clear whether:

- (a) the Nation intends to move forward with compacting the Field Operations branch of the Minerals and Mining program by April 1, 2023 as was previously under consideration,
- (b) whether the Nation is also requesting to compact funding for the other branches of Minerals and Mining by April 1, 2023, or

(c) whether compacting of Field Operations is being postponed until [fiscal year] 2024 or a later date in order to comprehensively compact eligible funding for the entire Mining and Minerals program.

*Id.*

On December 1, 2022, Plaintiff explained that it would evaluate the additional information requested before it decided which parts of the Minerals program that it would propose to assume: “We have requested additional information to evaluate before we make decisions that you sighted below. I believe that we have indicated on our letter and on the calls, that we are now considering taking all the Osage tribal shares for Minerals and Mining.” *See id.*

The next day, on December 2, 2022, the Bureau sent an initial response to Plaintiff’s November 2, 2022, request for additional information. *See* Ex. 23 (Dec. 2, 2022, Response). The Bureau treated Plaintiff’s November 2 letter as a “letter of interest,” noting that it was responding “[i]n accordance with 25 C.F.R. § 1000.172.” *Id.*; 25 C.F.R. § 1000.172(b) (explaining that the Bureau should respond with information “[w]ithin 30 calendar days of receipt of the Tribe’s/Consortium’s letter of interest”). “A letter of interest is the initial indication of interest submitted by the Tribe/Consortium informing the bureau of the Tribe’s/Consortium’s interest in seeking information for the possible negotiation of one or more bureau programs.” 25 C.F.R. § 1000.170. It is part of the information phase of the Negotiation Process specified in the regulations and is prior to and distinct from formal negotiations. *See* 25 C.F.R. § 1000.166(a)–(b) (“There are two phases of the negotiation process: [t]he information phase and [t]he negotiation phase.”). The Bureau recognized that Plaintiff was “still evaluating and developing its request and plan for assumption” but assumed that “the Nation no longer intends to proceed with negotiating and drafting a funding agreement for the Nation’s assumption of the Field Operations branch,” which had been the sole subject of all previous Minerals negotiation. Ex. 23 (Dec. 2, 2022, Response).

Counsel for Plaintiff confirmed that its November 2, 2022, letter requesting additional information about the Minerals program was a “letter of interest” by citing 25 C.F.R. § 1000.172(b). Ex. 24 (Nov. 15, 2022, Email). Plaintiff’s counsel further noted that negotiations would proceed after Plaintiff received the requested information: “The Nation’s staff and consultants would like thirty days from the date of receipt of the information to review and discuss how it would like to move forward with negotiations. If we can receive the information by December 2, 2022 or soon thereafter, we are hopeful we can begin discussions regarding the transfer of contractible [programs, services, functions, and activities] by mid-January.” *Id.*

On January 13, 2023, the Bureau informed Plaintiff that its supplemental response to Plaintiff’s November 2, 2022, letter was delayed because, among other things, “the Bureau’s response relies in part on the Osage Agency’s [Fiscal Year 2023] budget, and the contractible amounts cannot be estimated until it is received.” Ex. 25 (Jan. 13, 2023, Letter). Subsequently, on February 6, 2023, the Bureau provided a supplemental response to Plaintiff’s November 2, 2022, letter of interest. Ex. 26 (Feb. 6, 2024, Supp. Resp.).

After receiving the December 2, 2022, and February 6, 2023, responses, Plaintiff did not request to resume negotiations and did not submit an update to the Draft Amendment to assume any other programs, services, functions, and activities. *See* Compl. Ex. 1, ECF No. 1-1, at 23–24 (showing limited communications and limited negotiations). Plaintiff also never submitted a proposed “transition plan” regarding employees of the Branch of Field Operations from the Bureau to Plaintiff as it had said was forthcoming “in the next two weeks” on November 1, 2022. *See* Ex. 3 (Nov. 20, 2023, Initial Response) at 4.

#### **V. Plaintiff Submits the October 23, 2023, Letter that It Calls a “Final Offer”**

On October 23, 2023, a little more than a year after Plaintiff cancelled the last scheduled negotiation meeting, Plaintiff sent a letter to the Bureau misleadingly entitled “Osage Nation Final

Offer Amendment to 2020-2025 Funding Agreement.” *See* Compl. Ex. 1, ECF No. 1-1 at 2. The October 23, 2023, Letter announced the mistaken legal conclusion that it would be Plaintiff’s “final offer to amend its . . . 2020-2025 [Agreement.]” *Id.*

The proposal in the October 23, 2023, Letter went well beyond the incomplete negotiations about Minerals and Probate. Plaintiff wrote that it proposed to assume “[a]ll [programs, services, functions, and activities] associated with the Osage Agency . . . of the [Bureau] that have not previously been assumed by the Nation, including but not limited to Realty, Minerals/Mining, Probate, Trust Services, and Executive Direction [programs, services, functions, and activities].” *Id.* Elsewhere, the Nation proposed to assume its “full, proportional share of all Realty, Minerals/Mining, Probate, Trust Services, and Executive Direction [programs, services, functions, and activities] associated with the Eastern Oklahoma Regional Office . . . of the [Bureau].” *Id.*

