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)

PLAINTIFF OSAGE NATION'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 5301 *et seq.*, provides that "[t]he United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act." 25 U.S.C. § 5331(a). Defendants' claim that sovereign immunity bars this suit runs headlong into this broad grant of jurisdiction and waiver of immunity.

In 2020 Congress amended ISDA to provide that tribes can make a "final offer" to the Department of the Interior if the parties are unable to agree on the programs or funding that a tribe should receive under a self-governance compact, and thereby require the agency to make a prompt decision that can be appealed to federal court. *See* 25 U.S.C. § 5366(c). Congress made this change to "minimize[e] opportunities for the Secretary to delay compacting or funding," as had happened under the existing regulatory regime. S. Rep. No. 116-34, at 5 (2019).

In 2023 plaintiff Osage Nation (Nation) invoked the new final offer process and then filed this action after the Bureau of Indian Affairs (BIA) rejected the Nation's final offer. Defendants

now seek to evade judicial review by contending that the Nation's final offer was invalid because, under regulations promulgated in 2000 that were superseded by the 2020 statutory amendments, the Nation had not negotiated sufficiently with BIA before it made its final offer. In other words, defendants seek to use the old regulations to neuter the 2020 Congressional enactment that was designed to fix those very regulations! This may be chutzpah, but it is not the law.

STATUTORY BACKGROUND

In 1975 "Congress enacted [ISDA] to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes' members." *Navajo Nation v. U.S. Dep't of the Interior*, 852 F.3d 1124, 1126 (D.C. Cir. 2017). *See* Pub. L. 93-638. The Act provides that tribes may enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs or services that otherwise would have been administered by the federal government. *See id.*, §§ 102(a)(1), 103(a) (codified at 25 U.S.C. § 5321(a)(1)). In practice, most ISDA contracting is conducted with BIA or the Indian Health Service (IHS).

In 1988 Congress enacted a series of amendments to ISDA. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472 (1988). It added a new section 110 to the Act to provide for judicial review of disputes between tribes and the agencies. Subsection (a) of this statute, now codified at 25 U.S.C. § 5331(a), provides:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or

> any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder.

Congress also created a demonstration project that authorized a small group of tribes to negotiate self-governance compacts, rather than standard contracts. *See* Pub. L. 100-472, 102 Stat. 2289 (1988). "The hallmark of these agreements was the unprecedented flexibility of tribal contractors to redesign programs and reallocate funding to suit local needs. In effect, these tribes would receive funds in the contractual equivalent of block grants from the Secretary." Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 32 (2014). This demonstration project included both BIA and IHS.

In 1994 Congress enacted a permanent compacting program for the Department of the Interior (*i.e.*, BIA) by adding a new Title IV to ISDA. *See* Pub. L. 103-413, 108 Stat. 4270 *et seq.* (2000) (codified as amended at 25 U.S.C. § 5361 *et seq.*). Regulations implementing this compacting program, which appear at 25 C.F.R. Part 1000, were promulgated in 2000. *See* 65 Fed. Reg. 78688 (Dec. 15, 2000). Subpart G of those regulations addressed the process for negotiating a self-governance compact or an annual funding agreement. They provided that a tribe submits a written request to initiate negotiations, 25 C.F.R. § 1000.173, which triggers a "negotiation phase." 25 C.F.R. §§ 1000.175, 1000.176. They further provided that if the parties do not reach agreement during the negotiation phase by the mutually agreed to date for completing negotiations, the Tribe and the BIA may each make a "last and best offer" to the other party. 25 C.F.R. § 1000.179. Neither the Title IV statute nor the 2000 regulations made any reference to a "final offer."

