

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

THE NORTHERN CHEYENNE TRIBE,
Plaintiff,

vs.

No. CV-24-52-BLG-SPW-TJC

THE UNITED STATES OF AMERICA;
the UNITED STATES DEPARTMENT
OF THE INTERIOR; the BUREAU OF
INDIAN AFFAIRS; DEBRA
HAALAND, in her official capacity as
Secretary of the Interior; DARRYL
LACOUNTE, in his official capacity as
Director of the Bureau of Indian Affairs;
LENORA NIOCE, in her official
capacity as BIA Special Agent in
Charge/Approving Official;
Defendants.

COMPLAINT

Plaintiff, by and through the undersigned attorneys, for its Complaint against the Defendants, hereby alleges as follows:

1. This is an action by Plaintiff, the Northern Cheyenne Tribe (“Tribe”), seeking relief against the United States of America due to the Bureau of Indian

Affairs’ (“BIA” or “Bureau”) violation of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.* (“ISDEAA”) and its implementing regulations at 25 C.F.R. Part 900.

2. Defendants violated the ISDEAA when they declined to enter into a self-determination contract with Plaintiff that would allow Plaintiff to assume operation of the BIA Office of Justice Services’ (“BIA OJS”) law enforcement Program Management function within Plaintiff’s Reservation.

3. Defendants failed to negotiate in good faith with Plaintiff and failed to adequately support the decision to decline Plaintiff’s contract proposal, in contravention of the ISDEAA and its implementing regulations.

4. Plaintiff seeks a declaration by this Court that Defendants violated the ISDEAA and an injunction ordering Defendants to rescind the declination and award Plaintiff’s proposed contract.

PARTIES

5. Plaintiff is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987 (codified at 25 U.S.C. § 5123). The Tribe possesses all legal rights afforded to federally recognized

Indian tribes, including the right to enter into self-determination contracts under 25 U.S.C. §§ 5321(a)(1) and 5304(e).

6. The Tribe governs and occupies the Northern Cheyenne Reservation in Montana.

7. Defendant United States, acting by and through the Department of the Interior and the Bureau of Indian Affairs, as a matter of federal statutory, regulatory and common law, is charged with carrying out trust and statutory duties and responsibilities to provide law and order within the Tribe's Reservation.

8. Defendant United States Department of Interior ("DOI") is an executive department of the United States Government organized and existing under 5 U.S.C. § 101, as amended. Defendant DOI is responsible for, among other things, entering into self-determination contracts with Indian tribes to administer DOI's programs, functions, services and activities under 25 U.S.C. § 5321 and the supervision, management, direction, and oversight of Defendant Bureau of Indian Affairs, which is a federal agency subsidiary of the DOI, pursuant to the provisions of 43 U.S.C. § 1457(10).

9. Defendant Bureau of Indian Affairs is a subsidiary bureau within DOI. Defendant BIA is responsible for administering federal Indian policy; fulfilling its

federal trust responsibilities to American Indians, tribal governments, and Alaska Natives; and promoting tribal self-determination and self-governance.

10. Defendant Debra Haaland, or her successor, is the Secretary of the Department of Interior of the United States of America (“Secretary”) and is being sued in her official capacity as an officer and agent of the United States. The Secretary, as head of an executive department, reports directly to the President of the United States, *see* 43 U.S.C. § 1451, and is responsible for directing and supervising all operations and activities of DOI, including entering into self-determination contracts with tribes under 25 U.S.C. §§ 5321 and 5304(i).

11. Defendant Darryl LaCounte, or his successor, is the Director of the Bureau of Indian Affairs. As Director, he provides direction and coordination of the Bureau’s responsibilities in the implementation of the ISDEAA. Indian Affairs Manual, Part 13, Ch.2, § 1.5.A.

12. Defendant Lenora Nioce or her successor is a Special Agent in Charge within the Bureau’s Office of Justice Services, District V, and was the Bureau official designated as the “Approving Official” for the Tribe’s ISDEAA proposal, and issued the contract declination and related correspondence that form the basis of this Complaint. Approving Officials are responsible for, among other things,

determining the contractibility of Bureau programs, services and functions or portion thereof; identifying potential declination and/or trust protection issues in contract proposals; approving or declining the contract/grant proposal pursuant to statute and requirements outlined in 25 C.F.R. Part 900; ensuring program objectives are consistent within authorizing legislation and appropriation language; and providing technical assistance to Indian tribes and tribal organizations in support of self-determination contracting. Indian Affairs Manual, Part 13, Ch. 2, § 1.5.F.