Exhibit A to the October 23, 2023, Letter details the extent to which Plaintiff sought to assume functions of the Bureau without negotiating over those functions. Plaintiff copied and pasted position descriptions within the Bureau’s Osage Agency and then proposed that Plaintiff assume all such functions. Compl. Ex. 1, ECF No. 1-1 at 7–13 (“all TPA Real Estate Services program elements,” “all TPA Probate program elements,” “all TPA Minerals and Mining program elements,” and “all TPA Executive Direction program elements,” “all TPA Trust Services program elements”). With respect to the Regional Office programs, services, functions, and activities, the October 23, 2023, Letter states Plaintiff’s proposal is to assume “a portion” of Real Estate Services, Trust Services, and Minerals Regional Oversight program elements and lists the job duties of Bureau employees but does not specifically identify which portion of each position’s duties Plaintiff will assume and which duties the Bureau would continue to perform. *See id.* at 14–17. Plaintiff also asserted that it would “assume a portion of” Executive Direction and Administrative

Services “program elements,” but no duties or position descriptions are included for the Executive Direction and Administrative Services programs. *See id.* at 17.

In the body of the October 23, 2023, Letter, Plaintiff asserted that its purported “final offer” followed “extensive negotiations, discussions, and exchanges of information regarding the Nation’s assumption of certain Realty, Minerals/Mining, Probate, Trust Services, and Executive Direction” functions. Compl. Ex. 1, ECF No. 1-1 at 2. Describing the “multiple negotiations and information exchanges,” Plaintiff pointed only to Probate negotiations on August 2, 2021; Probate and Minerals negotiations on August 23–24, 2022; and follow-up negotiations on September 15, 2022; September 29, 2022; and October 5, 2022. *Id.* at 2 n.1. Exhibit B confirms that the only relevant negotiations were those limited and incomplete negotiations about Probate and the Field Operations Branch of Minerals. *Id.* at 24. Correspondence in which Plaintiff sought information—i.e., the “information phase,” *see* 25 C.F.R. § 1000.166—was listed with respect to Probate and Minerals but not with other programs. Compl. Ex. 1, ECF No. 1-1 at 23.

Perhaps trying to pad the thin record of correspondence and negotiations, Exhibit B concludes with a list of stale “Earlier Correspondence” from October 2014 through October 2016, six years before the limited negotiations relevant to this dispute. *Id.* at 24. Exhibit B to the October 23, 2023, Letter also lists purported “offers from” the Bureau with respect to the Probate, Minerals (including the Branch of Field Operations), and Trust Services programs. *Id.* at 25. As is plain from the referenced documents, they were simply responses to Plaintiff’s requests for additional information about the programs which could serve as a starting point for potential negotiations in the future. For example, the Bureau provided tables that “contain[ed] the estimated amounts available to be contracted for each Agency Program based upon the Agency’s estimated residual need for each branch and program.” Ex. 26 (Feb. 6, 2024, Supp. Resp.) at 2; *id.* at 2 (table

for Real Estate Services and Probate Services “sets forth the Agency positions necessary to carry out the [inherent Federal functions] for . . . the programs . . . along with the estimated residual labor costs”).

The October 23, 2023, Letter does not identify any “offers” from the Bureau with respect to the Executive Direction program or any part of any programs, services, functions, and activities administered at the Regional Office. *Id.*

#### **VI. The Department Informs Plaintiff that Plaintiff Did Not Submit a Final Offer**

On November 17, 2023, the Department acknowledged receipt of Plaintiff’s October 23, 2023, Letter, stating: “Assuming the statutory and regulatory prerequisites for the submission of a final offer have been satisfied, . . . the 60-day statutory review and determination period . . . will end on December 26, 2023.” Ex. 27 (Nov. 17, 2023, Acknowledgement) (emphasis omitted). Three days later, the Bureau responded to the Nation, explaining that the October 23, 2023, Letter was “procedurally premature” because the Bureau and Plaintiff had not negotiated the programs, services, functions, and activities that were included. Ex. 3 (Nov. 20, 2023, Initial Response). The Bureau “respectfully request[ed] that [Plaintiff] withdraw” its procedurally deficient offer and “invite[d] Plaintiff to engage in and complete formal negotiations.” *Id.* at 1. “Without such negotiations,” the Bureau explained, the October 23, 2023, Letter did not “comply with [the Act’s] requirements for the submission of a final offer.” *Id.* The Bureau further explained that its response was “not a declination of the [October 23, 2023, Letter] pursuant to 25 U.S.C. § 5366” because Plaintiff’s October 23, 2023, Letter was premature and not a valid final offer, and that Plaintiff was not entitled to file suit in federal court. *Id.*

On December 1, 2023, Plaintiff declined to withdraw its October 23, 2023, Letter, asserting that Defendants’ request to complete the negotiations required by regulation was somehow “prima facie evidence of the inability of the parties to agree.” Ex. 28 (Dec. 1, 2023, Pl. Resp.).



