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

THE NORTHERN CHEYENNE TRIBE,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

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

**PLAINTIFF'S RESPONSE
BRIEF IN OPPOSITION TO
UNITED STATES' MOTION
FOR SUMMARY JUDGMENT**

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INTRODUCTION AND SUMMARY

This is a dispute between the Northern Cheyenne Tribe (“Tribe” or “Plaintiff”) and the Defendant Federal agencies and officials (“Defendants” or “United States”) regarding Defendants’ unlawful declination of a self-determination contract proposal. The Tribe submitted a proposal to Defendants to contract from Defendants law enforcement Telecommunications and Program Management functions under the Indian Self-Determination and Education Assistance Act (“ISDEAA”), 25 U.S.C. §§ 5321, 5324, 5325, and 5331.

Defendants declined the Program Management component of the Tribe’s proposal for reasons not allowed under the ISDEAA, failed to support their declination reasons as required by law, and failed to negotiate in good faith under the ISDEAA. The Tribe’s alteration of its proposal to remove a requested supervisory criminal investigator position, and the Tribe’s clarification that it sought only whatever funding was available for the Program Management function, provides no basis for declining the severable portion of the Program Management proposal. The United States’ post-hoc justifications that an administrative assistant job is an inherent federal function that cannot be contracted under the ISDEAA are insufficient because they were not communicated to the Tribe at the time of the declination or within 20 days thereafter, as the ISDEAA requires. The United States does not contest and presents no argument regarding the Tribe’s claim that

Defendants failed to negotiate in good faith, also required under the ISDEAA.

Because the United States fails to demonstrate that its conduct conformed to the express requirements of the ISDEAA, the United States' motion for summary judgment must be denied.

STATUTORY AND REGULATORY BACKGROUND

As explained in greater detail in the Tribe's Motion for Summary Judgment and supporting brief (Doc Nos. 37 and 38), the ISDEAA's purpose is to reduce Federal domination of Indian programs and promote tribal self-determination and self-reliance. *See* 25 U.S.C. § 5302(b); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005). The Secretary of the Interior ("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 the Department of the Interior ("DOI") within which the program or service is performed. 25 U.S.C. § 5321(a)(1). 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). In addition, the Secretary shall make best efforts to remove any obstacles which might hinder Indian tribes, including obstacles that hinder tribal autonomy and flexibility in administering such

programs. 25 C.F.R. § 900.3(b)(1).

The amount of funds provided under the terms of a self-determination contract shall not be less than the Secretary would have otherwise provided for the operation of the programs or contracted 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). This is known as the “Secretarial amount.” *See S. Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1074 (10th Cir. 2011). Once a tribe submits a proposal for a self-determination contract, the Secretary shall, within 90 days after receipt of the proposal, approve the proposal and award the contract, unless the Secretary provides written notification to the applicant tribe that contains a specific finding that clearly demonstrates, or is supported by a controlling legal authority, that one of five declination criteria apply. 25 U.S.C. § 5321(a)(2). The Secretary may only decline a contract proposal for the reasons listed in 25 U.S.C. § 5321(a)(2). 25 C.F.R. § 900.24. Furthermore, the Secretary may not decline to contract with an Indian tribe or tribal organization based on any objection that will be overcome by the contract. 25 C.F.R. § 900.23.

If the Secretary declines a contract proposal, the Secretary is required to state any objections in writing to the applicant tribe and assist the tribe to overcome the stated objections. 25 U.S.C. § 5321(b). The Secretary shall have the burden of proof

to clearly demonstrate the validity of the grounds for declining the contract proposal. 25 U.S.C. § 5321(e)(1); *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 107-08 (D.D.C. 2019) (“Congress passed the [ISDEAA] with the intent to circumscribe as tightly as possible the discretion of the Secretary.”). 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).

The ISDEAA has been broadly interpreted in favor of contractibility of programs. “It is the policy of the Secretary that the contractibility of programs under this Act should be encouraged. In this regard, Federal laws and regulations should be interpreted in a manner that will facilitate the inclusion of those programs or portions of those programs that are for the benefit of Indians[.]” 25 C.F.R. § 900.3(b)(8). Legislative history of the ISDEAA confirms that “tribes are eligible to contract for *any* program or function operated by [the] Secretary for the benefit of tribes, regardless of whether such specific programs or functions are operated locally.” S. Rep. 100-274 at 25 (1987), *reprinted at* 1988 U.S.C.C.A.N. 2620, 2644, 1987 WL 61567 (emphasis added).

