MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Avenue North, Suite 3200
Billings, MT 59101
Phone: (406) 247-4667
Fax: (406) 657-6058
Email: Mark.Smith3@usdoj.gov

RANDY J. TANNER
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
101 E Front Street, Suite 401
Missoula, MT 59802
Phone: (406) 329-4268
FAX: (406) 542-1476
Email: randy.tanner@usdoj.gov

ATTORNEYS FOR DEFENDANT
UNITED STATES OF AMERICA

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

THE NORTHERN CHEYENNE TRIBE, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CV-24-52-BLG-SPW-TJC **UNITED STATES' RESPONSE TO THE NORTHERN CHEYENNE TRIBE'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

The Court should deny the Tribe's motion for summary judgment and grant the United States' motion. Through its Second Proposal, the Tribe sought funds only for its Criminal Investigations and Telecommunications functions. OJS has provided every dollar of funding available for those functions, including funds that were available under OJS's Program Management function. Rather than suffering any loss, the Tribe's budget for its contracted functions far exceeds any amount OJS allocated or spent for its operation of the same functions. OJS's partial declination of the Tribe's Second Proposal was consistent with both the spirit and letter of ISDEAA.

I. The Tribe is improperly attempting to boost its Criminal Investigations and Telecommunications programs without performing the entire Program Management function.

The Tribe did not propose to contract for the entire Program Management function OJS was carrying out, which provided administrative support to the entirety of the law enforcement program serving the Northern Cheyenne Reservation. Instead, through its Second Proposal, the Tribe sought to support only its contracted programs. According to the Tribe:

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

(Doc. 34 at 10 (citing Doc. 1 at ¶ 42; Doc. 1-5 at 16.))

Stated simply, the Tribe sought full funding to perform only part of the function performed by OJS. ISDEAA empowers tribes to take over work done by the BIA and promises full funding for that work. It does not empower tribes to take over half the work in exchange for full funding.[1] *See, e.g.*, 25 U.S.C. § 5304(j) (stating a self-determination contract is for "the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law.") Otherwise, tribes could use ISDEAA as a tool to increase their overall share of limited appropriated dollars, at the expense of other tribes. *Cf. Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1038 (9th Cir. 2013) (rejecting an interpretation that would "transform[] [ISDEAA] from a tool that allows tribes to take over federally run programs to a tool that allows tribes to demand a contract for a program that does not exist"). That is particularly true where, as here, the Tribe has filed separate litigation challenging the adequacy of the very direct service

[1] The amount owed under such a contract is what the "Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). Under Title I, a contracting tribe must affirmatively "propose a redesign of a program, activity, function, or service carried out by the tribal organization under the contract," and the Secretary must then approve or deny the redesign proposal according to the statutory declination criteria. 25 U.S.C. § 5324(j). By contrast, a tribe participating in Title IV self-governance may redesign a program without approval of the Secretary. 25 U.S.C. § 5366(d).

operations it seeks to defund. *See Northern Cheyenne Tribe v. United States*, CV 22-75-BLG-SPW-TJC (D. Mont.).

Presumably, the Tribe made its Second Proposal because it had grown dissatisfied (or was always dissatisfied) with its 2021 settlement involving the Criminal Investigations function. In 2020, the Tribe submitted a $1.2 million contract proposal to operate Criminal Investigations. (Doc. 39 at ¶ 25.) That proposal was nearly $1 million higher than what OJS was allocating for its operation of Criminal Investigations. The reason the Tribe's proposal was so high was because it sought funding for eight positions: a Supervisory Investigator, four Investigators, an Investigative Specialist, and two Investigative Assistants. (Doc. 39 at ¶ 25.) OJS employed only two Criminal Investigators under its operation of the program. (Doc. 39 at ¶ 18.) The Tribe explained that the eight positions it requested would constitute a new law enforcement entity called the "Northern Cheyenne Investigative Services." (Doc. 39 at ¶ 25.) In essence, the Tribe sought to create a new parallel law enforcement service supplemental to the force operated by OJS.

OJS declined the Tribe's First Proposal because it far exceeded the funding OJS had allocated for Criminal Investigations—by nearly $1 million—and sought functions not provided under OJS's direct service. The Tribe then sued. During litigation, the parties negotiated funding for the Criminal Investigations and related functions.