On December 20, 2023, the Bureau again explained that Plaintiff’s purported “final offer” was not “negotiated by [Plaintiff] in accordance with [the Act] and its implementing regulations and is therefore not a ‘final offer’ within the meaning of” the Act. Ex. 5 (Dec. 20, 2023, Rejection) at 1. Specifically, Plaintiff did not “initiat[e] . . . negotiations for certain programs, . . . complet[e] . . . negotiations and . . . submi[t] . . . a draft funding agreement for others, and . . . inclu[de] . . . information in a draft funding agreement required by [the Act] and its regulations.” *Id.* at 1; *id.* at 5 (“For the Real Estate Services, Probate, Trust Services, and Minerals and Mining programs, although informal information gathering and negotiations may have occurred at various times, some of these negotiations occurred nearly a decade ago and, in any event, were never completed as required by the statute and its implementing regulations.”). *See generally id.* at 3–8 (detailing how Plaintiff failed to complete negotiations).

In the alternative, if Plaintiff’s October 23, 2023, Letter were deemed a final offer, the Department partially rejected the offer because it requested more money than the Secretary was spending for the same programs, *id.* at 9-15, and requested to assume programs that are inherent Federal functions that may not be delegated to Indian Tribes, *id.* at 15-36. The Bureau explained that Plaintiff would not have made these errors if it had engaged in negotiation. *See id.* at 12 (“[B]ecause the Nation did not engage in negotiations regarding the Regional Office programs, it has mistakenly requested funding for programs that do not provide direct services to the Nation and/or funds used to perform only inherently federal functions.”).

On March 11, 2024, Plaintiff filed the instant lawsuit. *See* Compl., ECF No. 1. Defendants filed their Answer on June 18, 2024, noting, among other things, that “Plaintiff’s Complaint fails to state a claim upon which relief can be granted,” “The Court lacks subject matter jurisdiction over some or all of Plaintiff’s claims and some or all relief requested,” and “Defendants have not

waived their sovereign immunity from suit.” Answer at 6. The parties filed a meet and confer statement in which Defendants explained that Plaintiff “has not submitted a final offer” “[b]ecause Plaintiff rejected the Bureau’s offer to engage in adequate negotiations.” Meet and Confer Statement at 3–4, ECF No. 12. Defendants noted that they stood ready to complete negotiations to allow the parties to reach an agreement or to allow Plaintiff to reach the point where it could file a final offer. *See id.* at 6–7.

After the parties filed their meet and confer statement, the Court ordered permitted Defendants to file a motion for summary judgment limited to jurisdictional issues, writing, “The government believes that the Court lacks subject-matter jurisdiction over the plaintiff’s claims and would like to forego discovery and proceed to summary judgment. The Court agrees with the government to the extent that it should not bear the burden of full discovery if the Court lacks jurisdiction.” July 30, 2024, Min. Order.

## LEGAL STANDARDS

### **I. Lack of Subject-Matter Jurisdiction**

Under D.C. Circuit law, post-answer motions to dismiss a complaint for lack of subject-matter jurisdiction are treated as motions under Rule 12(b)(1) rather than motions for summary judgment under Rule 56. *See Kirkham v. Societe Air France*, 429 F.3d 288, 291 (D.C. Cir. 2005) (“Summary judgment, however, represents a decision on the merits, which courts may render only after jurisdiction has been established.”), *abrogated on other grounds by OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), *as recognized by Rosenkrantz v. Inter-Am. Dev. Bank*, 35 F.4th 854, 863 (D.C. Cir. 2022). *But see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that a plaintiff’s burden to show subject-matter jurisdiction increases at summary judgment). Subject-matter jurisdiction may be challenged at any time under Rule 12(h)(3): “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”

“A motion styled as one under Rule 12(h)(3) is treated in the same way as a motion to dismiss for lack of subject-matter jurisdiction under” Rule 12(b)(1). *Ams. for Fair Treatment v. U.S. Postal Serv.*, 663 F. Supp. 3d 39, 49 (D.D.C. 2023) (citing *Murray v. Amalgamated Transit Union*, 206 F. Supp. 3d 202, 207 (D.D.C. 2016)); see also *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) (The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.”); *Lewis v. Schafer*, 571 F. Supp. 2d 54, 56 (D.D.C. 2008) (when defendant filed a post-answer motion, the court “address[ed] only those arguments raised pursuant to [Rule] 12(b)(1)”; *FEC v. NRA*, 553 F. Supp. 1331, 1343 (D.D.C. 1983) (“[A] ‘factual attack’ under Rule 12(b)(1) may occur at any stage of the proceedings, and plaintiff bears the burden of proof that jurisdiction does in fact exist.” (quoting *Menchaca v. Chrysler Credit Corp.*, 513 F.2d 507, 511 (5th Cir. 1980))). Because the same standards apply, Defendants refer to Rule 12(b)(1) when discussing the applicable legal standard.