FACTUAL BACKGROUND

The United States includes an extensive list of alleged undisputed facts supporting its motion. *See* Doc. No. 39 (United States’ Stmt. of Undisputed Facts; hereafter, “US SUF”). As the Tribe contends in its Statement of Disputed Facts (filed

herewith; hereafter, “Pltf.’s SDF”), some of those “facts” are not facts but rather are statements of law. More problematic for the United States is that nearly all the undisputed facts are simply not material to the legal issues stated by Plaintiff’s claims.

In February 2022, the Tribe successfully contracted the Bureau of Indian Affairs – Office of Justice Services’ (“BIA-OJS”) criminal investigation function and established the Tribe’s law enforcement agency, Northern Cheyenne Investigative Services (“NCIS”). Pltf.’s SDF, Add’l Fact 1. The funding NCIS receives from BIA-OJS to perform the Criminal Investigation function pays the salaries of two criminal investigators and one law enforcement/investigative specialist. *See* US SUF ¶ 29.

Around the same time, the Tribe expressed interest in contracting for the BIA-OJS law enforcement dispatch function, known as “Telecommunications,” as well as the administrative support function, known as “Program Management.” US SUF ¶¶ 30, 31. To that end, the Tribe submitted a contract proposal to assume those two functions from BIA-OJS under the ISDEAA. US SUF ¶ 36; Doc. No. 39-2 at 120-56. The Telecommunications component of the Tribe’s proposal was granted and is not contested in this case. US SUF ¶ 39; Doc. No. 39-2 at 41; Doc. No. 1 ¶ 41 n.2. NCIS oversees all of the Tribe’s law enforcement functions, including the dispatch center. Pltf.’s SDF, Add’l Fact 2.

The Program Management part of the Tribe's contract proposal included an annual budget of \$360,333.66 and sought to assume any and all positions within the law enforcement Program Management function on the Reservation, including any law enforcement assistants and supervisory positions. Pltf.'s SDF, Add'l Fact 3. The requested budget amount was based on a November 30, 2021 letter from BIA-OJS to the Tribe stating that the Program Management "Secretarial amount" for FY 2021 was \$319,562 and that the FY 2022 actual funding amount could not be provided due to DOI operating under a Congressional continuing resolution for FY 2022 "with limited funding available." Pltf.'s SDF, Add'l Fact 4. The Tribe initially intended to use the Program Management funding to pay the salary of a supervisory criminal investigator and an office manager for NCIS, thus freeing up some funding within the Criminal Investigation function to hire a third investigator. Pltf.'s SDF, Add'l Fact 5. The supervisor and office manager would be shared by all of NCIS, including the dispatch center and criminal investigators. *Id.*

On October 6, 2022, BIA-OJS told the Tribe that the Tribe could not use Program Management funding to fund a supervisory criminal investigator position because that position is not funded with Program Management dollars, and the Tribe had already contracted and received all funding the Tribe is entitled to receive for Criminal Investigations operations, including \$76,632 in Program Management funding for administrative support of criminal investigations, which is received in

the form of salary for the NCIS law enforcement/investigative specialist. Pltf.’s SDF, Add’l Fact 7. At the same time, BIA-OJS asserted 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. Pltf.’s SDF, Add’l Fact 8.

In light of BIA-OJS’s response, the Tribe requested BIA-OJS’s Northern Cheyenne law enforcement budget for FY 2022 demonstrating how Program Management funding is allocated between all law enforcement functions at Northern Cheyenne. *Id.* On December 16, 2022, the Tribe learned that the FY 2022 budget for Program Management was set at \$325,829, but that BIA-OJS had unilaterally transferred \$253,303.49 in Program Management funding to the Telecommunications function “to meet the Tribe’s requested funding amount” from the Tribe’s Telecommunications contract proposal. *Id.* At the same time, BIA-OJS stated that only \$72,525.51 remained 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[.]” Pltf.’s SDF, Add’l Fact 10.

