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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

**REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

The United States' response arguments fail to overcome BIA-OJS's facially unlawful declination of the Northern Cheyenne Tribe's ISDEAA contract proposal to assume the law enforcement Program Management function. Accordingly, the Court should grant the Tribe's motion for summary judgment and deny the United States' motion.

1. The Tribe Properly Amended Its Proposal To Contract “All” Program Management Functions.

The United States’ assertions that the Tribe sought Program Management function funding to “boost” its previously contracted programs and that “the Tribe never intended to operate the Program Management functions OJS provided,” Doc. 41 (U.S. Resp. Br.) at 1, 5, are incorrect statements of fact and also wrong as a matter of law under the ISDEAA. Under the ISDEAA, an agency may award a contract even if the initial proposal includes functions that are not contractible or requests funding in excess of the Secretarial amount, subject to a tribe’s agreement to alter its proposal. *See* 25 U.S.C. § 5321(a)(4).

After BIA-OJS explained on August 12, 2022, in response to the Tribe’s initial July 25, 2022 proposal, that Program Management does not fund a supervisory criminal investigator position despite inclusion of a “Supervisory Criminal Investigator” on the BIA-OJS organizational chart, *see* Doc. 39-2 at 160, the Tribe amended its proposal on August 30, 2022 by clarifying the Tribe’s intent ““to contract all the Program Management functions and its associated budget and positions.”” Doc. 44 at 28 ¶ 6 (quoting Doc. 40-1 at 12) (emphasis in original). The Tribe’s amended proposal expressly stated, “[i]f Program Management includes supporting the [BIA-OJS direct service] patrol division, then the Tribe wishes to contract that as well.” Doc. 40-1 at 12 (emphasis added). The Tribe reiterated that request in writing on February 6, 2023 and numerous times during telephonic

technical assistance¹ meetings between BIA-OJS and the Tribe regarding the Tribe's proposal. Doc. 44 at 31 ¶ 12; Doc. 1-10 at 2-3.

Yet the Tribe received no response from BIA-OJS regarding the Tribe's request to contract the Law Enforcement Assistant (LEA) position that supports BIA-OJS's direct service functions – until BIA-OJS issued the formal declination on August 21, 2023, stating that the LEA position could not “be completed by the Tribe due to the BIA LEA function for BIA law enforcement is [*sic*] specific to Federal Employees.” Doc. 39-2 at 175; *see* Doc. 44 at 31 ¶ 11. On September 19, 2023, after BIA-OJS declined the Program Management contract proposal, the Tribe wrote to BIA-OJS and emphasized in writing for a third time that the Tribe had amended its proposal to contract the available LEA position. Doc. 44 at 31-32 ¶ 13; Doc. 39-2 at 177-78. It is thus indisputable that the Tribe did seek to contract all of the Program Management function, including the LEA position that supports BIA-OJS direct services. Furthermore, it is indisputable that BIA-OJS clearly understood that the Tribe's proposal included contracting the LEA position that supports BIA-OJS direct service.

¹ The ISDEAA requires that the Secretary provide technical assistance to avoid declination of a proposal. *See* 25 C.F.R. § 900.28 (“Secretary shall provide any necessary requested technical assistance to an Indian tribe, ... and shall share all relevant information with the Indian tribe... in order to avoid declination of the proposal.”); § 900.30 (Secretary shall provide additional technical assistance to overcome stated objections and to develop any modifications to overcome stated objections).

There is nothing in the ISDEAA, *see* 25 U.S.C. § 5321(a)(4), or in BIA-OJS's declination, suggesting that the Tribe's amendment of its proposal to "contract all the Program Management functions," eliminating pursuit of the supervisory position, was insufficient under section 5321(a)(4). The United States now insists – for the first time in response to the Tribe's summary judgment motion – that a "revised proposal, including a revised scope of work, organizational chart, and position descriptions" was required to reflect the Tribe's intent to contract "any and all positions" within the Program Management function. Doc. 41 at 5 n.3. At no point during technical assistance meetings and contract negotiations did BIA-OJS inform the Tribe or express the view that the Tribe was required to submit a wholly new contract proposal in light of new information from BIA-OJS. Such failure to identify the now-alleged procedural requirement illustrates either the lack of good faith by BIA-OJS during the contract negotiations or the United States' post hoc rationalizations. *See* Doc. 34 (Pltf.'s Br. in Supp. of Summ. J.) at 13-15.

It is also disingenuous for the United States to assert that the Tribe's contract proposal sought to "use ISDEAA as a tool to increase [a tribe's] overall share of limited appropriated dollars, at the expense of other tribes." Doc. 41 at 2. The United States is well aware that nothing in the ISDEAA requires BIA-OJS to reduce funding allocated to another tribe to fully fund Northern Cheyenne's contract proposals. *See* 25 C.F.R. § 900.3(a)(4). BIA-OJS receives a lump sum appropriation, including

significant funding that is not allocated to specific tribes.² This does not provide any reason to deny the Tribe's motion.