When adjudicating a Rule 12(b)(1) motion, courts accept the factual allegations in the complaint as true and “may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.” *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253–54 (D.C. Cir. 2005). Even in the absence of a Rule 12(b)(1) motion, the Court has an “independent obligation” to assess its jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

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“independent obligation” to assess its jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Functionally, this is similar to the summary-judgment standard except that “[o]n a motion attacking the court’s jurisdiction, the district judge may resolve disputed jurisdictional-fact issues.” Wright & Miller, Federal Practice & Procedure § 2713.

Under the doctrine of sovereign immunity, the United States is immune to suit unless Congress has expressly waived the defense of sovereign immunity by statute. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”). “[T]he Court may not exercise jurisdiction over the tort claims here unless there has been a clear waiver of sovereign immunity.” *Gaskin v. May*, Civ. A. No. 15-0033 (EGS), 2023 WL 2239349, at \*4 (D.D.C. Feb. 27, 2023) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)) (citation omitted), *appeal filed*. Plaintiff bears the burden of establishing that sovereign immunity has been abrogated for each claim advanced against the United States. “[A] plaintiff must overcome the defense of sovereign immunity in order to establish the jurisdiction necessary to survive a Rule 12(b)(1) motion to dismiss.” *Jackson v. Bush*, 448 F. Supp. 2d 198, 200 (D.D.C. 2006) (citing *Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 575 (D.C. Cir. 2003)). “The scope of a sovereign immunity waiver is to be strictly construed in favor of the sovereign. The sovereign’s consent to a particular remedy must also be unambiguous.” *Brown v. Wachovia Bank*, Civ. A. No. 06-0153 RMC, 2007 WL 1378491, at \*4 (D.D.C. May 10, 2007), *aff’d*, No. 07-5188, 2008 WL 2516476 (D.C. Cir. Feb. 26, 2008).

## **II. Summary Judgment**

In the alternative, if the Court concludes that the jurisdictional issue here is best resolved at summary judgment or that the “final order” requirement is non-jurisdictional, it should grant summary judgment to Defendants. *See* Wright & Miller, Federal Practice & Procedure § 1350

(“[N]umerous federal courts have recognized that when subject matter jurisdiction is dependent on the same statute that forms the basis of the underlying claim, the jurisdictional question is tied up with the merits of the case. Therefore, it should not be decided on a motion to dismiss but may be appropriate for summary judgment.”).

Rule 56(a) provides that summary judgment shall be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson*, 477 U.S. 242. The party moving for summary judgment need not prove the absence of an essential element of the nonmoving party’s case. *Celotex Corp.*, 477 U.S. at 325. “The burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party’s case.” *Id.* Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

## ARGUMENT

The Act waives the United States’ sovereign immunity and authorizes a suit in federal court if the Secretary of Interior rejects a “final offer” submitted by a Tribe. A statutory and regulatory prerequisite to the submission of a final offer and the Bureau’s determination with respect thereto, however, is that the Tribe and the Bureau “negotiate” but be “unable to agree . . . on the terms” of a funding agreement. 25 U.S.C. §§ 5363(a); 5366(c)(1). The “negotiation process” is required by regulation. *See* 25 C.F.R. §§ 1000.160–182. A Tribe cannot submit a final offer with respect to programs, services, functions, and activities it did not negotiate.

As explained more fully below, Plaintiff and the Bureau never reached a point where they were “unable to agree” on the programs, services, functions, and activities included in Plaintiff’s October 23, 2023, Letter because they did not “negotiate” those programs, services, functions, and activities in accordance with the Act and the process prescribed in its regulations. Plaintiff incompletely negotiated with respect to the Probate and Field Operations Branch of the Minerals Program. It then abandoned negotiations and did not negotiate the remaining programs sought in the October 23, 2023, Letter at all. Thus, Plaintiff never submitted a final offer, and the United States has not waived its sovereign immunity from suit for a rejection of any final offer. This Court therefore lacks subject-matter jurisdiction and must dismiss Plaintiff’s case.

**I. Submission of a Final Offer Requires the Tribe to Initiate and Conclude the Negotiation Process Set Forth by Regulation**

The Act requires the Bureau and the Tribe to “negotiate” a funding agreement “on the request of [the] Tribe[.]” 25 U.S.C. § 5363(a); *cf.* 25 U.S.C. § 5366(e) (“In the negotiation of compacts and funding agreements, the Secretary shall at all times negotiate in good faith to maximize implementation of the self-governance policy.”). The regulations that implement the Act establish a mandatory “negotiation process” for self-governance compacts and funding agreements. *See* 25 C.F.R. § 1000.160 (“This subpart provides the process and timelines for negotiating a self-governance compact with the Department and an AFA with any bureau.”).<sup>2</sup> The negotiation of amendments to funding agreements follows the same process as the negotiation of initial funding agreements. *See* 25 C.F.R. § 1000.182.