On August 21, 2023, BIA-OJS formally declined the Tribe’s proposal to contract the Program Management function. US SUF ¶ 41; Doc. No. 39-2 at 174-76. The declination reasons BIA-OJS proffered were:

- 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 § 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 § 5321(a)(2)(E), “the Program Management proposal is beyond the scope of the ISDEAA[.]”

Doc. No. 39-2 at 174-75 (underscore normalized). BIA-OJS explained that there is no funding in the BIA-OJS Program Management line item that funds a criminal investigator or supervisory criminal investigator; that the Tribe already received a share of the Program Management funding for administrative support of the Criminal Investigation function through award and approval of the ISDEAA Criminal Investigations contract; and that the remaining Program Management function retained by BIA-OJS is required to provide administrative support for BIA-OJS direct services. *Id.* at 174. Furthermore, BIA-OJS stated that the Tribe cannot contract the remaining administrative support position because “the BIA L[aw] E[nforcement] A[ssistant] function¹ for BIA law enforcement is specific to Federal

¹ The BIA-OJS Law Enforcement Assistant position was vacant until September 22, 2024. Pltf.’s SDF, Add’l Fact 14.

Employees.” *Id.* While BIA-OJS’s proffered denial rationale may appear pragmatic at first blush, they are not sufficient as a matter of law under the plain language of the ISDEAA.

ARGUMENT

As a matter of law, the United States fails to demonstrate that it is entitled to summary judgment because the United States has not shown that its declination of the Tribe’s contract proposal was lawful under the ISDEAA.

A. Summary Judgment Standard.

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.1987). A genuine material fact dispute requires sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

Summary judgment is warranted where the documentary evidence produced by the parties permits only one conclusion. *Id.* at 250-51. All reasonable inferences

must be viewed in the light most favorable to the non-moving party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). Where the party moving for summary judgment bears the burden of proof at trial, the moving party “must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.” *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992).

B. Defendants Violated the ISDEAA by Declining the Tribe’s Proposal for Reasons Not Allowed by Law.

Defendants bear the burden of proof to clearly demonstrate, or support with controlling legal authority, the validity of the grounds for declining the contract proposal. 25 U.S.C. §§ 5321(a)(2), (e)(1); *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 107-08 (D.D.C. 2019). The United States’ extensive recitation of immaterial facts, *see* Doc. No. 39, fails to carry this burden.

1. The Tribe’s Modification of Its Proposal to Remove the Supervisory Criminal Investigator Position Does Not Provide Any Support for Declination of the Proposal.

The United States first argues that the “Tribe’s contract proposal for Program Management improperly included funding for a supervisory position,” which subsequently “triggered two declination criteria under ISDEAA.” Doc. No. 38 at 21. However, this completely ignores the fact that the Tribe modified its proposal during the negotiations, as is permitted and appropriate, to exclude such a position, to

conform to BIA-OJS' insistence that only one position (a Law Enforcement Assistant, or "LEA") was part of the Program Management function.

A contract proposal may be modified after submission and the severable portion of the proposal approved. *See* 25 U.S.C. § 5321(a)(4) (scope of proposal may be altered with approval of tribe and Secretary); 25 C.F.R. § 900.25 (same). After BIA-OJS informed the Tribe, on August 12, 2022, that the Northern Cheyenne supervisory criminal investigator position is not funded with Program Management funding, the Tribe clarified that its contract proposal intended "to contract all the Program Management functions and its associated budget and positions." Doc. No. 40-1 at 12 (emphasis in original); Pltf.'s SDF, Add'l Fact 6. The Tribe pointed out that an April 2021 organization chart (reproduced at Doc. No. 39-2 at 49) showed only one Law Enforcement Assistant position at Northern Cheyenne; thus,

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.

Doc. No. 40-1 at 12; Pltf.'s SDF, Add'l Fact 6. Accordingly, the Tribe requested "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.

BIA-OJS responded on October 6, 2022 that the April 2021 organizational chart was the “current approved” organization of the BIA-OJS Northern Cheyenne Agency, and that rather than provide a scope of work for program management, BIA-OJS could “provide a sample position description of an administrative position within BIA OJS that identifies the administrative support functions that are required to carry out our direct service program management functions.” Doc. No. 40-1 at 34-35. No such “sample position description” was provided after that October 2022 letter. Pltf.’s SDF, Add’l Fact 9.