The parties settled the matter with OJS agreeing to fund Criminal Investigations at $377,085 per year with an additional $76,632 per year in "program administration funds for a law enforcement assistant." (Doc. 39 at ¶ 28.) In total, OJS agreed to fund the Tribe's Criminal Investigations program at $453,717, which was nearly double what OJS had allocated under its own operation—$237,733 in fiscal year 2020. (Doc. 40-1 at 90 (USA 1026).) The settlement was a significant concession by OJS because OJS had to pull money from other accounts to bridge this gap.[2]

Only after the Tribe and OJS settled the First Proposal on November 26, 2021, and entered a contract for Criminal Investigations on February 13, 2022, did the Tribe submit its Second Proposal on July 25, 2022, for Program Management and Telecommunications. (Doc. 39-2 at 120, 163, 165.) As explained above, the Tribe sought to use the Program Management funds solely to support the Tribe's Criminal Investigations and Telecommunications programs, not to actually

[2] Although OJS initially deducted the $76,632 from the Program Management allocation ($319,562 to $242,930) (Doc. 39-2 at 157), it later restored that amount ($319,562 plus appropriated increase of $6,267 became $325,829) (Doc. 39-2 at 170), and the final amounts provided by OJS reflect the larger amount ($325,829 less $253,303.49 reallocated to Telecommunications became $72,525.51), (Doc. 39-2 at 160, 170, 172).

perform the Program Management function OJS was performing. The Tribe later obfuscated its intentions, insisting six months into negotiations that it was, in fact, "requesting to contract the Program Management function including any and all positions within that function." (*See* Exhibit 3, attached, at 1 (USA 220).) But the Tribe never submitted an amended proposal to that effect and, by the Tribe's own admissions—in its Complaint in this case (Doc. 1 at ¶ 42) and its opening brief (Doc. 34 at 10)—the Tribe never intended to operate the Program Management functions OJS provided.[3]

Nevertheless, because the Tribe claimed it intended to perform the functions OJS was performing (which was not accurate), OJS felt compelled to explain in its declination why the existing Program Management function could not be contracted. (Doc. 39 at ¶¶ 37–40.) When OJS partially approved the Tribe's Second Proposal (approving Telecommunications), OJS reserved only $72,525.51 in Program Management, which funded a Law Enforcement Assistant position

[3] In its opening brief, the Tribe argues OJS's declination lacks precision in terms of the justifications for declination. The United States disagrees with this claim, but OJS can hardly be faulted in light of the Tribe's shifting representations. Had the Tribe truly sought to contract for the Chief of Police or the Law Enforcement Assistant that supported OJS direct service and the Chief of Police, the Tribe would have needed to submit a revised proposal, including a revised scope of work, organizational chart, and position descriptions, reflecting that intention. The statement that the Tribe was requesting "any and all positions" failed to meet the requirements for a contract proposal under 25 C.F.R. § 900.8.

supporting OJS direct service. (Doc. 39 at ¶ 40.) Through the Settlement Agreement, OJS had already provided the Tribe with all funds—and substantially more—related to Criminal Investigations, including dedicated funding of $76,632 for that program's own Law Enforcement Assistant. (Doc. 39 at ¶¶ 28, 37; Doc. 39-2 at 161.) OJS further explained the "Supervisory Criminal Investigator" position OJS retained in its organizational chart was the Chief of Police, which heads Uniform Patrol and could not be contracted because OJS directly operates Uniform Patrol. (Doc. 39 at ¶ 38.)

Ultimately, these explanations by OJS have proven unnecessary because the Tribe again makes clear in its opening brief that it did not make its Second Proposal to secure funds for either (1) a Law Enforcement Assistant supporting OJS direct service or (2) the Chief of Police position. Instead, it wants to utilize the Program Management funding for an entirely different purpose—additional positions in the Tribe's Criminal Investigations and Telecommunications programs. (Doc. 34 at 10.) But, as the United States has reiterated in its briefing, there was and is $0 available in Program Management for Criminal Investigations and Telecommunications because OJS has already provided all money related to those functions through both the Settlement Agreement and approval of the Telecommunications portion of the Tribe's Second Proposal.[4]