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<sup>2</sup> The relevant regulations were “negotiated among representatives of Self-Governance and non-Self-Governance Tribes and the U.S. Department of the Interior.” *Office of the Assistant Secretary—Indian Affairs; Tribal Self-Governance*, 65 Fed. Reg. 78,688, 76,688 (Dec. 15, 2000); *see also* 25 U.S.C. § 5373(b)(1) (“A negotiated rulemaking committee established pursuant to section 565 of Title 5 to carry out this section shall have as its members only representatives of the Federal Government and Tribal government.”).

“There are two phases to the negotiation process: . . . the information phase and . . . the negotiation phase.” 25 C.F.R. § 1000.166. In the information phase, the Tribe submits a letter of interest “seeking information for the possible negotiation of one or more [Bureau] programs.” 25 C.F.R. § 1000.170. Among other things, the letter “should identify,” “[a]s specifically as possible, the program a [Tribe] is interested in negotiating under” a funding agreement,”[t]he scope of activity that a [Tribe] is interested in including” in a funding agreement, and requests for information on the funds available to perform the programs. 25 C.F.R. § 1000.170(a), (c), (g)–(h). Within thirty days of receipt, the Bureau should provide the requested information to the extent it is readily available. 25 C.F.R. § 1000.172(b)(1).

“To initiate the negotiation phase, [the Tribe] submits a written request to negotiate . . . [f]or a . . . [Bureau] program.” 25 C.F.R. § 1000.173(a). Thereafter, negotiation meetings are scheduled which “must address at a minimum” seven items, including “[t]he specific Tribe proposal(s) and intentions,” “[d]ates for conducting and concluding negotiations,” “[r]esponsibility for preparation of a written summary of the discussions,” and “[w]ho will prepare an initial draft of the” funding agreement. 25 C.F.R. § 1000.176. Negotiations must be “successfully completed” and a proposed funding agreement must be prepared. 25 C.F.R. § 1000.175(c); *see also* [2020–2025 Agreement at 8–9] § 23 (“[T]he parties shall negotiate an amendment incorporating the annual reprogramming requests in the [2020–2025 Agreement].”).

The proposed funding agreement “shall” contain certain mandatory provisions, including the services and functions to be provided under the funding agreement and the division of responsibilities between the Tribe and the Secretary. *See* 25 U.S.C. § 5363(m)(2); 25 C.F.R. § 1000.87(a). The funding agreement “must also specify the applicable funding [r]etained by [the Bureau] for ‘inherently Federal functions’ identified as ‘residuals.’” 25 C.F.R.

§ 1000.82(a). The relationship between the programs, services, functions, and activities assumed by the Tribe and the Bureau’s residual responsibility must be set forth in writing. *Id.* § 1000.87(b).

After negotiations are completed, the proposed agreement is either approved or disapproved within thirty days of the completion of negotiations or “by a mutually agreed upon date.” 25 C.F.R. § 1000.175(c). A Tribe “may submit a final offer” “[i]f the Secretary and [the Tribe] are unable to agree . . . on the terms of a . . . funding agreement.” 25 U.S.C. § 5366(c)(1). Thus, the Tribe can submit a final offer only if the Secretary and the Tribe “do not reach agreement during the negotiation phase by the mutually agreed date for completing negotiations.” 25 C.F.R. § 1000.179(a).

**II. Plaintiff Did Not Negotiate the Programs, Services, Functions, and Activities that are Included in the October 23, 2023, Letter.**

**A. Plaintiff Failed to Complete Negotiations of the Field Operations Branch of the Minerals Program and Did Not Negotiate Any Other Branch**

The only branch of any program that Plaintiff requested to assume during the negotiations was the Field Operations Branch of the Minerals program. On August 17, 2022, the Bureau confirmed negotiations scheduled for August 23-24, 2022, would include the Minerals program. *See* Ex. 7 (Aug. 17, 2022, Negotiations Confirmation) at 1 (“We will proceed with Probate as well as Minerals/Mining program discussions.”). While Plaintiff expressed a desire to eventually assume all available functions of other branches of the Minerals program, it moved forward only with negotiations for the Field Operations Branch. During what turned out to be the final negotiations meeting between Plaintiff and the Bureau, Plaintiff proposed an amendment to its 2020–2025 Agreement to include only the Field Operations Branch. *See* Ex. 17 (Draft Amendment) (proposing to assume only “the [Bureau’s] Osage Agency Branch of Field Operations”); *see also* Ex. 11 (Sept. 2, 2022, Minerals Letter) at 2 (requiring extensive detail only about “the Minerals Branch of Field Operations”). As the undisputed facts show, Plaintiff



thereafter canceled further negotiations that could have finalized the Draft Amendment regarding the Field Operations Branch and never resumed negotiations about the Field Operations Branch or any other branch of the Minerals program.