JURISDICTION

13. This Court has jurisdiction over the subject matter under 28 U.S.C. §§ 1331, 1361 and 1362 because this is a civil action arising under the laws of the United States, including 25 U.S.C. § 5321, and is brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, to compel Defendants to perform duties owed to Plaintiff. Under 25 U.S.C. §§ 5321(b)(3) and 5331, the Court has jurisdiction over an action initiated in federal district court by a tribe seeking a hearing on the Secretary's decision to decline an ISDEAA contract proposal.

14. The United States has waived its sovereign immunity under 25 U.S.C. § 5331 because this is an action in federal court seeking immediate injunctive relief to reverse a declination finding under 25 U.S.C. § 5321(a)(2) and to compel the Secretary of the Interior to award and fund a self-determination contract.

VENUE

15. Venue is proper in the District of Montana under 28 U.S.C. §§ 1391(b) and (e) because an officer or employee of the United States is a defendant and a substantial part of the events or omissions giving rise to the claim occurred in this District.

APPLICABLE LAW

16. In enacting the ISDEAA, Congress recognized the United States' obligation to assure maximum Indian participation in the direction of federal services to Indian communities, and its commitment to an orderly transition from federal domination of Indian services to effective and meaningful participation by Indian tribes in the planning, conduct and administration of services to Indian communities. 25 U.S.C. § 5302.

17. The Secretary is directed, upon the request of any Indian tribe, to enter into a self-determination contract to plan, conduct and administer programs or

portions thereof for the benefit of Indians because of their status as Indians, without regard to the agency or office of DOI within which the program or service is performed. 25 U.S.C. § 5321(a)(1).

18. The programs, functions, services, or activities that are contracted under 25 U.S.C. § 5321(a)(1) shall include administrative functions of DOI that support the delivery of services to Indians, without regard to the organizational level within the Department that carries out such functions. *Id.*

19. The Secretary is required, at all times, to negotiate self-determination contracts in good faith to maximize the policy of tribal self-determination and carry out the ISDEAA in a manner that maximizes the policy of tribal self-determination. 25 U.S.C. § 5321(f).

20. The amount of funds provided under the terms of self-determination contracts shall not be less than the Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within DOI at which the program, including supportive administrative functions that are otherwise contractable, is operated. 25 U.S.C. § 5325(a).

21. Once a tribe submits a proposal for a self-determination contract, the

Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that:

21.1 the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory, 25 U.S.C. § 5321(a)(2)(A) and 25 C.F.R. § 900.22(a);

21.2 adequate protection of trust resources is not assured, 25 U.S.C. § 5321(a)(2)(B) and 25 C.F.R. § 900.22(b);

21.3 the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract, 25 U.S.C. § 5321(a)(2)(C) and 25 C.F.R. § 900.22(c);

21.4 the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under 25 U.S.C. § 5325(a), 25 U.S.C. § 5321(a)(2)(D) and 25 C.F.R. § 900.22(d); or

21.5 the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services,

or activities because the proposal includes activities that cannot lawfully be carried out by the contractor. 25 U.S.C. § 5321(a)(2)(E) and 25 C.F.R. § 900.22(e).

22. The Secretary may only decline a contract proposal for the reasons listed in 25 U.S.C. § 5321(a)(2) and 25 C.F.R. § 900.22. 25 C.F.R. § 900.24.

23. The Secretary shall approve any severable portion of a contract proposal that does not warrant a declination finding described under 25 U.S.C. § 5321(a)(2); thus, if a tribe submits a contract proposal that proposes a level of funding that is in excess of the applicable level determined under 25 U.S.C. § 5325(a), the Secretary shall approve the contract with a level of funding authorized under section 5325(a). 25 U.S.C. § 5321(a)(4).

24. Under 25 U.S.C. § 5321(b), if the Secretary declines a contract proposal, the Secretary is required to state any objections in writing to the tribe; provide assistance to the tribe to overcome the stated objections; and provide the tribal organization 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, under such rules and regulations as the Secretary may promulgate, except that the tribe may, in lieu of filing such appeal, exercise the option to initiate an action in a federal district court and proceed directly to such

court pursuant to 25 U.S.C. § 5331(a).