Meanwhile, in 2000, Congress expanded permanent compacting to some IHS programs by adding a new Title V to ISDA. *See* Tribal Self-Governance Amendments of 2000, Pub. L. 106-

260, 114 Stat. 713-731 (2000) (codified at 25 U.S.C. § 5381 *et seq.*). Title V included a provision enabling a tribe to submit a "final offer" to culminate negotiations with IHS over the terms or funding of a compact, and require the agency to make an appealable decision:

> (b) FINAL OFFER.—In the event the Secretary and a participating Indian tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian tribe may submit a final offer to the Secretary. Not more than 45 days after such submission, or within a longer time agreed upon by the Indian tribe, the Secretary shall review and make a determination with respect to such offer. In the absence of a timely rejection of the offer, in whole or in part, made in compliance with subsection (c), the offer shall be deemed agreed to by the Secretary.

Pub. L. 106-260, § 507(b), 114 Stat. 721 (2000) (codified at 25 U.S.C. § 5387(b)). This provision did not establish any preconditions for submitting a final offer. Further, the legislative history explained that "the only circumstances" under which the Secretary may reject an Indian tribe's final offer are set forth in subsection (c). H.R. Rep. No. 105-765, at 22 (1998); S. Rep. No. 106-221, at 12 (1999). That subsection, codified at 25 U.S.C. § 5387(c), provides that a final offer may be rejected for four reasons, none of which relates to the status of negotiations between the parties before the final offer was submitted.[1]

Nor do the regulations implementing Title V establish any preconditions for submitting a final offer. These regulations, which were promulgated in 2002 (*see* 67 Fed. Reg. 35334) do not establish any rules covering the "negotiation process," as had the BIA regulations implementing Title IV. They make no mention of a "last and best offer" by each of the parties. And they

[1] Those four reasons for rejecting a final offer are:

> (i) the amount of funds proposed in the final offer exceeds the applicable funding level to which the Indian tribe is entitled under this subchapter;
> (ii) the program, function, service, or activity (or portion thereof) that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe;
> (iii) the Indian tribe cannot carry out the program, function, service, or activity (or portion thereof) in a manner that would not result in significant danger or risk to the public health; or
> (iv) the Indian tribe is not eligible to participate in self-governance under section 5383 of this title.

specifically provide that a tribe may submit a final offer either "[d]uring negotiations to the agency lead negotiator or (2) [t]hereafter to the Director." 42 C.F.R. § 137.132(a) (emphasis added).

In 2020, Congress amended Title IV to incorporate "improvements" from Title V in the BIA compacting process, including a "final offer" provision. H.R. Rep. No. 116-422, at 2 (2020). The Title IV "final offer" mechanism provides in pertinent part:

> (c) INABILITY TO AGREE ON COMPACT OR FUNDING AGREEMENT.—
> (1) FINAL OFFER.—If the Secretary and a participating Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian Tribe may submit a final offer to the Secretary.
> (2) DETERMINATION.—Not more than 60 days after the date of receipt of a final offer by one or more of the officials designated pursuant to paragraph (4), the Secretary shall review and make a determination with respect to the final offer, except that the 60-day period may be extended for up to 30 days for circumstances beyond the control of the Secretary, upon written request by the Secretary to the Indian tribe.

PROGRESS for Indian Tribes Act, Pub. L. 116-180, § 406(c), 134 Stat. 867 (2020) (codified at 25 U.S.C. § 5366(c)). The legislative history explains that Congress wanted to "establish[] clear 'final offer' processes and timelines for situations when DOI and a tribe are unable to agree on particular terms of a compact or funding agreement, or when DOI delays approval unreasonably." H.R. Rep. No. 116-422, at 3 (2020).[2] Congress delineated six reasons for which a final offer can be rejected, none of which relates to the status of negotiations between the parties before the offer was submitted. 25 U.S.C. § 5366(c)(6)(A)(I).[3]

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[2] Similarly, the Senate Report said that "The first title of the bill is intended to mirror the IHS self-governance program in several respects by codifying several regulations, clarifying procedures, and minimizing opportunities for the Secretary to delay compacting or funding." S. Rep. No. 116-34, at 5 (2019).