The United States' reliance on *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013), *see* Doc. 41 at 2, is misplaced because that case is inapposite here. There, a tribe sought ISDEAA funding to establish a police force where "there was no existing BIA program, and therefore nothing to transfer to the Tribe" because that tribe was located in a state that exercises primary criminal jurisdiction in Indian country under Public Law 280, 18 U.S.C. § 1162(a). *Id.* at 1030-31. BIA "generally does not allocate funds for direct law enforcement services to tribes in Public Law 280 states]." *Id.* at 1031 (internal quotation marks omitted). Thus, when the tribe submitted a ISDEAA proposal seeking law enforcement funding to create a new police function, BIA rejected the proposal under 25 U.S.C. § 5321(a)(2)(D) (proposed funding in excess of applicable funding) because there was no existing BIA police function for the Band to assume and, thus, no funding available. *Id.* at 1034. The court upheld the declination because

² *See* Doc. 39-1, ¶ 14 and n. 14 (citing to Indian Affairs Greenbooks); FY 2020 IA Greenbook at IA-ES-3 (\$376.7 million, out of a total Public Safety and Justice budget of \$409.2 million, goes to tribal and direct service law enforcement programs, leaving \$32.5 million not allocated to specific tribes), IA-ST-3 (\$6.543 million of PS&J budget, consisting of "Law Enforcement Program Management" funding, allocated to Central Office), *available at* https://www.bia.gov/sites/default/files/dup/assets/as-ia/obpm/2020_BIA_Greenbook.pdf.

the tribe was “attempting to use the ISDA to create a program that does not exist.” *Id.* at 1035.

Montana is not a Public Law 280 state, and the BIA currently funds and operates a law enforcement program within the Northern Cheyenne Reservation. Here, funds are being provided for law enforcement, and 25 U.S.C. § 5325(b)(5) allows a tribe to ask the Secretary to “increase[]” that funding “if necessary to carry out [the ISDEAA].” The *Los Coyotes* court did not consider 25 U.S.C. § 5325(b)(5), and applying the logic of *Los Coyotes* here would render § 5325(b)(5) a nullity. *Los Coyotes* is distinguishable and does not control here.

The United States presumes to know the Tribe’s intent in submitting the proposal to contract the Telecommunications and Program Management functions and attempts to use inadmissible evidence to bolster its claims. Doc. 41 at 3-4. The settlement regarding the Tribe’s proposal to contract Criminal Investigations, *see id.* at 4, has no bearing on the Tribe’s subsequent proposal to contract other related law enforcement programs. The settlement agreement and the negotiations leading up to the agreement cannot be relied upon at all by the United States in this litigation under the terms of the agreement itself. *See* Doc. 44 at 17-18; Doc. 39-2 at 162 (Settlement Agmt. ¶ 5).³

³ The United States asserts that “[t]he settlement was a significant concession by OJS because OJS had to pull money from other accounts to bridge this gap.” Doc. 41 at 4. This statement is not supported by the United States’ Statement of

Regardless, assumed dissatisfaction with a prior ISDEAA contract award provides no basis for declining a tribe's subsequent proposal. Doc. 41 at 3. The ISDEAA is meant to circumscribe the Secretary of the Interior's discretion "as tightly as possible." *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 108 (D.D.C. 2019) (internal quotation omitted). Declination reasons are limited to those set forth in the statute. 25 C.F.R. § 900.24. Perceived discontent with a prior awarded contract is not a proper declination reason.

It is well known that the Tribe is in the process of building its own law enforcement agency, Northern Cheyenne Investigative Services (NCIS), which provides multiple law enforcement functions, not just criminal investigations. Doc. 44 at 27 ¶ 2. The Tribe is utilizing the ISDEAA as intended to contract for the law enforcement functions performed by BIA-OJS and fold them into NCIS. Doc. 39-2 at 122, 132-33. There is nothing improper about the Tribe's goal; rather, the ISDEAA expressly approves such exercises of Tribal sovereignty and self-determination. That the Tribe has chosen to contract law enforcement functions in a stepwise manner, rather than wholesale, is a choice that the ISDEAA leaves to tribes. 25 C.F.R. § 900.3(b)(5) ("tribal decisions to contract or not to contract are equal expressions of self-determination.")

Undisputed Facts or its Statement of Disputed Facts. It is also barred by Fed. R. Evid. 408 and Fed. R. Civ. P. 56(c)(2).