25. In the federal district court, tribes may seek appropriate relief including money damages; injunctive relief against any action by an officer of the United States or any agency thereof contrary to the ISDEAA or its implementing regulations; or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under the ISDEAA or its implementing regulations, including immediate injunctive relief to reverse a declination finding under 25 U.S.C. § 5321(a)(2) or to compel the Secretary to award and fund an approved self-determination contract. 25 U.S.C. § 5331.

26. The ISDEAA is to be liberally construed for the benefit of the tribe participating in self-determination, and all ambiguity shall be resolved in favor of the tribe. 25 U.S.C. § 5321(g).

ALLEGATIONS

27. The Northern Cheyenne Indian Reservation (“Reservation”) is located in present-day southeastern Montana, and is approximately 444,000 acres in size with 99% tribal ownership. The Reservation is located in the counties of Big Horn and Rosebud. Tribal headquarters and BIA’s local law enforcement office are located in Lama Deer, Montana, within the Reservation.

28. The United States is responsible for providing law enforcement services on the Tribe's Reservation.

29. The United States has not provided adequate law enforcement services to the Tribe for several years. The Tribe has attempted to work with BIA OJS and DOI to address the issues, including a lack of qualified officers assigned to the Reservation, inadequate criminal investigations by BIA OJS and inadequate dispatching services by BIA OJS.

30. The Tribe submitted a proposal to contract the Reservation's criminal investigation function from the Bureau under the ISDEAA in August 2020. Defendants awarded that contract in February 2022, after the Bureau initially declined the proposal and the Tribe sued the Bureau alleging that the declination was unlawful under the ISDEAA. The litigation ended with a settlement agreement requiring the Bureau to award the contract to the Tribe.¹

31. On December 7, 2020, the Tribe's legislative body, the Tribal Council, adopted Resolution No. DOI-044 (2021), authorizing submission of an ISDEAA

¹ Plaintiff seeks no relief regarding the criminal investigations contract and provides this information only as background.

contract proposal to assume the Reservation's Program Management and Telecommunications law enforcement functions from the Bureau. The Telecommunications function encompasses operating the BIA OJS dispatch center in Lane Deer, which is a public safety answering point designated to receive 911 calls and route them to emergency personnel, including BIA OJS police officers.

32. On January 14, 2021, the Tribe's President sent a letter to BIA OJS requesting technical assistance and information necessary to develop the contract proposal under 25 U.S.C. § 5322(d), including the "Secretarial amounts" for all law enforcement programs operated by BIA at Northern Cheyenne and "an explanation how the Bureau manages funding shortfalls within the programs[.]" (Filed herewith as Exhibit 1.)

33. The Bureau responded via letter on February 18, 2021, stating that the Fiscal Year ("FY") 2021 Secretarial amounts for Telecommunications and Program Management were \$271,127 and \$321,049, respectively. (Filed herewith as Exhibit 2.) It also stated that BIA OJS

has managed budget shortfalls by shifting resources when needed. The BIA OJS's appropriation is structured in a manner that gives the BIA flexibility to shift resources to a particular program to address program shortfalls. As an example, when BIA OJS has vacant positions, that

creates a budgetary savings that can be utilized to support the overall public safety program operations within the organization.

Ex. 2 at 1.

34. The Tribe adopted a second authorizing resolution (No. DOI-177 (2021)) in August 2021, and submitted to the Bureau a letter of intent to contract the Telecommunications and Program Management functions on September 1, 2021. The Tribe again requested the funding budgets for each program component, for FYs 2021 and 2022.

35. The Bureau responded via letter on September 8, 2021, acknowledging the Tribe's intent "to submit a proposal to contract that portion of the Program Management and Telecommunications program, functions, services and activities funding attributed to the provision of [the] Criminal Investigations component[.]" (Filed herewith as Exhibit 3.)

36. The Tribe corrected BIA OJS via letter on September 16, 2021, stating that the Tribe intended to assume responsibility for the entire Program Management and Telecommunications functions, not just those portions attributable to Criminal Investigations.

37. On November 30, 2021, the Bureau responded via letter that the FY 2021 Secretarial amounts for the Telecommunications and Program Management

components were \$269,871 and \$319,562, respectively. (Filed herewith as Exhibit 4.) The Bureau did not explain why these amounts differed from its Feb. 18, 2021 letter.

38. The Bureau did not provide FY 2022 Secretarial amounts in its Nov. 30, 2021 letter, because at that time “federal agencies under the Department of the Interior (DOI) are operating under a congressional continuing resolution (CR) for FY2022 with limited funding available; therefore BIA OJS cannot provide actual figures for FY2022.” *Id.* at 1.