[3] Those six reasons for rejecting a final offer are:
> (I) the amount of funds proposed in the final offer exceeds the applicable funding level as determined under section 5325(a)(1) of this title;
> (II) the program that is the subject of the final offer is an inherent Federal function or is subject to the discretion of the Secretary under section 5363(c) of this title;

The PROGRESS Act mandates that "each provision of this subchapter [Title IV] and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-governance, and any ambiguity shall be resolved in favor of the Indian Tribe." Pub. L. 116-180, § 406(i), 134 Stat. 869-870 (codified at 25 U.S.C. § 5366(i)). Congress also addressed the issue of regulations to implement the revised Title IV. It directed the Secretary of the Interior "to negotiate and promulgate such regulations as are necessary to carry out this subchapter [Title IV]." *Id.*, § 413(a), 134 Stat. 877 (codified at 25 U.S.C. § 5373(a)). It further provided that "this subchapter [Title IV] shall supersede any conflicting provision of law (including any conflicting regulations)." *Id.*, § 413(d)(2), 134 Stat. 878 (codified at 25 U.S.C. § 5373(d)(2)). Finally, it provided that "[t]he lack of promulgated regulations on an issue shall not limit the effect or implementation of this subchapter." *Id.*, § 413(d)(3) (codified at 25 U.S.C. § 5373(d)(3)). During the time period at issue here, no regulations had yet been promulgated.

On July 15, 2024, after this litigation commenced, proposed regulations were published that completely revamp 25 C.F.R. Part 1000. 89 Fed. Reg. 57524. They include a new Subpart I addressing final offers because "[t]he previous version of title IV included no such provisions, nor does the current rule." 89 Fed. Reg. 57528. The proposed regulations provide that: (1) a tribe "may submit a final offer when it has determined that [it] and the Secretary are unable to agree, in whole or in part, on the terms of a compact [or] funding Agreement, (proposed § 1000.1105, 89 Fed. Reg. 57555); (2) "[t]he document should be separate from the compact, funding agreement

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(III) the Indian Tribe cannot carry out the program in a manner that would not result in significant danger or risk to the public health or safety, to natural resources, or to trust resources;
(IV) the Indian Tribe is not eligible to participate in self-governance under section 5362(c) of this title;
(V) the funding agreement would violate a Federal statute or regulation; or
(VI) with respect to a program or portion of a program included in a final offer pursuant to section 5363(b)(2) of this title, the program or the portion of the program is not otherwise available to Indian Tribes or Indians under section 5321(a)(1)(E) of this title.

or amendment and clearly identified as a 'Final Offer,'" (proposed § 1000.1110(b), 89 Fed. Reg. 57556); and (3) "[a] final offer must contain a description of the disagreement …, the [tribe's] final proposal to resolve the disagreement, including any proposed terms for a compact, funding agreement, or amendment, and the name and contact information for the person authorized to act on behalf of the Tribe," (proposed § 1000.1115, 89 Fed. Reg. 57556).

MATERIAL FACTS

The Nation has a self-governance compact and an associated funding agreement with the BIA pursuant to Title IV of ISDA, 25 U.S.C. §§ 5363, 5364. Under these agreements, the Nation has previously assumed the federal responsibility, and the associated funding, for performing a number of programs, functions, services and activities (PFSAs) relating to real estate and natural resources on the Osage Reservation, which is coterminous with present-day Osage County, Oklahoma. *See* Defendants' Statement of Material Facts (SOMF) ¶¶ 3-4.

Between 2021 and 2023, the Nation and BIA engaged in negotiations about transferring additional PFSAs to the Nation. In 2021, they negotiated about transferring the Probate program and related administrative support to the Nation. SOMF ¶ 9. In 2022, the Nation sought to negotiate for Real Estate Services, Probate, and Minerals programs and related administrative support, SOMF ¶ 12, and during two days of meetings in August 2022 the parties discussed the Probate and Minerals programs and related administrative support. SOMF ¶¶ 13, 17, 18. In September 2022, the Nation requested additional information from BIA including an updated list of inherent federal functions in each branch of the Minerals program, extensive detail about the Osage Agency and the Regional Office, and detail about the Minerals Branch of Field Operations to allow it "to contract all non-inherently federal functions." SOMF ¶ 22. And, in a separate letter in September 2022, the Nation expressed an interest in "assum[ing] as much of the Probate program as possible." SOMF ¶ 23. Thereafter, on September 29 and October 2, 2022, further negotiation sessions were held between