1. Plaintiff Did Not Complete Negotiations About the Field Operations Branch

Plaintiff did not complete negotiations with respect to Field Operations. After Plaintiff circulated the Draft Amendment just before the final negotiation meeting on October 5, 2022, the parties scheduled a follow-up meeting for October 25, 2022, to address outstanding issues that had to be addressed before the Draft Amendment could be finalized. The parties recognized that, among those remaining issues, they needed to determine the effective date of the amendment, which was subject to a dispute about whether Plaintiff could take over the function mid-year on April 1, 2023. Ex. 17 (Draft Am.) (leaving the effective date blank); Ex. 10 (Sept. 1, 2022, “Osage Negotiations” Email) (“We have had internal discussions and would like to schedule a brief (1 hour) meeting with the Osage Nation regarding the proposal to transfer operations mid-year (6months on April 1).”); *id.* (noting that the parties needed to “meet briefly” with respect to a “Mid-year determination”). Additionally, the parties had not yet resolved whether Bureau employees of the Branch of Field Operations would be laid off, hired by Plaintiff pursuant to an Intergovernment Personnel Act agreement, or hired directly as tribal employees. *See* Ex. 16 (Oct. 5, 2022, Negotiations Agenda) (“Discussion of the timeline/activities for transition of Field Ops employees”); Ex. 18 (discussing options).

On October 19, 2022, however, Plaintiff cancelled those negotiations and never rescheduled. *See* Ex. 19 (Oct. 19, 2022, Canceled Calendar Invitation). On November 1, 2022, Plaintiff refused to commit to further negotiations, stating that it was “still developing [its] request” and that it “hope[d] to have something ready in the next two weeks.” Ex. 20 (Nov. 1, 2022, Email).

In a November 2, 2022, letter, Plaintiff asserted that it “intends to assume all branches available at the [Bureau] Osage Agency under Minerals and Mining.” Ex. 22 (Dec. 1, 2022, Email re: Negotiations). Not only did this letter not resume or constitute further negotiations, it caused greater confusion about whether Plaintiff intended to move forward with negotiating Field Operations that year at all. *See id.* In response, Plaintiff again declined to indicate that it would seek negotiations, stating instead that it needed more information before it could decide how it intended to move forward. *See id.* The Bureau responded in a December 2 letter that it “assume[d] that the Nation no longer intends to proceed with negotiating and drafting a funding agreement for the Nation’s assumption of the Field Operations branch on April 1, 2023, as previously proposed.” Ex. 23 (Dec. 2, 2022, Response). Plaintiff did not dispute that characterization.

Because negotiations with respect to the programs, services, functions, and activities of the Field Operations Branch were not completed, Plaintiff was not authorized to submit a final offer with respect to the Field Operations Branch.

## 2. Plaintiff Did Not Negotiate the Other Branches of the Minerals Program

Moreover, Plaintiff’s negotiations with respect to the Field Operations Branch and inquiries about other Branches of the Minerals Program do not constitute negotiations of any programs, services, functions, and activities of the other branches of the Minerals program. Indeed, Plaintiff’s Draft Amendment itself states that Plaintiff “reserves the right to negotiate and include other Minerals programs in its [2020–2025 Agreement].” Ex. 17 (Draft Amendment). Plaintiff’s “reserv[ation] of the right to negotiate” other branches is a concession that no other programs were negotiated at that time. Plaintiff did not negotiate the other branches. Instead, Plaintiff called off all negotiations after proposing to assume only the functions of the Field Operations Branch on October 5, 2022. *See* Compl. Ex. 1, ECF No. 1-1 at 24 (last negotiations were on October 5, 2022);

*see also* Ex. 19 (Oct. 19, 2022, Canceled Calendar Invitation); Ex. 20 (Nov. 1, 2022, Email) (Plaintiff declining to reschedule negotiations after being prompted).

Instead of further negotiation meetings, on November 2, 2022, Plaintiff submitted requests for additional information about other branches in the Minerals program. *See* Ex. 21 (Nov. 2, 2022, Minerals Letter). The November 2, 2022, Letter asserted that Plaintiff “intend[ed]” to assume all branches but did not request to initiate negotiations, did not include a draft amendment, and did not even specify when any assumption might occur. *See id.* When directly asked whether the November 2, 2022, Letter represented a request to also compact funding for other branches of the Minerals program, Plaintiff responded that it had not made a decision and would have to first evaluate the requested additional information. *See* Ex. 22 (Dec. 1, 2022, Email re: Negotiations).