The Tribe reiterated that it sought only to contract for whatever funding and positions were left in the Program Management budget on at least two additional occasions after BIA-OJS took the position that the supervisory criminal investigator position was not funded by the Program Management budget. *See* Pltf.’s SDF, Add’l Facts 12-13. Thus, under 25 U.S.C. § 5321(a)(4) and 25 C.F.R. § 900.25, the Tribe’s alteration of its proposal to remove the supervisory criminal investigator position provides no basis for declining the severable portion of the Program Management proposal.

The United States’ complete refusal to acknowledge this modification to the Tribe’s proposal and denial on that basis exemplifies the United States’ utter lack of good faith during the contract negotiations. *Infra*, § C.

2. The Tribe’s Proposal Did Not Seek Any “Duplication of Funding,” Therefore Such Rationale Does Not Provide Lawful Justification for Declining the Contract Proposal.

The United States argues that the “Tribe’s contract proposal for Program Management services improperly included funding for an administrative position.” Doc. No. 38 at 19. The United States alleges impropriety for two reasons: first, BIA-OJS “had already provided funding for a law enforcement assistant for the tribally operated Criminal Investigations program[,]” *id.*; and second, the LEA “position could not be lawfully contracted as long as the position supports federal programs[,]” *id.* at 20.

To the extent that the United States relies upon the idea that funding a law enforcement assistant position for NCIS could only come from Criminal Investigations funding, that ignores the reality of how the Tribe’s law enforcement agency operates. NCIS does not just provide criminal investigations; it oversees all the Tribe’s law enforcement functions, including dispatch and inherent Tribal law enforcement authority. Pltf.’s SDF, Add’l Fact 2. Thus, much like the BIA-OJS LEA supports multiple BIA-OJS functions at Northern Cheyenne, US SUF ¶ 20, the Tribe sought funding for a LEA in the same manner to serve as NCIS’s office manager, Pltf.’s SDF, Add’l Fact 5.

BIA-OJS’s denial on the basis of allegedly duplicative funding being sought is not a proper application of 25 U.S.C. § 5321(a)(2)(D), which allows the Secretary

to decline a contract proposal only if “the amount of funds proposed under the contract is in excess of the applicable funding level for the contract[.]” The Tribe sought to contract only the amount of funding available under the Program Management program. Pltf.’s SDF, Add’l Facts 6, 12, 13. Thus, this declination reason is invalid on its face since the proposal conformed to the statutory requirement by expressly seeking only the available Program Management funding.

Regardless, there is no limitation in the ISDEAA that prevents the Tribe from using Program Management funds that the Secretary spends on administrative support to provide administrative support to other ISDEAA-contracted law enforcement functions within and for the same tribe. The ISDEAA specifically allows a tribe to contract for “those administrative activities supportive of, but not included as part of, the service delivery programs ... that are otherwise contractable[.]” and those “administrative functions . . . shall be contractable without regard to the organizational level within the Department that carries out such functions.” 25 U.S.C. § 5321(a)(1) (emphasis added). This clearly allows a tribe to contract for an administrative support position that supports Criminal Investigations and other law enforcement functions, even if the administrative position is not included as part of the Criminal Investigations function. BIA-OJS Program Management presently funds a LEA position that supports other law enforcement functions at Northern Cheyenne, including the Telecommunications/dispatch

function. US SUF ¶ 20. This is exactly what the Tribe proposed: to assume the LEA funding and use it to provide administrative support for all law enforcement functions performed by the Tribe. Pltf.’s SDF, Add’l Fact 5.

Because the applicable funding level for a contract proposal under 25 U.S.C. 5321(a)(2)(D) “is determined based on what the Secretary otherwise would have spent, not on the source of the funds the Secretary uses[,]” *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 544 (D.D.C. 2014), the alleged ‘duplication of funding’ rationale relied upon by the United States provides no basis for declining the Tribe’s Program Management contract proposal.

3. The United States Cannot Rely on Post-Hoc Justifications in its Briefing Here to Support a Declination Issued in August 2023.