39. Attached to the Nov. 18, 2021 letter were “Budget Data” spreadsheets for Telecommunications and Program Management. The Telecommunications spreadsheet indicated that while the “Program Fund Allocation” was \$269,871, the “Funding Expenditures” were \$381,409, suggesting that the Bureau actually spent \$381,409 on the Telecommunications program in FY 2021 (\$111,538 over the allocated budget). *Id.* at 3.

40. The Budget Data spreadsheet for Program Management indicated that actual Funding Expenditures were \$83,480 out of the allocated \$319,562 in FY 2021, leaving \$236,082 in unspent funds. *Id.* at 4.

41. On July 25, 2022, the Tribe submitted a self-determination contract proposal to BIA OJS to assume the law enforcement Telecommunications and Program Management functions. (Filed herewith as Exhibit 5.) The Telecommunications contract proposal was for assuming operation of the law enforcement dispatch/call center in Lane Deer, with a proposed budget of \$528,467.49.² The Program Management contract proposal included a budget of \$360,333.66, which the Tribe proposed to use for funding two positions within that function at Lane Deer: an office manager and a supervisory position. *See* Ex. 5 at PDF page 29.

42. The Tribe intended to use the Program Management funding to pay the salaries of a supervisory criminal investigator and an office manager for the Tribe's Criminal Investigation Services, thus freeing up some contract funding within the Criminal Investigation function to hire a third investigator. The supervisor and

² As explained *infra*, the Telecommunications portion of the proposal was approved by Defendants and Plaintiff makes no claims and seeks no relief regarding that proposal and contract award at this time.

office manager would be shared by the Telecommunications dispatch center and Criminal Investigations (“CI”) program.

43. On August 12, 2022, BIA OJS wrote to the Tribe identifying three “[p]otential [d]eclination [i]ssues under 25 U.S.C. § 5321(a)(2)” raised by the Tribe’s contract proposal, two of which are relevant to this Complaint. (Filed herewith as Exhibit 6.) First, BIA OJS observed that

[t]he Tribe’s proposal includes a budget request for funding direct operation of the Telecommunications program in the amount of \$528,467.49. In accordance with the BIA OJS FY2022 base funding allocation (Secretarial level amount) for the BIA OJS Northern Cheyenne Tribe, the full-year funding amount allocated for BIA OJS to provide telecommunications/dispatch functions for our direct services law enforcement uniform patrol function is \$269,871.

Id. at 1-2. BIA OJS referenced its Nov. 30, 2021 letter to support its observation. Because the Tribe’s requested amount was in “excess of the applicable funding level for the contract pursuant to 25 U.S.C. § 5321(a)(2)(D), the Secretary cannot approve the Tribe’s proposal to fund the Telecommunications program for \$528,467.49.” *Id.* at 2. To resolve this issue, BIA OJS requested “a revised budget and funding request for \$269,871[.]”

44. Second, BIA OJS observed that “[t]he Tribe’s proposal includes a budget request for funding direct operation of Program Management/Supervisory

Criminal Investigator components in the amount of \$360,333.66. Included in the proposal is the Tribe's planned use of Program Management funding for a Supervisory Criminal Investigator (listed under Program Management Component) and Office Manager." *Id.* at 2. BIA OJS then identified "two issues regarding this request."

44.1 The first issue was that "[a] Supervisory Criminal Investigator position is not funded with Program Management dollars, as Criminal Investigations is a direct operation function that is under the direct Criminal Investigations funding appropriated dollars. The Tribe has already contracted and received all funding the Tribe is entitled to receive for Criminal Investigations operations; therefore, this would not be a contractible component under Program Management funding." *Id.*

44.2 The second issue was that

[t]he Tribe already received the share of the BIA OJS Program Management funding (\$76,632) related to the Criminal Investigations function when the Criminal Investigations contract was issued/awarded. The remaining amount of the BIA OJS Northern Cheyenne Agency Program Management funding, which totals \$242,930 (\$319,562 was the amount provided in the November 30, 2021 LOI letter, less the amount issued for your CI contract), is the funding to provide administrative support for the uniform patrol operations, juvenile corrections, and dispatch operations at the Northern Cheyenne Agency. The portion of this funding that supports dispatch operations may be available to the

Tribe in its proposal to contract dispatch operations. The BIA OJS is available to discuss apportioning the Program Management funding to determine the amount that goes to dispatch operations and may be contractible by the Tribe in its proposal.