In no uncertain terms, the Tribe's Second Proposal seeks to redesign entirely what remains of Program Management under OJS's operation—eliminating a key position supporting OJS direct service to instead redundantly fund functions already provided for in the Tribe's Criminal Investigations and Telecommunications contracts—all with the goal of "freeing up some funding" for additional positions not approved in any contract. (Doc. 35 at 9.) The Tribe, however, has not abided ISDEAA in its attempt at a redesign. Under Title I of ISDEAA, a Tribe seeking to redesign a function must submit a proposal specifically addressing the redesign of that function and must secure approval of the Secretary. 25 U.S.C. § 5324(j). This requirement under Title I contrasts with the Congressional design evident in Title IV of ISDEAA, under which tribes participating in the self-governance program have greater flexibility. *See* 25 U.S.C. § 5363(b)(3).

[4] Through the Settlement Agreement, OJS agreed to provide annually $76,632 in program administration funds related to Criminal Investigations. (Doc. 39 at ¶ 28.) And through the Telecommunications approval, OJS reallocated $253,303.49 from Program Management to Telecommunications. (Doc. 39 at ¶ 39.)

II. OJS stated valid grounds for partially declining the Tribe's Second Proposal, as it related to Program Management.

OJS initially allocated $325,829 in Fiscal Year 2022 for Program Management. (Doc. 39 at ¶ 47, n.20.) That is the sum the Tribe now argues it is entitled to, on annual basis, through its Second Proposal. The Tribe's claim to this sum ignores the fact that OJS already awarded $253,303.49 of this amount to the Tribe under its Telecommunications contract. (Doc. 39 at ¶ 39.) OJS clearly and transparently explained this reallocation to the Tribe multiple times prior to the final agency decision and nearly a year before the Tribe executed the Telecommunications contract. (Doc. 39 at ¶ 39.) Given this reallocation, which was provided to the Tribe, the funds remaining in Program Management for Fiscal Year 2022 were as follows:

$325,829.00	FY22 funds allocated to Program Management
– $253,303.49	Reallocation to Telecommunications
$ 72,525.51	Remaining funds in Program Management

As explained above, the remaining $72,525.51 funded a Law Enforcement Assistant to support remaining OJS direct service, which the Tribe did not seek in its Second Proposal. For this reason, OJS properly declined the Tribe's Second Proposal, as it related to Program Management, under declination criterion (D). No other justification was necessary given the scope of the Tribe's Second Proposal.

A. The Tribe's proposal for Program Management was "in excess of the applicable funding level for the contract," 25 U.S.C. § 5321(a)(2)(D).

The Tribe states that the applicable funding level is what OJS "actually spends on the Program Management function." (Doc. 34 at 18 (emphasis original) (citing 25 U.S.C. § 5325(a)(1))). But the amount OJS was actually spending on Program Management was $83,480—far less than the Tribe sought. (Doc. 39 at ¶ 35.) Even looking past actual expenditures, the Tribe has received all funding possibly attributable to the support of the Criminal Investigations and Telecommunications programs. All that was left, $72,525.51, funded a function the Tribe had not sought to perform—namely, administrative support for uniform patrol. The applicable funding level that remained for the Tribe's proposed contracts was therefore $0 because OJS had already provided to the Tribe every dollar from Program Management that supported Criminal Investigations and Telecommunications. OJS addressed this with the Tribe on several occasions during the contract negotiations. (Doc. 39 at ¶¶ 37–44.)

The Tribe cites *Pyramid Lake* for the proposition that "the applicable funding level for a contract proposal is to be determined from the date the agency receives the Tribe's proposal." (Doc. 34 at 19 (citing *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 543 (D.D.C. 2014))). The Tribe therefore claims it is entitled to the full $325,829.00 that OJS allotted to Program Management in fiscal year 2022. The Tribe advances this argument even though OJS already awarded the Tribe $253,303.49 of that sum, on an annual basis, through the reallocation from Program Management to Telecommunications.

Instead of acknowledging this substantial sum it received and continues to receive for Telecommunications through the reallocation, the Tribe now claims OJS "intentionally defunded" Program Management through the reallocation. (Doc. 34 at 19.) OJS did not "defund" Program Management. OJS reallocated the $253,303.49 from Program Management to Telecommunications precisely to meet the Tribe's request for Telecommunications funding. And the Tribe was made aware of this on multiple occasions before OJS partially approved and partially declined the Second Proposal. (Doc. 39 at ¶ 39.)