The United States’ position that an administrative support staff position cannot be contracted is not a lawful declination rationale under 25 U.S.C. § 5321(a)(2)(E) because administrative support is not an inherent Federal function and BIA-OJS’s 2023 declination did not present any reasoning to that effect.

Certain “inherent Federal function[s]” that may only be performed by federal employees are subject to exclusion from the scope of a self-determination contract. 25 U.S.C. §§ 5361(6), 5363(k). An ISDEAA contract proposal may be lawfully declined where “the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of [ISDEAA] because the proposal includes activities that cannot lawfully be carried out by the contractor.” 25 U.S.C.

§ 5321(a)(2)(E) (emphasis added).

However, such a declination basis must be demonstrably substantiated, not baldly asserted. In an administrative decision by the Interior Board of Indian Appeals, BIA failed to meet its burden to clearly demonstrate the validity of an ISDEAA declination based on an alleged inherent Federal function when “BIA did not provide any *specific examples* of residual functions at the Agency level that could only be performed by Federal employees” that the tribe sought to contract. *Paiute Indian Tribe of Utah v. S. Paiute Agency Supt.*, 46 IBIA 285, 287, 2008 WL 1902819 (2008) (emphasis in original, modification normalized).

Here, the entirety of BIA-OJS’s written explanation for declining to contract the administrative support portion of the Program Management funding is:

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 [*sic*] 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.

Pltf.’s SDF, Add’l Fact 11 (quoting Doc. No. 39-2 at 175). Contrary to the United States’ characterization, US SUF ¶ 42, this is not a “detailed explanation”; it provides no reasoning or specific of examples of job functions that can only be carried out by Federal employees.

Per the statute, this declination rationale properly applies only 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’s 2023 declination cites no law prohibiting the Tribe from carrying out the Program Management function, which BIA-OJS claims is limited to employing a single administrative assistant. To the contrary, it is certainly lawful for the Tribe to assume such clerical and administrative duties. Without any citation to “controlling legal authority,” 25 U.S.C. § 5321(a)(1), this declination reason is invalid as a matter of law.

Practical inconvenience is not the same as lawful non-contractability. Regardless of whether contracting the LEA component of the Program Management function may present a modest organizational dilemma for BIA-OJS in terms of administrative support for its direct service law enforcement functions, *see* US SUF ¶ 40, the legal standard under the ISDEAA is whether an activity cannot lawfully be carried out by a contractor because the activity is an inherent Federal function. BIA-OJS’s 2023 declination provided no basis for its counterfactual conclusion that an administrative assistant role is lawfully not contractable.

The United States presents on summary judgment entirely new reasoning and grounds for declining the contract proposal based on alleged inherent Federal function non-contractability. Doc. No. 38 at 20-22. However, the allegedly inherent Federal functions relating to procurement, firearms or “management of Federal funds,” Doc. No. 38 at 22, allegedly performed by the LEA and relied upon now for the first time by the United States to justify the declination did not appear in BIA-

OJS’s August 2023 declination letter or in any documents provided to the Tribe during negotiations or before the informal conference. *See, e.g.*, Pltf.’s SDF, Add’l Fact 16. For example, the job description provided to the Tribe in 2021 includes no mention of alleged “responsibilities related to the issuance, transfer, inventory, disposal, and reporting of lost federal firearms,” *see* Doc. No. 38 at 21. The Indian Affairs Manual cited in the United States’ brief supporting this assertion, *id.* at n.4, contains absolutely no delegation of such firearms responsibilities to agency LEAs. *See* Indian Affairs Manual, Part 23, Chapter 9, § 1.7.² In fact, there is no role at all for law enforcement assistants in BIA-OJS’s firearms policy. Pltf.’s SDF, Add’l Fact 17.

Notably, the supposedly inherent Federal functions performed by the BIA-OJS LEA that render the LEA position non-contractable are identical to the job duties performed by the NCIS law enforcement/investigative specialist, a position that BIA-OJS previously allowed the Tribe to contract under ISDEAA. Pltf.’s SDF, Add’l Fact 15.