Id.

45. The Tribe responded to BIA OJS on August 30, 2022. (Filed herewith as Exhibit 7.) Regarding the first declination issue over the Telecommunications budget (§ 43 above), the Tribe pointed out that BIA OJS's

November 30, 2021 letter provided \$269,871 as the "FY2021 Secretarial amount," and indicated that "BIA OJS cannot provide actual figures for FY2022." However, the "Budget Data" attachment to your November 30, 2021 letter indicates that BIA OJS actually spent \$381,409 for the telecommunications function in FY2021. According to the same budget information, \$269,871 is not enough to cover salaries for the employees in the telecommunication program, let alone other operating costs. Under 25 U.S.C. § 5325(a), the amount of funds provided under the terms of self-determination contracts "shall not be less than the . . . [S]ecretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract..." If BIA OJS reprograms money from other budget areas to supplement the Telecommunications base allocation, then the same option (and funding) must be made available to the Tribe. **Thus, at minimum, the Secretarial amount should be \$381,409.**

Ex. 7 at 2 (emphasis in original).

46. The Tribe's letter further argued that

to the extent that there were vacant positions and BIA OJS engaged in shifting "budgetary savings" resulting from those vacancies, to other

programs to “support the overall public safety program operations,” ..., the amounts reflected in your Nov. 30, 2021 letter may be too low. The Tribe intends to fully staff the Telecommunication function and at least two vacancies existed in the program in April 2021 (per attached organizational charts). **Please explain if the \$269,871 amount includes funding for all 6 telecommunications operators/dispatchers included in the April 2021 organizational chart.**

Id. at 3 (emphasis in original) (quoting Ex. 2, 2021-02-18 OJS to Tribe).

47. The Tribe’s letter continued:

Given BIA’s position that the Telecommunication function is “critical to carrying out the law enforcement patrol functions,” BIA must ensure that the Secretarial amount is sufficient for the Tribe to actually operate the program. Congress envisioned “the Secretarial amount as a floor; tribes are able to negotiate for higher levels of funding.” *Seneca Nation of Indians v. United States HHS*, 945 F. Supp. 2d 135, 143 (D.D.C. 2013) (citing 25 U.S.C. § 5325(a)(3)(C)). The Secretarial amount “may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out [the ISDEAA].” 25 U.S.C. § 5325(b)(5). It is the Tribe’s position that it cannot operate the Telecommunications function at the level required by BIA OJS and in accordance with best law enforcement practices, for \$269,871 annually. **The Tribe implores BIA OJS to negotiate in good faith regarding funding amounts so that the Tribe has the opportunity to provide high-quality dispatch services.**

Id. (emphasis in original).

48. Regarding the first declination issue relating to the Program Management proposal (¶ 44.1 above), the Tribe explained that organization charts provided to the Tribe by BIA OJS on April 21, 2021 identified a Supervisory

Criminal Investigator position within the Northern Cheyenne Law Enforcement program, in addition to 2 criminal investigators, and the Tribe was “simply seeking to contract that Supervisory Criminal Investigator position now as it was not included in the CI program funding. **If it is BIA’s position that the Supervisory Criminal Investigator position is not funded through Program Management, please explain how this position is funded.**” *Id.* at 4 (emphasis in original).

49. Regarding the second declination issue relating to the Program Management proposal (§ 44.2 above), the Tribe requested “a revised budget for FY2022 Program Management demonstrating how the budget is allocated between all law enforcement functions at Northern Cheyenne” in light of BIA OJS’s position that only a portion of Program Management is contractible based on the percentage of the Program Management budget used to support the Telecommunication function. *Id.* at 5. The Tribe clarified that

it was the Tribe’s intent to contract all the Program Management function and its associated budget and positions. According to organization charts that you provided on April 21, 2021 ..., there is only one LEA position in the entire Law Enforcement program; if BIA OJS already transferred that position and associated funding into the CI program, then all that remains is the operational funding which the Tribe would like to contract to provide program support to the CI and Telecommunications functions. If Program Management includes supporting the patrol division, then the Tribe wishes to contract that as

well. Please provide a complete and up-to-date scope of work for the BIA OJS Program Management function so that the Tribe can update its proposal, as well as an updated organization chart showing what positions, if any, are funded by Program Management dollars.

Id. (emphases in original).

50. On October 6, 2022, BIA OJS responded via letter that it agreed to provide the Tribe with \$528,467.49 in funding requested to operate the Telecommunications functions. (Filed herewith as Exhibit 8.) BIA OJS did not disclose the source of the additional funding.