Nor is it improper for the Tribe to request funding amounts in its contract proposals in excess of BIA-OJS-budgeted amounts to perform the same function. This is expressly allowed by the ISDEAA. *See* 25 U.S.C. § 5325(b)(5). BIA-OJS admits that the United States underfunds law enforcement across Indian country and relies upon tribes to “supplement federal funds with tribal funds to provide their desired level of law enforcement services.” Doc. 39-1 ¶ 8. The Tribe is challenging the adequacy of BIA-OJS law enforcement direct services in a separate lawsuit. Doc. 41 at 2-3. The Tribe sought increased funding in its proposals to contract those functions to ensure that the Tribe could provide adequate services through an ISDEAA contract. The proposed budgets submitted to BIA-OJS were based on the Tribe’s determination of what it would cost to provide the services “in accordance with best law enforcement practices[.]” Doc. 40-1 at 10.

2. BIA-OJS’s Decision to Reallocate Funding Does Not Alter the Legal Requirement That a Secretarial Amount Is Determined From the Date a Proposal Is Received.

The United States argues that BIA-OJS properly declined the Tribe’s proposal to contract Program Management because it “reall[oc]at[ed]” all but \$72,525.51 of its Program Management funding into the Telecommunications function and needed all of the remaining Program Management funding for an LEA “to support remaining OJS direct service.” Doc. 41 at 8.

Contrary to the United States’ argument, *id.* at 10-11, *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D.D.C. 2014), is directly on point. In *Pyramid Lake*, after the tribe submitted a proposal to Indian Health Services (IHS) to contract an emergency medical services (EMS) program, IHS “ceased operation of the [program] due its large operating deficit” and then declined the tribe’s contract proposal because IHS “discontinued the program” after receiving the contract proposal such that the “base amount available for contracting under [§ 5325(a)(1)] was zero.” *Id.* at 539. The declination reason proffered by IHS was not that the EMS program was cancelled; it was that the contract proposal sought funding in excess of the Secretarial amount. *See id.* at 543. Thus, the issue in *Pyramid Lake* is exactly the same issue raised here – “at what point must the agency calculate the applicable funding under section [5321](a)(2)(D): at the date of the proposal or at the date of the declination letter?” *Id.* It matters not whether a program was fully cancelled or had some of its funding redirected. The *Pyramid Lake* court properly concluded that the Secretarial amount is determined from the date the agency receives a tribe’s proposal. *Id.*

The United States further argues that even if the Tribe is correct as a matter of law, the funding amount to which the Tribe is entitled is \$600,993 because that is the sum of the FY 2022 allocations to Telecommunications and Program Management. Doc. 41 at 12. The purported logic behind this assertion is that “[t]he

Tribe’s Second Proposal was a single contract proposal for two functions, not two separate proposals each for a different function.” *Id.* This is wholly unsupported by the statute, which dictates that funding amounts provided “shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs[.]” 25 U.S.C. § 5325(a)(1). There is no reference to ‘multiple’ programs being covered by a single amount in a single proposal.⁴

The United States’s circular argument that 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,” Doc. 41 at 11, does not address that BIA-OJS unilaterally made the decision to move funding away from Program Management after the Tribe submitted a proposal to contract the Program Management function, in violation of the ISDEAA. It also highlights a fatal inconsistency in the United States’ argument: that BIA-OJS program funds are entirely fungible and can be moved around at the Secretary’s whim as long as the program is operated by BIA-OJS, but that the Tribe may not (1) do the same once the funds are awarded via ISDEAA or (2) ask OJS to do the same on the Tribe’s

⁴ This is also factually incorrect because the FY 2022 Secretarial amount for Telecommunications was actually \$381,409, not \$275,164. Doc. 44 at 36 ¶ 20; Doc. 40-1 at 3-4, 9. It bears repeating that BIA-OJS budget expenditures are not tantamount to the Secretarial amounts; instead, “the agency remains bound to pay ... what it would have paid” had it run the program itself. *Cook Inlet Tribal Council, Inc. v. Dotomain*, 10 F.4th 892, 896 (D.C. Cir. 2021).

behalf without submitting a separate proposal to “redesign” the program.⁵ The United States insists that the Tribe cannot receive any Program Management funding and apply it to the Criminal Investigations program, yet OJS was apparently free to apply Program Management funding to the Telecommunications program. This double standard is not what Congress intended.

Nor would the Tribe receive a “windfall” if it is awarded the amount of funding requested. *See id.* at 13. All funds received must be spent providing the program; the Tribe would put every penny received into providing the contracted law enforcement services, as it is required to do. Far from being a windfall, this funding is sorely needed. BIA-OJS all but admits that its law enforcement programs are underfunded. *See* Doc. 39-1 ¶¶ 8, 45. As previously stated, BIA-OJS receives a lump sum appropriation and has funding sources that do not require reducing funding elsewhere in order to provide Northern Cheyenne with full funding for its contracted law enforcement programs. *Supra* at n.1.