Plaintiff’s November 2, 2022, Letter started the information phrase with respect to the other branches. 25 C.F.R. § 1000.166. (“There are two phases of the negotiation process: . . . [t]he information phase; and . . . the negotiation phase.”). Plaintiff confirmed that its November 2, 2022, Letter was meant to be a letter of interest. *See* Ex. 24 (Nov. 15, 2022, Email). The letter of interest necessarily does not cause the beginning of the negotiation phase because it “seek[s] information for the possible negotiation of one or more [Bureau] programs,” but does not guarantee that the Tribe will, or require the Tribe to, negotiate or otherwise assume the programs about which it inquires. 25 C.F.R. § 1000.170.

While a Tribe can “go directly to the negotiation phase,” 25 C.F.R. § 1000.168, a Tribe cannot complete negotiations by skipping the negotiation phase. The negotiation meetings are necessary to address seven key items about how to proceed. *See* 25 C.F.R. § 1000.176(a), (g). Moreover, as relevant here, to “successfully complete[]” negotiations a Tribe and the Bureau must “prepare and either execute or disapprove a [funding agreement] within 30 days or by a mutually

agreed upon date.” 25 C.F.R. § 1000.175(c). Plaintiff did not submit a draft funding agreement requesting to assume other branches of the Minerals program within thirty days of the conclusion of negotiations. For all of the above reasons, the parties never reached a point where they were unable to agree about assumption of the other branches of the Minerals program and Plaintiff did not submit a final offer about the Minerals program.

**B. Plaintiff Did Not Pursue or Complete Negotiations for the Probate Program.**

Plaintiff did not pursue or complete negotiations regarding the Probate programs, services, functions, and activities. On the first day of negotiations, August 23, 2022, Plaintiff and the Bureau briefly discussed the Probate program. *See* Ex. 29 (Aug. 23, 2022, Agenda). The Bureau referenced a 2021 letter it had sent to Plaintiff that made clear that the programs, services, functions, and activities of the Probate program were inherent Federal functions that Plaintiff could not assume. *See* Ex. 4 (May 6, 2021, Probate Resp.). Beyond limited discussion of one discrete function of the Probate program, Plaintiff did not attempt to negotiate the Probate program at all. *See* Ex. 5 (Dec. 20, 2023, Rejection) at 5 (“[B]eyond inquiring about the limited function of the intake of Osage trusts, [Plaintiff’s Principal Chief Standing Bear] represented that the Probate program would not be negotiated because a change to federal statutes would be required to allow the Nation to perform them.” (footnote omitted)); Ex. 8 (Sept. 2, 2022, Probate Letter) at 2 (“remedial legislation is most likely necessary to accomplish the Nation’s goal with respect to the Probate program”). For instance, the Probate program was not discussed on the second day of negotiations. *See* Ex. 30 (Aug. 24, 2022, Agenda). Plaintiff’s sole draft amendment before cancelling negotiations did not propose to assume any programs, services, functions, and activities of the Probate program. Ex. 17 (Draft Amendment). The draft is the culmination of negotiations. *See* 25 C.F.R. § 1000.175(c) (“Once negotiations have been successfully completed, the bureau and Tribe/Consortium will prepare and either execute or disapprove” a funding agreement); 25 C.F.R. § 1000.176(g) (“The

negotiation meetings referred to in § 1000.175 must address . . . [w]ho will prepare an initial draft of the” funding agreement). The reason for these procedural requirements is clear. Plaintiff’s failure to negotiate the Probate program led it to submit an October 23, 2023, Letter that failed to specify “in writing the services, functions, and responsibilities to be assumed by the Tribe[] and . . . the Secretary,” 25 C.F.R. § 1000.87(a), the “division of responsibilities between the Tribe and [the Bureau],” including the “relationship between the program and [the Bureau]’s residual responsibility,” *id.* § 1000.87(b), and “the applicable funding retained by [the Bureau] for ‘inherently Federal functions’ identified as ‘residuals,’” *id.* § 1000.82(a) (cleaned up); *see also* 25 U.S.C. § 5363(m)(2).

Because Plaintiff and the Bureau never reached a point where they were unable to agree on the terms of an amendment to the 2020–2025 Agreement about the Probate program, Plaintiff could not submit a final offer about that program. Thus, the United States has not waived its sovereign immunity for any claim regarding the programs, services, functions, and activities of the Probate program.

**C. Plaintiff Did Not Even Request to Start Negotiating Executive Direction, Trust Services, or Regional Office Programs, Services, Functions, and Activities.**

The Indian Self-Determination and Education Assistance Act and its regulations place a burden on the Tribe to initiate negotiations with respect to assuming programs, services, functions, or activities. *See* 25 U.S.C. § 5363(a) (explaining that negotiations begin “on the request of any Indian Tribe or Tribal organization”); 25 C.F.R. § 1000.173(a) (“To initiate the negotiation phase, an authorized official of the [Tribe] submits a written request to negotiate [a funding agreement] . . . [f]or a [Bureau] program.”). Thereafter, negotiation meetings are scheduled which “must address at a minimum . . . [t]he specific [Tribe] proposal(s) and intentions.” 25 C.F.R.