Such post-hoc rationalization is insufficient to carry the United States’ burden to demonstrate that the declination reasons stated at the time of declination are

² *Available at:*

https://www.bia.gov/sites/default/files/dup/assets/public/raca/manual/pdf/23_iam_9_acquisition_and_accountability_firearms_and_ammunition_final_3.13.24_dasm_signed_3.19.24_w.footer_508.pdf (last accessed Oct. 22, 2025).

lawful. *See Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 542, 544 (“As a threshold matter, this argument cannot support the Secretary’s motion for summary judgment because she did not make it in the declination letter. . . . [The agency] never advanced this . . . argument in declining the Tribe’s proposal. It cannot now be used as a post-hoc to [*sic*] justification for the agency’s decision.”).

The statute is crystal clear: to deny a proposal, the Secretary must provide “written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority” that at least one of the declination conditions demonstrably applies. 25 U.S.C. § 5321(a)(2) (emphasis added). This is further supported by the DOI regulations implementing the ISDEAA:

What is the Secretary required to do if the Secretary decides to decline all or a portion of a proposal?

If the Secretary decides to decline all or a severable portion of a proposal, the Secretary is required . . . [t]o advise the Indian tribe or tribal organization in writing of the Secretary’s objections, including a specific finding that clearly demonstrates that (or that is supported by a controlling legal authority that) one of the conditions set forth in § 900.22 exists, together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision

25 C.F.R. § 900.29 (emphasis added). “The law requires a detailed explanation of the Secretary’s rationale for his decision and a disclosure of the facts or documents on which he relied for his decision.” *Cheyenne River Sioux Tribe v. Kempthorne*,

496 F. Supp. 2d 1059, 1068 (D.S.D. 2007) (emphasis added). “Simply reciting the declination criteria is absolutely insufficient.” *Id.* An argument supporting declination made only in a subsequent summary judgment motion and not in a declination letter cannot be used as a post-hoc justification for BIA-OJS’s decision. *Pyramid Lake Paiute Tribe*, 70 F. Supp. 3d at 544.

Neither BIA-OJS’s August 21, 2023 declination letter, Doc. No. 39-2 at 174-75, nor the November 2, 2023 report of the informal conference, Doc. No. 39-2 at 180, contain any of the findings or explanations now proffered by the United States to defend the declination and support its motion. BIA-OJS did not provide within the 20-day time limit, 25 C.F.R. § 900.29, any of the supporting rationale or documents that the United States now relies on in its briefing, Doc. No. 38 at 20-22. Pltf.’s SDF, Add’l Fact 16; *see* Doc. No. 39-2 at 174-175. The United States’ attempt to rewrite the unlawful declination letter now on summary judgment is ineffectual, and the declination remains invalid on its face.

C. The United States Presents No Argument Regarding Plaintiff’s Claim That Defendants Failed to Negotiate in Good Faith.

The United States admits that it intentionally defunded the Program Management function after Plaintiff submitted its contract proposal. US SUF ¶ 39. Its motion presents no legal argument supporting summary judgment against Plaintiff on this aspect of Plaintiff’s claims. *See* Doc. No. 38; Doc. No. 1 at 30 (Claim I ¶ 3).

Defendants are required to, in negotiation of self-determination contracts, “at all times negotiate in good faith to maximize implementation of the self-determination policy[.]” 25 U.S.C. § 5321(f)(1). “[E]ach provision of [the ISDEAA] and each provision of a contract or funding agreement shall be liberally construed for the benefit of the Indian Tribe participating in self-determination, and any ambiguity shall be resolved in favor of the Indian Tribe.” 25 U.S.C. § 5321(g). Defendants do not receive any deference on interpretation of ambiguous provisions of the ISDEAA; instead, the statute must “be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.” *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, 256 F. Supp. 3d 1186, 1223 (D.N.M. 2015) (quoting *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (1989)).

To that end, “the applicable funding level for a contract proposal is to be determined from the date the agency receives the tribe’s proposal.” *Pyramid Lake Paiute Tribe*, 70 F.Supp.3d at 543. Otherwise, the Secretary “could simply circumvent” the “carefully-constructed declination criteria in the ISDEAA” by cancelling (or defunding) a program “after receiving a self-governance proposal and then declining the proposal[.]” *Id.* The ISDEAA restricts the Secretary’s discretion to re-allocate funding once a tribal proposal to contract that funding has been received. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996) (Congress “clearly expressed . . . its intent to circumscribe as tightly as

possible the discretion of the Secretary” in the ISDEAA.) Defendants present no legal argument to the contrary.