The facts in this case, then, are quite different than those that drove the district court's decision in *Pyramid Lake*. In *Pyramid Lake*, a tribe proposed to contract with Indian Health Services (IHS) for the tribe's emergency medical services program. *Id.* at 539. The proposal requested $502,611. *Id.* at 539. After the tribe submitted its proposal, IHS suspended the emergency medical services program because the associated hospital no longer agreed to serve as the "base" hospital for the program. *Id.* at 539. IHS then declined the tribe's proposal, reasoning there were no funds available for contracting since IHS had suspended the program. *Id.* The district court concluded IHS could not decline a proposal on account of it having canceled the program after the tribe submitted the proposal, reasoning that to hold otherwise would "undo the carefully-constructed declination criteria" of ISDEAA by permitting the agency to "circumvent these limited criteria" through program cancelation. *Id.* at 543.

Here, OJS did not cancel the Program Management function. Nor did it redirect Program Management funds in a way that made the funds unavailable to the Tribe. The opposite is true. The Tribe has, in fact, already received the reallocated funds in question, all in response to the Tribe's own proposed funding level for Telecommunications. Unlike *Pyramid Lake,* this is not a case where funds existed prior to the tribe's proposal and then were made unavailable after the proposal. Instead, the same funds existed before and after the proposal, and they were awarded to the tribe and included in the Telecommunications contract the Tribe executed.

Even if *Pyramid Lake* applied to this case, the Court should apply the rule as stated by the *Pyramid Lake* court: "[T]he applicable funding level for a *contract proposal* is to be determined from the date the agency receives the tribe's proposal." *Id.* at 543 (emphasis added).[5] Here, the Tribe sought

[5] This language is no mistake but rather tracks the language of 25 U.S.C. § 5325(a)(1) ("The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or

Telecommunications and Program Management in the same proposal. The Tribe's Second Proposal was a single contract proposal for two functions, not two separate proposals each for a different function. Consequently, the applicable funding level for the Second Proposal was $600,993—the sum of $275,164 (Telecommunications allocation for fiscal year 2022) and $325,829 (Program Management allocation for fiscal year 2022). (Doc. 39 at ¶ 47, n.20.) The Tribe executed a contract for $528,467.49, which represents $600,993 less $72,525.51 reserved for the Law Enforcement Assistant supporting OJS direct service. As to this remainder, the Tribe has expressly disavowed any intent to contract for the Law Enforcement Assistant position supporting OJS direct service. (*See* Doc. 34 at 10 (citing Doc. 1 at ¶ 42; Doc. 1-5 at 16.)) The Tribe has received the reallocated funding in question. Neither the reasoning nor the rule in *Pyramid Lake* can be stretched to entitle the Tribe to that same funding a second time.

If the Court approves the Tribe's Second Proposal as it relates to Program Management, the Tribe will receive a total annual allocation of $854,296.49 for the Second Proposal ($528,467.49 for Telecommunications plus $325,829 for Program

---

portions thereof for the period covered by the contract."). The statutory command speaks only of a single "amount" for multiple "contracts" covering multiple "programs or portions thereof." *Id.* The language does not permit the Tribe to divide programs into portions and emerge with a greater sum than it previously received.

Management). That is $253,303.49 greater than the sum OJS allocated for the two programs in fiscal year 2022. ISDEAA compels no such windfall. *See* 25 U.S.C. § 5325(a)(1) (providing that funds transferred under an ISDEAA contract "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract . . ."). The inevitable result of doubling this funding would be that OJS would be forced to take funding from some other part of its operations, a result that ISDEAA explicitly disclaims. 25 U.S.C. § 5325(b) (flush paragraph) ("Notwithstanding any other provision in [ISDEAA], the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this chapter.").

B. The remaining funds in Program Management ($72,525.51) are for a function the Tribe did not seek and "cannot lawfully be carried out by" the Tribe, 25 U.S.C. § 5321(a)(2)(E).