51. In that same October 6, 2022 letter, BIA OJS informed the Tribe that the Tribe could not use Program Management funding to fund a Supervisory Criminal Investigator position because there is “no funding appropriated or allocated within the BIA OJS Program Management line item that funds a Criminal Investigator or Supervisory Criminal Investigator.” Ex. 8 at 2.

52. At the same time, BIA OJS reasserted that the portion of Program Management funding available to support dispatch operations “may be available to the Tribe in its proposal to contract dispatch operations.” *Id.* The Tribe requested a budget for FY 2022 demonstrating how Program Management funding is allocated between all law enforcement functions at Northern Cheyenne in its August 30, 2022

letter and verbally during technical assistance calls with BIA OJS on October 19, 2022 and November 2, 2022. The Tribe never received a response to that request.

53. On December 16, 2022, BIA OJS stated via letter that only \$72,525.51 was allocated to the Program Management function and that amount “is not available to the Tribe under the ISDEAA, as it funds the BIA OJS administrative support staff person for the remaining BIA OJS Northern Cheyenne law enforcement programs that the BIA OJS provides the Tribe through direct service.” (Filed herewith as Exhibit 9.) BIA OJS indicated that sometime between August 2022 and October 2022, the FY 2022 Program Management funding was increased to \$325,829, but then BIA OJS “re-allocated” \$253,303.49 of the Program Management budget to the Telecommunications budget “to meet the Tribe’s requested funding amount [for the Telecommunications program].” *Id.*

54. On February 6, 2023, the Tribe confirmed to BIA OJS via letter that the Tribe intended to contract the available administrative support staff position and funding for the Program Management function, *i.e.* the Law Enforcement Assistant position. (Filed herewith as Exhibit 10.)

55. BIA OJS responded via letter on March 23, 2023 that

the change in the [S]ecretarial amount for Program Management funding was a direct result of BIA OJS working to satisfy the Tribe's request for additional funds, while ensuring that the agency can continue to carry out the remaining direct service program management functions. Through our re-programming authority, we can shift funds between our direct service programs.... We therefore re-programmed the available funding from Program Management to Telecommunications/Dispatch to meet the Tribe's requested funding level for the Dispatch function. After reprogramming the Program Management funding to meet the Tribe's funding request for the Dispatch function, the amount that remains in Program Management funding—\$72,525.51—is not available to the Tribe under the [ISDEAA], as it funds the BIA OJS administrative support staff person for the remaining BIA OJS Northern Cheyenne law enforcement programs that the BIA OJS provides the Tribe through direct service[.]

(Filed herewith as Exhibit 11.)

56. This position for a BIA OJS administrative support staff person for the remaining BIA OJS Northern Cheyenne law enforcement functions is currently vacant and the Tribe believes it has been vacant for several years.

57. On August 21, 2023, BIA OJS formally declined the Tribe's proposal to contract the Program Management function. The declination reasons were that under 25 U.S.C. § 5321(a)(2)(A), the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; under section 5321(a)(2)(D), the amount of funds proposed under the contract is in excess of the applicable funding level for the contract; and under

section 5321(a)(2)(E), the Program Management proposal “is beyond the scope of the ISDEAA.” In the same letter, the Tribe’s Telecommunications contract proposal was approved. (Filed herewith as Exhibit 12.)

58. On September 19, 2023, the Tribe sent BIA OJS a letter requesting an informal conference regarding the declination under 25 C.F.R. § 900.154.

59. The informal conference occurred on October 18, 2023 in Billings with Eric Wilcox, the Deputy Regional Director for BIA’s Eastern Region, as the hearing officer. Tribal representatives presented the Tribe’s arguments that the declination was unlawful because (1) BIA OJS’s declination reasons were insufficient under 25 U.S.C. § 5321(a)(2), and (2) BIA OJS’s conduct during the negotiations lacked good faith.

60. On November 3, 2023, the Tribe received the Hearing Officer’s written recommendation. (Filed herewith as Exhibit 13.) The “report of the Informal Conference” section is a single paragraph that fails to include most of what the Tribe presented at the October 18 conference. The decision acknowledges the Tribe’s arguments that BIA OJS did not negotiate in good faith but fails to address the Tribe’s argument that the declination itself was unlawful because the Law Enforcement Assistant position is not exempt from ISDEAA contracting and

because BIA OJS's August 21 declination letter failed to adequately support the declination decision. The decision concluded that BIA OJS properly declined the Tribe's Program Management proposal, and encouraged the Tribe and BIA OJS "to work together to develop a long-term strategy to meet the Northern Cheyenne's community law enforcement needs." Ex. 13 at 2.