BIA-OJS’s unilateral decision to defund Program Management to provide the requested level of Telecommunications funding does not comply with the agency’s statutory obligation to negotiate ISDEAA contracts in good faith. As the United States admits, all funding for BIA-OJS law enforcement is “part of the annual lump sum appropriation for ‘Operation of Indian Programs’ that funds most of the BIA.” US SUP ¶ 4. Although Congress “specifies certain amounts through explanatory statements and committee reports, including amounts for ‘Criminal Investigations and Police Services’ and ‘Detention/Corrections,’” *id.*, such “restrictive language contained in Committee Reports is not legally binding.” *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005). It is well-established that the United States cannot shirk its obligations under the ISDEAA by refusing to fund a self-determination contract with legally unrestricted funds based solely on the government’s preference to use those unrestricted funds for direct service functions. *Id.* at 642.

The Secretary may increase funding for a 638 contract at the request of a tribe, restricted only by the caveat that “the provision of funds under [the ISDEAA] is subject to the availability of appropriations[.]” 25 U.S.C. § 5325(b). The Tribe’s proposal to contract the Telecommunications function sought such an increase in

funding because it was plainly obvious that the purported Secretarial amount of \$269,871 communicated by BIA-OJS on August 12, 2022 was not equal to the amount that BIA-OJS spent on the program, nor was it sufficient to actually provide the service. *See* Pltf.’s SDF, Add’l Fact 20.

But BIA-OJS was, at the same time, required to negotiate the Secretarial amount for the Program Management function in good faith, which requires at least that BIA-OJS ‘freeze’ the Secretarial amount to that which was budgeted for Program Management as of July 27, 2022, the date of the Tribe’s contract proposal. Doc. No. 40-1 at 3; *Pyramid Lake Paiute Tribe*, 70 F.Supp.3d at 543. Nothing in any statute limits the United States’ funding source for Northern Cheyenne law enforcement to the “budgeted” amounts, and the United States freely acknowledges that “[i]t is not uncommon for actual expenditures to differ from budgeted amounts across functional areas.” US SUF ¶ 15. The ISDEAA clearly requires DOI and BIA to pull funds from elsewhere in their lump-sum appropriation if necessary to satisfy the requirements of the ISDEAA. *See Oglala Sioux Tribe v. United States*, 674 F. Supp. 3d 635, 683 (D.S.D. 2023) (“[A] Court cannot ignore the law’s commands simply because doing so may prompt difficult budgeting decisions for the Defendants. And that Congress has chosen to underfund law enforcement in Indian country does not thereby justify dismissal of ISDEAA claims.”) (citing *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200, (2012)).

Thus, even if BIA-OJS saw necessary to transfer \$253,303 into the Telecommunications program to meet its obligations to the Tribe under the ISDEAA, it was simultaneously obligated to maintain the FY2022 Program Management funding available to the Tribe by tapping other sources of funding available to BIA-OJS. *See Oglala Sioux Tribe*, 674 F. Supp. 3d at 683-84 (observing that OJS has funding available that is “not spent on reservations”).

BIA-OJS asserted that it could not contract the remaining \$72,525.51 left in Program Management because “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[.]” Doc. No. 39-2 at 171. However, BIA-OJS provided no such justification for why it could not have contracted the other \$253,303.49 in FY 2022-budgeted Program Management funding other than by transferring of those funds away from Program Management in violation of the ISDEAA. Nothing in the United States’ motion or supporting brief supports summary judgment for Defendants on this aspect of the claim.

CONCLUSION

For the foregoing reasons, United States fails to demonstrate that BIA-OJS’s unlawful denial of the Tribe’s self-determination contract proposal conformed to the express requirements of the ISDEAA, and therefore the United States’ motion for summary judgment must be denied.

Dated this 22nd day of October, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The number of words in this brief is 5,593, excluding caption, table of contents and authorities, exhibit index, this certificate of compliance, and certificate of service, in compliance with L.R. 7.1(d)(2)(E).

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CERTIFICATE OF SERVICE

I certify that on October 22, 2025, I served a copy of the foregoing upon the parties as follows:

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Dated this 22nd day of October, 2025.

s/ Laura Bartholet

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