§ 1000.176(a). A final offer may be submitted only with respect to a “requested program.” 25 C.F.R. § 1000.179(b).

Plaintiff never requested to negotiate Osage Agency Executive Direction and Trust Services, or any programs, services, functions, and activities of the Regional Office. Instead, Plaintiff submitted a written request to negotiate only the Real Estate Services, Probate, and Minerals programs. *See* Ex. 7 (Aug. 17, 2022, Negotiations Confirmation); *see also* Ex. 2 (Approval of Pre-Award Costs). After explaining that Real Estate Services was the subject of pending litigation, the Office of Self-Governance confirmed negotiations would take place only for the Probate and Minerals programs. Ex. 7 (Aug. 17, 2022, Negotiations Confirmation); *see also* 25 C.F.R. § 1000.174(d)(2) (“If the program is unavailable for negotiation, the bureau will give to the Tribe/Consortium a written explanation of why the program is unavailable for negotiation.”). Confirming that Plaintiff never negotiated Executive Direction, Trust Services, or any programs, services, functions, and activities of the Regional Office, Plaintiff’s sole draft amendment before it cancelled negotiations addressed only the “Osage Agency Branch of Field Operations.” Ex. 17 (Draft Amendment).

Additionally, Plaintiff’s November 2, 2022, letters did not constitute a request to negotiate Executive Direction, Trust Services, or Regional Office programs, services, functions, and activities. The November 2, 2022, Letter only asserted that the nation intended to assume “all branches available at the Osage Agency under Minerals and Mining.” Ex. 21 (Nov. 2, 2022, Minerals Letter). Because Plaintiff did not even request to negotiate Executive Direction, Trust Services, or Regional Office programs, services, functions, and activities, *see* 25 C.F.R. § 1000.173(a) (explaining how to initiate the negotiation phase), no negotiations of those programs

ever took place and the Plaintiff and the Bureau never reached a point where they were “unable to agree.” *See* 25 U.S.C. § 5366(c)(1).

Similarly, the October 23, 2023, Letter at issue also confirms that Plaintiff and the Bureau did not negotiate Regional Office programs, services, functions, and activities or reach a point where they were unable to agree regarding them. A funding agreement must specify the services to be provided under the funding agreement; the functions to be performed under the funding agreement; and the responsibilities of the Indian Tribe and the Secretary under the funding agreement.” 25 U.S.C. § 5363(m)(2); *see also* 25 C.F.R. § 1000.87(a). The October 23, 2023, Letter includes copied position descriptions identifying all duties for various employees of the Regional Office without identifying any specific duties that Plaintiff would assume, the remaining duties Bureau employees would continue to perform, and the relationship between them. *See* Compl. Ex. 1, ECF No. 1-1 at 14–17. Even more egregiously, the October 23, 2023, Letter does not copy and paste *any* duties of Regional Office Executive Direction and Administrative Services employees let alone the specific “portion” of these duties Plaintiff proposes to assume. *See id.* at 17.

Having failed to negotiate with respect to these programs, Plaintiff could not submit a final offer regarding them, and the United States has not waived its immunity to suit for any rejection of a final offer about them.

**D. Plaintiff’s Response to Defendants Further Confirms that Negotiations Were Not Completed**

On November 20, 2023, Defendants explained the deficiencies in Plaintiff’s letter and offered to complete negotiations. The Bureau noted that Plaintiff “never expressed interest in, or requested, the[] negotiation” of programs like Executive Direction and Regional Office programs, services, functions, and activities. Ex. 3 (Nov. 20, 2023, Initial Response) at 2. The Bureau further

noted that Plaintiff failed to complete negotiations with respect to Minerals and Probate and never negotiated Real Estate Services. *Id.* at 1–3.

In response, Plaintiff blandly asserted that it “disagrees with” the Bureau’s “characterization of the history and substance of the negotiations between the Department and the Nation.” But it offered no explanation as to how negotiations were completed with respect to the Field Operations Branch of the Minerals program or the Probate program or how negotiations were even initiated with respect to the remainder of the programs discussed in the October 23, 2023 Letter. Ex. 28 (Dec. 1, 2023, Plaintiff Response). Plaintiff could not do so because it had already admitted to the same extremely limited set of negotiations on which the Bureau relied. *See* Compl. Ex. 1, ECF No. 1-1 at 24.

**III. Even Were the “Final Offer” Requirement Non-Jurisdictional, Plaintiff’s Claim Fails**

In the alternative, if the Court determined that the requirement of a “final offer” in 25 U.S.C. § 5366(c)(6)(A)(iii) were non-jurisdictional, it still would be appropriate to grant judgment to Defendants. As shown above, there is no genuine dispute of material fact that Plaintiff failed to submit a final offer.

\* \* \*



### CONCLUSION

For these reasons, the Court should dismiss the Complaint for lack of subject-matter jurisdiction or, alternatively, grant summary judgment to Defendants.

Dated: September 11, 2024

Respectfully submitted,

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