When a tribe proposes to contract for a particular function, it must actually perform the function OJS was performing. *See* 25 C.F.R. § 900.8(g), (h). A tribe, for instance, cannot propose to contract for detention services but then use all that funding for uniform patrol, leaving no detention services in place. If a tribe proposes to contract for a function, it must perform the function. *See, e.g.*, 25 U.S.C. § 5304(j) (stating a self-determination contract is for "the planning, conduct, and administration of programs or services that are otherwise provided to

Indian Tribes and members of Indian Tribes pursuant to Federal law"); 25 U.S.C. § 5329(c) (Model Agreement section 1(c)(1)). As noted above, a tribe can propose to modify or "redesign" a function, but the tribe must submit a specific redesign proposal and coordinate with OJS, which will evaluate the proposal.[6] *See* 25 U.S.C. § 5324(j).

The Tribe submitted a Scope of Work with its Second Proposal and made clear it sought to contract for Program Management solely to fund positions in the Tribe's Criminal Investigations and Telecommunications functions. (Doc. 1-5 at 16; *see also* Doc. 34 at 10.) The Tribe did not intend to assume or contract for the Law Enforcement Assistant supporting OJS direct service. In short, the Tribe was not proposing to perform the only remaining function in Program Management.

Even if, however, the Tribe had sought to contract for the Law Enforcement Assistant supporting OJS direct service, that position could not lawfully be carried out by the Tribe. The United States described the basis for this restriction in its opening summary judgment brief. (*See* Doc. 38 at 26–29.) OJS therefore had valid grounds for declining the Program Management portion of the Tribe's proposal on this alternative basis, and it provided a specific explanation to the Tribe in its declination:

[6] In its contract proposal, the Tribe indicated it was not proposing to redesign any element of Program Management. (Doc. 39-2 at 123.)

> The remaining program management funding retained by BIA OJS is required to provide administrative support for the BIA OJS direct service uniformed patrol and juvenile corrections. This 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.

(Doc. 39-2 at 175.) This explanation from OJS's partial declination letter came after OJS had already repeatedly addressed this issue with the Tribe. (Doc. 39-2 at 170–72.)

The Court need not address this alternative basis for OJS's declination because the Tribe concedes that the Second Proposal never sought to contract for Program Management in order to assume the Law Enforcement Assistant position supporting OJS direct service. (Doc. 34 at 10.) Yet, it reinforces the propriety of the declination.

III. OJS negotiated with the Tribe in good faith.

The Tribe claims OJS failed to negotiate in good faith. (Doc. 34 at 18–20 (citing 25 U.S.C. § 5321(f)(1))). The Tribe does not point to any standard for what constitutes "good faith." But by any standard, OJS operated in good faith.

The Tribe's only example of OJS's purported failure to negotiate in good faith is:

> Defendants failed to negotiate with the Tribe in good faith and carry out the ISDEAA in a manner that maximizes the policy of tribal self-determination, because BIA-OJS intentionally defunded the Northern Cheyenne Program Management function after the Tribe submitted its contract proposal in 2022.

(Doc. 34 at 19) As explained above, OJS did not "defund" Program Management. To meet the Tribe's Second Proposal, as it related to Telecommunications, OJS reallocated $253,303.49 from Program Management to Telecommunications. All of that money went to and continues to go to the Tribe. OJS provided the Tribe every dollar—and then some—available in Program Management for Telecommunications and Criminal Investigations. OJS addressed all of this during a well-documented and robust period of negotiations. (Doc. 39 at ¶¶ 36–44.) OJS was never deceptive or misleading in its representations to the Tribe, and it did not move or otherwise make funds unavailable to the Tribe. The Tribe's "good faith" argument has no basis in fact.

In fact, OJS has repeatedly provided the Tribe with additional funding for its Criminal Investigations and Telecommunications operations above and beyond what OJS spent on those functions. Under its Criminal Investigations contract, OJS provided an additional $139,352 above OJS expenditures[7] for the Tribe's two

[7] Even apart from the $76,632 provided for an administrative position, the core $377,085 for criminal investigations represented an increase of $139,352 over what OJS spent on criminal investigations, which was $237,733 in FY 2020. (Doc. 40 at 90 (USA 1026).) After receiving this increase, the Tribe hired its preferred

criminal investigators and an additional $76,632 for an administrative position above OJS expenditures. (Doc. 39 at ¶ 28.) Under the Telecommunications contract, OJS provided an additional $147,058.49 over OJS expenditures. (Doc. 39 at ¶¶ 41, 47, n.20.)