the parties. SOMF ¶¶ 28, 29. On November 2, 2022, the Nation sent a letter to BIA stating that it "intends to assume all branches available at the Osage Agency under Minerals and Mining." SOMF ¶ 36.[4]

On October 23, 2023, the Nation submitted to BIA a letter entitled "Osage Nation Final Offer Amendment to 2020-2025 Funding Agreement," which proposed to amend the funding agreement for the Nation to assume responsibility and related funding for (1) all remaining PFSAs associated with the Osage Agency Office that had not been previously assumed by the Nation, including Realty, Minerals/Mining, Probate, Trust Services, and Executive Direction; and (2) the Nation's full, proportional share of all funding related to Realty, Minerals/Mining, Probate, Trust Services, and Executive Direction PFSAs associated with the Eastern Oklahoma Regional Office. The Nation noted that there was precedent for its proposal to completely close the Osage Agency Office because a number of other tribes had shuttered their single-tribe BIA Agency Office and assumed all of its PFSAs and associated funding. Compl. Ex. 1, ECF No. 1-1.

BIA, by a letter dated November 20, 2023, provided an "initial response" to the Nation's final offer, contending that it was "procedurally premature and otherwise deficient." SOMF, Exh. 3 at 1. The letter requested that the Nation withdraw its proposed amendment to the funding agreement to provide time for further negotiations, while noting that "this correspondence is not a declination"[5] of the final offer "pursuant to 25 U.S.C. § 5366 and is, therefore, not a final agency action entitling the Nation to file suit in federal court." *Id.*

[4] Defendants' motion spends many pages recounting chapter and verse of these negotiations and detailing supposed procedural deficiencies under the regulations in effect before the 2020 amendments to Title IV. But, as discussed below, these regulations were superseded by the final offer provision enacted in 2020 and so the details of the negotiations are immaterial.

[5] Under ISDA, BIA may "decline" a tribal "proposal" under Title I. *See* 25 U.S.C. § 5321(b). However, Title IV provides that BIA may "reject" a "final offer." *See* 25 U.S.C. § 5366(c)(6). Thus, BIA used the wrong terminology here.

The Nation did not withdraw its final offer and, by a 38-page letter dated December 20, 2023, BIA proceeded to "decline to accept or execute" the final offer. First, BIA purported to decline the final offer on the ground that it had not been negotiated by the Nation in accordance with ISDA and so was not a "final offer." BIA noted that "[t]his declination is separate and distinct from the rejection of a final offer under 25 U.S.C. § 5366(c)(6)(A)(i)."[6] SOMF, Exh. 5 at 1. Alternatively, BIA rejected the offer on two statutory grounds: (1) the programs at issue are inherent federal functions in whole or in part, and (2) the requested amount of funding exceeded the amount the Secretary would have otherwise provided for the operation of these programs because the Nation had included certain unfunded and unfilled positions. *Id.* at 9-37.

The Nation then filed this suit seeking declaratory relief that BIA's grounds for rejecting the Nation's final offer are invalid, and declaratory/injunctive relief requiring the BIA to accept the Nation's final offer and transfer the responsibility and related funding for all the PFSAs at issue to the Nation. Defendants have lodged the instant jurisdictional objection in an effort to avoid litigating the merits of these claims.