The Bureau's Unlawful Declination of the Tribe's Proposal

61. Each of the reasons supplied by BIA for declining the contract violated the ISDEAA.

62. First, BIA's declination letter, Ex. 12 at 2-3, cites 25 U.S.C. § 5321(a)(2)(A) as a declination reason in its introductory paragraph, but no further explanation of this declination reason is provided in the letter. Thus, to the extent BIA relied upon § 5321(a)(2)(A) for the declination, it failed to support it with any rationale as required by 25 U.S.C. § 5321(a)(2).

63. Second, BIA's declination under 25 U.S.C. § 5321(a)(2)(D), *see* Ex. 12 at 3, ignores the Tribe's subsequent modification of the proposal because of technical assistance provided by BIA OJS. After BIA OJS insisted that only \$72,525.51 was available for Program Management and that the Tribe could not contract that amount since it funds an administrative support staff person for BIA

OJS, the Tribe modified its proposal to contract the available position and funding. Thus, the objection to the funding amount requested under 25 U.S.C. § 5321(a)(2)(D) was resolved (and documented in the Tribe's Feb. 6, 2023 letter to BIA OJS (Ex. 10)).

64. Third, BIA's position that the administrative support staff position cannot be contracted is not a lawful declination rationale under 25 U.S.C. § 5321(a)(2)(E). BIA OJS stated that "[t]his is a function that cannot be transferred to another BIA OJS Agency nor can it be completed by the Tribe due to the BIA LEA function for BIA law enforcement is specific to Federal Employees. The funding for this function cannot be separated out as it would not provide enough funding for the requirements to be carried out on either the Tribal or BIA OJS side." Ex. 12 at 3. Per the statute, this declination reason only applies if the "proposal includes activities that cannot lawfully be carried out by the contractor." 25 U.S.C. § 5321(a)(2)(E) (emphasis added). BIA OJS cites no law prohibiting the Tribe from carrying out the Program Management function, which BIA claims is limited to employing a single Law Enforcement Assistant.

65. The ISDEAA must be interpreted in favor of contractibility of programs. *See* 25 U.S.C. § 5324(p). Tribes are eligible to contract for any program

or function operated by the Secretary of the Interior for the benefit of tribes. Section 5321(a) provides that “[t]he administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.”

66. Certain “inherent federal functions” that may only be performed by Federal employees are subject to exclusion from the scope of a self-determination contract. *See* 25 U.S.C. §§ 5361(6) and 5363(k). If BIA OJS believes that the Program Management program, and specifically a Law Enforcement Assistant position, involves an “inherent federal function,” BIA and DOI failed to justify that determination in either the declination letter (Ex. 12) or the informal conference report (Ex. 13).

67. Fourth, BIA stated an additional reason for its declination is that “[t]he funding for this function cannot be separated out as it would not provide enough funding for the requirements to be carried out on either the Tribal or BIA OJS side.” Ex. 12 at 3. This simply raises additional questions about whether BIA OJS has been honest with the Tribe about the true “Secretarial amount” for Program Management. If \$72,525.51 is insufficient for BIA OJS to carry out its Program Management functions, and BIA OJS intends to supplement that amount with funds

from other programs and sources, then the Tribe is entitled to contract all that BIA OJS actually spends on the Program Management function. *See* 25 U.S.C. § 5325(a)(1).

68. Under 25 U.S.C. § 5321(f), Defendants were required to, at all times, negotiate with the Tribe in good faith and carry out the ISDEAA in a manner that maximizes the policy of Tribal self-determination. Defendants failed to do so.

69. BIA OJS's intentional defunding of the Program Management function, and refusal to contract the remaining administrative position within the Program Management function after that defunding, are unlawful under the ISDEAA.