Through its Criminal Investigations and Telecommunications contracts, the Tribe received $982,184.49 when those contracts were awarded (today, it receives $1,044,188 annually).[8] (Doc. 39 at ¶¶ 28, 39, 47.) This is significantly greater than the sum of what OJS either allocated or spent on Criminal Investigations, Telecommunications, and Program Management combined under direct service.[9]

---

supervisor candidate into one of the investigator roles. (Doc. 1 at ¶ 42; Doc. 34 at 5.)

[8] On top of this amount, the Tribe receives contract support costs at a set rate of 18 percent of budgeted salary cost, plus 24.6 percent or whatever rate the Tribe negotiates for indirect costs. (Doc. 39-2 at 246); *See also* Indian Affairs Manual, Chapter 13, Part 7, Page 5, https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/13_IAM_7_Contract_Support_Costs_508_OIMT.pdf.

[9] OJS expenditures are reflected in the record as follows: $237,733 for Criminal Investigations in FY 2020; $381,409 for Telecommunications in FY 2021; and $83,480 for Program Management in FY 2021. These amounts sum to $702,622. (*See* Doc. 39 at ¶ 47, n.20; Doc. 39-2 at 58–59; Doc. 40-1 at 90 (USA 1026).)

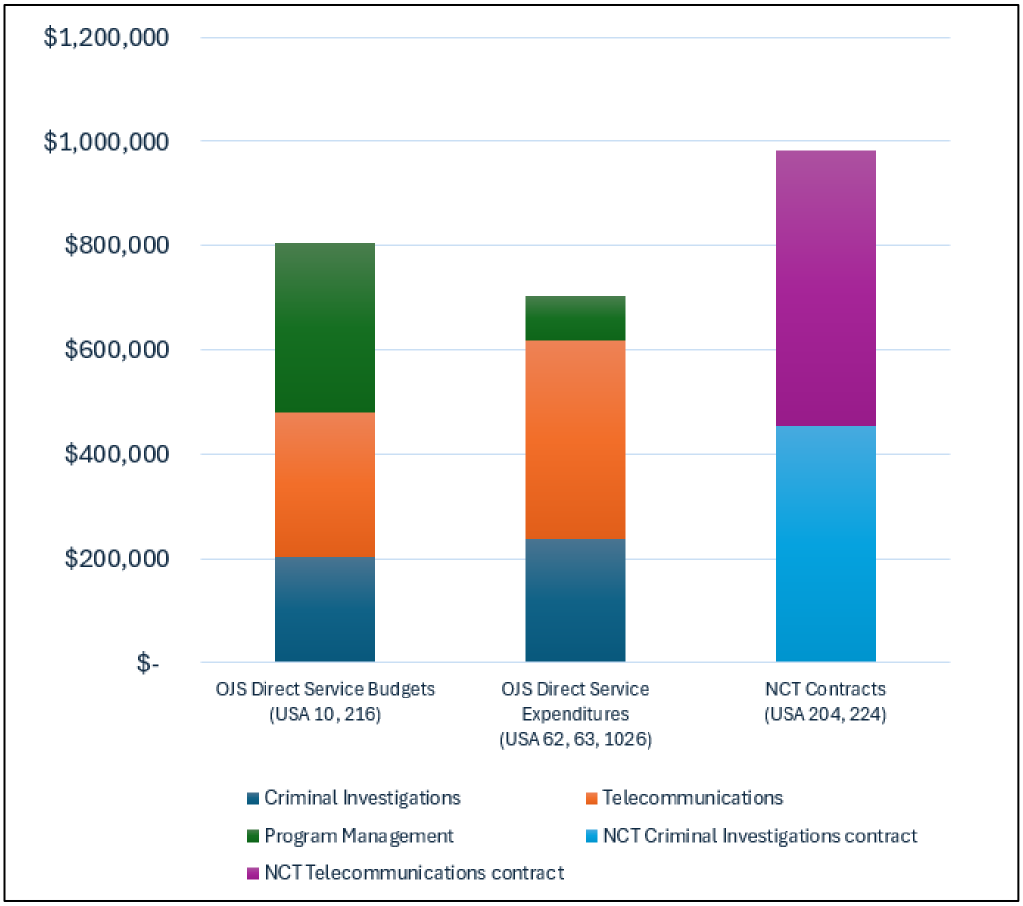

Figure 1 - Comparison of OJS direct-service funding and NCT contracted funding

While the Tribe protests (incorrectly) that it has been denied funding for Program Management, the Tribe has in fact already received all available Program Management funding and then some. If the Tribe desires to spend that money in a way not provided for in the existing contracts, the Tribe need only submit a redesign proposal to OJS, which the agency will review according to the declination criteria. 25 U.S.C. § 5324(j). This is the path provided by law for the Tribe to achieve what it claims to seek—not to double-dip on amounts already received at the expense of other tribes and programs.

IV. The United States is entitled to summary judgment, but if the Court finds in favor of the Tribe, remand is the appropriate remedy.

The Tribe argues that if it prevails, the Court should automatically approve the Tribe's contract proposal and award the Program Management contract. (Doc. 34 at 20–23.) This Court explained, however, that remand to the agency is the appropriate remedy for an agency's insufficient declination of a new contract proposal. *See N. Arapaho Tribe v. LaCounte*, 2017 WL 2728408, at *5 (D. Mont. June 23, 2017) (citing *S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1083 (10th Cir. 2011)). In *Northern Arapaho*, the Court found the BIA had not sufficiently stated some of its reasons for declining a tribe's judicial services contract. *Id.* The Court then concluded that remand was the appropriate remedy and if, on remand, the BIA declined the proposal, "it must explain more accurately and fully any reasons for its declination." *Id.*