ARGUMENT

Defendants move, in the alternative, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) or for summary judgment under Fed. R. Civ. P. 56. Defendants contend that that the Nation did not satisfy certain alleged prerequisites for the submission of a final offer and that, consequently, this Court lacks jurisdiction over the Nation's claims because there is no applicable waiver of sovereign immunity. This argument is meritless for the reasons explained below. In addition, defendants contend that they "are entitled to judgment as a matter of law if submitting a 'final offer' is merely an element of Plaintiff's claim." Defs' Mtn. at 1; *see also id.* at 35. However,

[6] In this letter, BIA purports to distinguish its "declination" of the Nation's final offer from its "rejection" of that offer pursuant to the provisions of Title IV.

this non-jurisdictional argument contravenes the Court's order of July 30, 2024, which permitted defendants "to file a motion for summary judgment limited to jurisdictional issues."

I. ISDA Grants Jurisdiction To This Court And Waives Sovereign Immunity Over The Nation's Claims

Defendants' contention that this Court lacks jurisdiction because there is no applicable waiver of sovereign immunity runs headlong into 25 U.S.C. § 5331(a), which provides in unequivocal terms that "[t]he United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act." (emphasis added). A clear waiver of sovereign immunity occurs "'when a statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 49 (2024) (quoting *Financial Oversight and Management Bd. for P. R. v. Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 347 (2023)).

Accordingly, as Judge Bates observed, 25 U.S.C. § 5331(a) provides a "broad waiver of sovereign immunity that gives '[t]he United States district courts ... original jurisdiction over any civil action or claim ... arising under' the ISD[A]." *Three Affiliated Tribes of Fort Berthold Indian Reservation v. U.S.*, 637 F.Supp.2d 25, 34 (D.D.C. 2009) (quoting 25 U.S.C. § 5331(a)). Likewise, Judge Kollar-Kotelly found "no reason why the general principle of sovereign immunity should trump the specific, plain language of the statute at hand [§ 5331(a)]." *Red Lake Band of Chippewa Indians v. U.S. Dept. of Interior*, 624 F.Supp.2d 1, 25 (D.D.C. 2009).

A tribal claim that an agency wrongfully rejected its "final offer" under Title IV or Title V plainly arises under the ISDA. For example, Judge Hogan adjudicated a 2013 case in which IHS contested whether a letter that plaintiff tribe had submitted to it constituted a "final offer" under Title V. *See Manilaq Association v. Burwell*, 72 F.Supp.3d 227 (D.D.C. 2014). He found that

"[t]his Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 25 U.S.C. § 450m–1(a) [now recodified as § 5331(a)] …." *Id.* at 231. Indeed, IHS did not contend in that case (as BIA does here) that the court lacked jurisdiction because the letter was not a final offer.

Similarly, in 2019, Judge Kelly opined that ISDA section 5331(a) "provides federal district courts with original jurisdiction over claims against the Secretary arising under Title V, including a tribe's claim that IHS improperly rejected its final offer." *Fort McDermitt Paiute and Shoshone Tribe v. Azar*, 2019 WL 4711401, at *2 (D.D.C. 2019), *aff'd in part & rev'd in part on other grnds*, 6 F.4th 6 (D.C. Cir. 2021).

Moreover, when Congress added the final offer provision to Title IV in 2020, it explicitly provided that a tribe may challenge a rejection of such an offer in federal court. "If the Secretary rejects a final offer … the Secretary shall … provide the Indian Tribe with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter, and the opportunity for appeal on the objections raised, except that 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). It could not be plainer that Congress has waived sovereign immunity with respect to such tribal suits.

Unlike the Administrative Procedure Act, where agencies can contest whether there has been "final agency action" which triggers the waiver of sovereign immunity in 5 U.S.C. § 704, there is no comparable limitation on the immunity waiver in 25 U.S.C. § 5331. Furthermore, the APA finality requirement relates to agency action whereas the ISDA provides for a "final offer" by a tribe, not the agency. Indeed, as discussed in the next section of this brief, the purpose of the final offer mechanism is to enable a tribe to trigger an agency decision on a tribal proposal, which the tribe can then appeal if it chooses.