70. Since early 2021, the alleged Secretarial amount of the Program Management function has declined as follows:

Feb. 18, 2021	\$ 321,049	Ex. 2
Nov. 30, 2021	\$ 319,562	Ex. 4
Aug. 12, 2022	\$ 242,930	Ex. 6
<i>Circa</i> Sept./Oct. 2022	\$ 325,829	Ex. 9
Dec. 16, 2022	\$ 72,525.51	Ex. 9

BIA OJS admitted that, sometime between August and October 2022, the FY 2022 Program Management funding was increased to \$325,829 but the Tribe was not informed until after BIA OJS “re-allocated” \$253,303.49 of the Program Management budget to the Telecommunications budget “to meet the Tribe’s requested funding amount [for the Telecommunications program].” Ex. 9. According to BIA OJS, \$76,632 of the OJS Program Management funding was shifted to the Criminal Investigations program and issued to the Tribe under its 638 contract for Criminal Investigations. Ex. 6 at 2. At the same time, BIA OJS has taken the position that the Tribe cannot use Program Management dollars to fund a Supervisory Criminal Investigator position because it would impermissibly shift Program Management program dollars to the Criminal Investigations program. *Id.*

71. BIA OJS apparently failed to spend the full budgeted Program Management amount in 2021, *see* Ex. 4, leaving \$236,082 in program savings unaccounted. By BIA OJS’s own admission, if the Tribe had contracted the Program Management function, then the Tribe could reallocate any program funding savings to other programs operated by the Tribe. During the October 18, 2023 informal conference, BIA OJS also admitted that if BIA OJS needed additional funding to pay salaries within its direct service Uniform Patrol division

at Northern Cheyenne, it could take funding from Program Management to pay those salaries. The Tribe is only seeking the same option: to be awarded the Program Management funding so the Tribe can reallocate that funding to positions that support its other contracted law enforcement functions.

CLAIM I: DECLARATORY RELIEF (25 U.S.C. §§ 5321, 5324, 5325,
5331 and 25 C.F.R. Part 900)

1. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1 through 71 above.

2. Under 25 U.S.C. § 5321, 25 C.F.R. § 900.22 and applicable law, Defendants could only decline the Tribe's self-determination contract proposal for one of the five reasons set forth in section 5321 and must adequately support any declination reason with clear and convincing evidence. Defendants failed to adequately support their declination decision and declined the Tribe's proposal for reasons not allowed by section 5321.

3. Defendants failed to negotiate with the Tribe in good faith as required by section 5321(f).

4. The Tribe asks the Court to declare that the Defendants violated the ISDEAA and its implementing regulations through the foregoing actions.

5. The Tribe asks the Court to declare that the Tribe is entitled to have its contract proposal approved.

6. The Tribe asks the Court to declare the Secretarial amount for this contract to be at least \$325,829 annually.

CLAIM II: MANDAMUS RELIEF (28 U.S.C. § 1361; 25 U.S.C. § 5331)

1. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1 through 71 above.

2. Under the statutes, regulations and applicable law, Defendants have a non-discretionary duty to approve the Tribe's self-determination contract proposal unless one of the five declination reasons set forth in 25 U.S.C. § 5321(a)(2) applies.

3. Defendants failed to perform this nondiscretionary duty to Plaintiff. Defendants improperly declined the Tribe's proposal for reasons not allowed under the ISDEAA and/or failed to adequately support the declination of the Tribe's proposal by clear and convincing evidence.

4. Defendants failed to perform this nondiscretionary duty by failing to approve the Tribe's proposal under 25 U.S.C. § 5321(a)(4).

5. Plaintiff asks the Court to order Defendants to approve Plaintiff's contract proposal and award the contract.

CLAIM III: INJUNCTIVE RELIEF (25 U.S.C. § 5331; Fed. R. Civ. P. 65)

1. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1 through 71 above.

2. Plaintiff asks the Court to order Defendants to reverse the August 21, 2023 declination and enter into a self-determination contract with the Tribe with an annual funding amount of at least \$325,829, subject to any alteration in the Tribe's proposal agreeable to the Tribe under 25 U.S.C. § 5321(a)(4).

CLAIM IV: EQUITABLE RELIEF

1. The Tribe realleges and incorporates by reference the allegations contained in paragraphs 1 through 71 above.

2. The Tribe seeks equitable relief that it may be entitled to receive under applicable law.

PRAYER FOR RELIEF

WHEREFORE, the Tribe respectfully requests that the Court:

1. Declare Defendants in violation of the ISDEAA and its implementing regulations for improperly declining Plaintiff's contract proposal;

2. Order Defendants to enter into a self-determination contract with the Tribe;
3. Award the Tribe its costs and attorneys fees incurred herein under 28 U.S.C. § 2412 and any other applicable law; and
4. Award such other relief as the Court deems just and equitable.

Dated this 7th day of May, 2024.

Respectfully submitted,

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