In reaching this conclusion, the Court expressly rejected the approach the Tribe advances here—i.e., "approv[al] by operation of law." *Id.* The Court explained that automatic approval would only be appropriate if the BIA had "'refused to continue funding an already-executed mature contract.'" *Id.* (quoting *S. Ute Indian Tribe*, 657 F.3d at 1083.). The Court noted the District of South Dakota had once approved a contract by operation of law, but "[t]he court's determination that the contract was 'approved by operation of law' simply reflected the tribe's right to continued funding for costs incurred under an already existing contract." *Id.* (quoting *S. Ute Indian Tribe*, 657 F.3d at 1083–84). As in *Northern Arapaho*, "[w]e face a different scenario." *Id.* The Tribe sought funding for a new function, Program Management. The Tribe's proposal was not for continued funding of an existing contract. This case is therefore materially indistinguishable from *Northern Arapaho*, and remand is the appropriate remedy, not approval by operation of law. *Id.*

The Tribe relies on two decisions to argue the Court must order the Secretary to fully fund its proposed contract—*Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, 256 F. Supp. 3d 1186 (D.N.M. 2015), and *The Spirit Lake Tribe v. Acting Great Plains Regional Director, Bureau of Indian Affairs*, IBIA 18–038, 2025 WL 2110707 (IBIA July 17, 2025). Neither decision has any precedential value. More importantly, they are distinguishable on the facts, and they were wrongly decided.

In *Navajo Health Foundation*, the United States District Court for the District of New Mexico concluded that the "sole remedy when a federal agency unlawfully declines contract proposal is to order the agency to fully fund the proposal." 256 F. Supp. 3d at 1237. But the cases it pointed to for this conclusion dealt only with untimely decisions by the BIA—i.e., the agency failing to decide a contract proposal within the statutory 90-day period. *See id.* (citing *Seneca Nation* *of Indians v. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 137–39 (D.D.C. 2013); *Yurok Tribe v. Dep't of the Interior*, 785 F.3d 1405, 1408 (Fed. Cir. 2015)). ISDEAA provides that "the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides [a written declination]." Given this language, these courts reasoned that if the Secretary fails to issue a decision within 90 days, then the contract is approved by operation of law. *See also* 25 C.F.R. § 900.18.[10] Here, OJS did, in fact, issue a partial declination to the Tribe. So, setting aside the question of whether these decisions were even correctly decided, their reasoning does not apply to this case.