Although the "final offer" mechanism has been a part of ISDA (in Title V) since 2000, there is not a single reported case in which the United States has argued that a federal court lacks jurisdiction under ISDA to adjudicate a dispute because the final offer at issue was premature or defective. Defendants' argument here is created out of whole cloth and is meritless. This Court's jurisdiction over the Nation's claims is not dependent on the "validity" of the final offer.

II. The Nation Submitted A Valid Final Offer

In addition, the premise of defendants' motion fails because the Nation submitted a valid final offer. Congress provided that, "[i]f the Secretary and a participating Indian Tribe are unable to agree, in whole or in part, on the terms of a compact or funding agreement (including funding levels), the Indian Tribe may submit a final offer to the Secretary." 25 U.S.C. § 5366(c)(1). Congress did not establish any prerequisites for submitting such an offer. The Nation's final offer – which was explicitly labeled as such and was treated by BIA (in the alternative) as a final offer – plainly qualifies under the statute.

BIA purported to reject the Nation's final offer because "the Nation did not satisfy certain statutory and regulatory prerequisites for the submission of a final offer, namely the initiation of negotiations for certain programs, the completion of negotiations and the submission of a draft funding agreement for others, and the inclusion of information in a draft funding agreement required by ISDEAA and its regulations." SOMF, Exh. 5, at 1. But there are no such prerequisites. They are nowhere to be found in 25 U.S.C. § 5366(c), which establishes the final offer process, or elsewhere in Title IV. Nor are such prerequisites to be found in regulations because, as discussed

above, there are not yet any final regulations which elaborate upon the statutory provisions governing final offers. [7]

As a matter of logic or policy, BIA's contention that the Nation did not negotiate sufficiently before submitting a final offer makes little sense. Tribes that are engaged in productive negotiations with BIA or IHS have no motive to invoke the final offer process. Submission of a final offer indicates that the parties have been unable to reach agreement through negotiation and the tribe has decided it must force the issue. And when the agency rejects the final offer and the tribe proceeds to file suit, there is no question that the parties are at an impasse and that the tribe's invocation of the final offer mechanism was appropriate. As one court has pointed out, "any annual funding agreement that reaches a federal district court has … been 'negotiated.'" *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 220 F.Supp.3d 1190, 1260 (D.N.M. 2016).

It could not the clearer that further negotiations between the parties about the positions at issue in this suit would be fruitless. BIA's objective in insisting upon such negotiations is delay pure and simple. "If there is anything that tribes—and Congress—have learned over the years, it is that the DOI and DHHS can be counted on to resist tribal self-governance, because it requires the transfer of program authority and associated funding from the federal bureaucracy to tribal control." Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 57 (2014). Congress has repeatedly amended ISDA to combat this agency

[7] The regulations governing final offers under Title V of ISDA provide that "[t]he document should be separate from the compact, funding agreement, or amendment and clearly identified as a 'Final Offer,'" 42 C.F.R. § 137.132(b), and that "[a] final offer contains a description of the disagreement between the Secretary and the Indian Tribe and the Indian Tribe's final proposal to resolve the disagreement." 42 C.F.R. § 137.133. The recently proposed draft regulations for final offers under Title IV contain the same requirements. *See* Subpart I: proposed 25 C.F.R. §§ 1000.1110(b), 1000.1115, 89 Fed. Reg. 57556 (July 15, 2024). The Nation's final offer satisfies these requirements, albeit they are inapplicable here.

resistance. For instance, in 25 U.S.C. § 5328, it limited the authority of the Secretaries to promulgate regulations under ISDA after they issued "proposed regulations [which] severely undercut Congress' intent in the original Act and [the 1988] amendments to liberalize the contracting process and to put these programs firmly in the hands of the tribes." S. Rep. No. 103-374, at 14 (1994). Congress complained that "[t]he proposed regulations erect a myriad of new barriers and restrictions upon contractors rather than simplifying the contracting process and freeing tribes from the yoke of excessive federal oversight and control." *Id.*