3. BIA-OJS Violated the ISDEAA’s Good Faith Standard.

The United States observes that “[t]he Tribe does not point to any standard for what constitutes ‘good faith,’” but nonetheless asserts that BIA-OJS “operated

⁵ The United States’ insistence that “the tribe must submit a specific redesign proposal” finds no support in the statute or regulations, as 25 C.F.R. § 900.8(g)(6) expressly indicates that a proposal to contract can include a proposed redesign of the programs to be contracted.

in good faith.” Doc. 41 at 15. The United States simply repeats its earlier assertions that BIA-OJS did not defund Program Management but that its actions resulted in the Tribe receiving the same funding for a different function, averring that “OJS was never deceptive or misleading in its representations to the Tribe.” *Id.* at 16.

The ISDEAA and its regulations must be liberally construed in favor of tribes. 25 C.F.R. § 900.3(b)(11). If the requirement to negotiate in good faith is ambiguous, the ISDEAA regulations at 25 C.F.R. Part 900 provide some guidance. *See* 25 C.F.R. § 900.3(b) (stating Secretarial policy to, *inter alia*, remove obstacles that hinder tribal autonomy and flexibility in administering programs; “provid[e] information” on programs so that tribes may become “increasingly knowledgeable” about them; and to, upon receipt of contract proposal, begin planning “to ensure a timely transfer of responsibilities and funding” to tribes).

BIA-OJS failed to adhere to those minimal requirements. Instead of planning for timely transfer of Program Management to the Tribe, BIA-OJS quietly moved funding away from the program. *See* Doc. 44 at 22 ¶ 39. Instead of sharing accurate information about Secretarial amounts, BIA-OJS misled the Tribe about how much funding was available. *Id.* at 35 ¶ 20. Instead of working to remove obstacles to autonomy over the Tribe’s own law enforcement agency, BIA-OJS created obstacles to prevent the Tribe from hiring additional staff badly needed to serve the Tribal community. *Id.* at 29 ¶ 7.

BIA-OJS provided additional funding for Criminal Investigations only after the Tribe sued the United States. *Id.* at 18 ¶ 29. BIA-OJS acknowledged during those contract negotiations that its stated FY 2020 Secretarial amount of \$237,733 was insufficient to actually operate the Criminal Investigations program since it was not enough to pay for any program costs other than salaries for two investigators. *Id.* at 35-36 ¶ 20. Since early in the negotiations over the Telecommunications and Program Management functions, the Tribe suspected that BIA-OJS was not being honest about the Secretarial amount for Telecommunications, which turned out to be true. *Id.*

4. Remand Is Not Appropriate Because It Would Be Futile.

The United States requests that if the Tribe is entitled to summary judgment, the Court should remand to BIA-OJS rather than award the Tribe's requested relief. Doc. 41 at 19.⁶ The United States argues that this Court remanded a contract declination to BIA in another case, and that "approval by operation of law" is not appropriate here. *Id.* (modification normalized) (quoting *N. Arapaho Tribe v. LaCounte*, 2017 WL 2728408, at *5 (D. Mont. June 23, 2017)).

The ISDEAA empowers courts to order "appropriate relief," including injunctive relief, to reverse a declination finding or to compel the Secretary to award

⁶ The United States also asserts that the Tribe is not entitled to "any money damages." Doc. 41 at 23. The Tribe requested equitable relief, not money damages. *See* Doc. 34 at 17-18.

and fund an approved contract. 25 U.S.C. § 5331(a). Regardless of how other courts apply the statute, the statute expressly allows the Court to award the Tribe's requested relief.

More problematic is that remand is inappropriate because it would likely be futile. *Cf. Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 38 F.4th 34, 60 (9th Cir. 2022) (courts should not grant an agency's request for voluntary remand where "the request is frivolous or made in bad faith"); *In re Clean Water Act Rulemaking*, 60 F.4th 583, 596 (9th Cir. 2023) (court's suspicion that "the agency does not actually intend to reconsider the challenged [agency action] ... is reason enough to deny a voluntary remand"). The United States does not suggest that it seeks remand in order to engage in good faith negotiations or to reach a different decision. More than likely, BIA-OJS will proceed to issue a revised declination letter elaborating the same declination reasons exhaustively repeated in the briefing.

CONCLUSION

For the foregoing reasons, the Tribe is entitled to summary judgment on its claims for relief as requested in its motion for summary judgment.

Dated this 3rd day of November, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The number of words in this brief is 3,249, excluding caption, 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 November 3, 2025, I served a copy of the foregoing upon the parties as follows:

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Dated this 3rd day of November, 2025.

s/ Anna Brady
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