Moreover, each of these cases—*Navajo Health Foundation* included—involved funding proposals for an existing contract. This is the same scenario this Court addressed in *Northern Arapaho* when it concluded that "automatic approval would only be appropriate if the BIA had refused to continue funding an already-executed mature contract." *N. Arapaho Tribe*, 2017 WL 2728408, at *5 (cleaned up). As this Court concluded in *Northern Arapaho*, "[w]e face a different scenario"—OJS timely issued a partial declination, and the Tribe's proposal was

[10] "What happens if a proposal is not declined within 90 days after it is received by the Secretary? A proposal that is not declined within 90 days (or within any agreed extension under [25 C.F.R.] § 900.17) is deemed approved and the Secretary shall award the contract or any amendment or renewal within that 90-day period and add to the contract the full amount of funds pursuant to section 106(a) of [ISDEAA]."

for a new contract, not an existing contract where the Tribe was continuing to incur costs. *See id.*

The Tribe also points to *Spirit Lake Tribe*, a decision by the Interior Board of Indian Appeals (IBIA), an administrative appellate review body. *See* 2025 WL 2110707. *Spirit Lake Tribe* has no precedential value, and it is not supported by ISDEAA or the cases on which it relies. In *Spirit Lake Tribe*, the IBIA addressed a declination by the BIA where, as the IBIA described it, the BIA declined the tribe's proposal by only reciting the declination criteria and not explaining the bases for the declination. OJS did no such thing here—it fully explained to the Tribe the reasons for its declination.

Factual distinctions aside, the IBIA's reasoning is unsupported. Like the court in *Navajo Health Foundation*, the IBIA concluded the tribe's proposal must be automatically approved on account of the BIA's deficient declination. But it erroneously relied on cases that do not support that conclusion. The IBIA pointed to *Navajo Health Foundation*, *Pyramid Lake*, and *Cheyenne River*, which are each inapplicable to this case for the reasons discussed above. None of these cases support automatic approval of a contract proposal where the agency timely explained the bases for its declination but the tribe nonetheless challenges the validity of those bases.

This Court has explained that in the circumstances presented by this case—e.g., as in *Northern Arapaho*—remand, not automatic approval, is the appropriate remedy. *See N. Arapaho Tribe*, 2017 WL 2728408, at *5. Moreover, remand rather than automatic approval makes practical sense because a Tribe's facially improper proposal should not be granted simply because OJS must provide additional detail for its declination. If the Court were to approve the Tribe's contract by operation of law, the result would be an excessive windfall to the Tribe requiring OJS to pull much-needed funds from other tribes and programs.

Finally, the Tribe asks the Court to make a monetary award as equitable relief—specifically, "a retroactive award of funding which it would have received had the proposal been approved as required by August 21, 2023." (Doc. 34 at 22.) For all the reasons discussed in the United States' briefing, the Tribe is not entitled to any money damages. OJS properly declined the Tribe's Second Proposal as it related to Program Management. OJS awarded the Tribe every dollar of funds supporting Criminal Investigations and Telecommunications. And OJS's provision of funds for the Tribe's Criminal Investigations and Telecommunications contracts are substantially higher than OJS's funding under its direct-service operation, even when including the Program Management funds (see graph above). The Tribe has suffered no losses whatsoever; it has only gained.

CONCLUSION

The Court should deny the Tribe's motion for summary judgment and grant the United States' Motion for Summary Judgment.

DATED this 20th day of October 2025.

KURT G. ALME
United States Attorney

/s/ Randy J. Tanner
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 5,343 words, excluding the caption and certificates of service and compliance.

DATED this 20th day of October 2025.

/s/ Randy J. Tanner
Assistant U.S. Attorney
Attorney for the United States

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October 2025, a copy of the foregoing document was served on the following person by the following means.

1-2	CM/ECF
_______	Hand Delivery
_______	U.S. Mail
_______	Overnight Delivery Service
_______	Fax
_______	E-Mail

1. Clerk of Court

2. Anna E. Brady
ZIONTZ CHESTNUT
2101 Fourth Ave., Suite 1230
Seattle, WA 98121
(206) 448-1230 – phone
(206) 448-0962 – fax
abrady@ziontzchestnut.com

/s/ Randy J. Tanner
Assistant U.S. Attorney
Attorney for Defendant