Likewise, Congress added the judicial review provision to ISDA "to assure that tribes had a strong, effective, and immediate means to obtain agency compliance with the Act's requirements." H.R. Rep. No. 106-477, at 34 (1999). Congress recognized that, "[t]o cure confirmed agency inclinations to block, delay, or minimize tribal contracting and funding, it is essential for the district courts to actively adjudicate de novo contracting and funding issues based on full discovery regarding agency budget and accounting practices, program and staffing decisions, and assertions of non-contractibility." *Id.*

Similarly, Congress amended Title IV in 2020 "to correct the bureaucratic processes and procedures that the Department of the Interior Self-Governance program has imposed which have either discouraged, to some degree, the further compacting of Indian programs within the Department of the Interior [DOI] by Indian tribes or hindered negotiations between [DOI] and Indian tribes for renewing compacts or annual funding agreements." S. Rep. No. 116-34, at 1 (2019). Congress added the final offer provision to Title IV to "establish[] clear 'final offer' processes and timelines for situations when DOI and a tribe are unable to agree on particular terms of a compact or funding agreement, or when DOI delays approval unreasonably." H.R. Rep. No. 116-422, at 3 (2020).

The "final offer" mechanisms in Titles IV and V empower tribes to tee up an issue for a final decision by the agency and potential judicial review. Congress provided a similar mechanism in Title I, which enables a tribe to submit a proposal and requires the agency to approve or disapprove it within 90 days. *See* 25 U.S.C. § 5321(a)(2). None of these provisions contain prerequisites that a tribe must satisfy before it can submit a final offer (Titles IV and V) or a proposal (Title I) and thereby compel an agency decision. To the contrary, these provisions enable a tribe to act at its discretion. Thus, the recently proposed regulations for Title IV provide that a final offer should be submitted when a tribe has determined that the parties are unable to agree:

> **§ 1000.1105 When should a final offer be submitted?**
>
> The Tribe/Consortium may submit a final offer when it has determined that the Tribe/Consortium and the Secretary are unable to agree, in whole or in part, on the terms of a compact, funding agreement, or amendment (including funding levels).

89 Fed. Reg. 57555. There is no provision for the agency to challenge the tribe's determination that a final offer is warranted.

Defendants' argument here is premised on the very regulations that Congress superseded by amending Title IV in 2020, i.e., "the bureaucratic processes and procedures that the Department of the Interior Self-Governance program has imposed." S. Rep. No. 116-34, at 1 (2019). Requiring tribes to satisfy these provisions before submitting a final offer would eviscerate the final offer mechanism, whose purpose is to enable tribes to obtain a prompt, appealable decision from the agency when the parties disagree about the scope or funding of a compact. In addition, application of these regulations would contravene the overall purpose of ISDA to empower tribes and free them from the yoke of agency control.

Moreover, acceptance of defendants' argument would generate pointless collateral disputes about whether or not the substantive dispute between a tribe and BIA is sufficiently ripe that the

tribe can demand a decision from the agency. The final offer provision is meant to flesh out and bring closure to substantive disputes about a compact or funding agreement, not to generate additional procedural disputes about whether a final offer is permissible.

Defendants' argument is a brazen effort to subvert the final offer mechanism that Congress added to Title IV in 2020 for the avowed purpose of "minimizing opportunities for the Secretary to delay compacting or funding." S. Rep. No. 116-34, at 5 (2019). Their contention that judicial review is premature here because the Nation did not satisfy all the bureaucratic processes and procedures that the agency previously imposed neatly illustrates why Congress enacted the final offer mechanism in the first place, i.e., to bring an end to agency obstruction. Their argument is specious and should be rejected.

CONCLUSION

Section 5331(a) of ISDA invests federal courts with jurisdiction and waives sovereign immunity for any civil action or claim arising under ISDA, including challenges to the denial of a final offer. Furthermore, defendants' jurisdictional argument is predicated on a meritless challenge to the validity of the Nation's final offer. For both of these reasons, defendants' motion to dismiss or, in the alternative, for summary judgment should be denied.

Dated: September 25, 2024

Respectfully submitted,

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