No. 25-2375

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LOWER BRULE SIOUX TRIBE,
*Plaintiff-Appellant*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS; DOUG BURGHAM, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; BRYAN MERCIER, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS; STEPHANIE CONDUFF, ACTING DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS; KRISSANNE STEVENS, OR HER SUCCESSOR, AWARDING OFFICIAL FOR THE BUREAU OF INDIAN AFFAIRS GREAT PLAINS REGION; AND THE UNITED STATES OF AMERICA,
*Defendants-Appellees*.

Appeal from the United States District Court for the District of South Dakota
No. 3:21-cv-03018-RAL (Hon. Roberto A. Lange)

**APPELLANT'S REPLY BRIEF**

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# INTRODUCTION

This appeal concerns the ability of the Lower Brule Sioux Tribe ("Tribe") to operate tribal schools on the Lower Brule Indian Reservation in South Dakota. The Tribe receives federal funding to operate those schools under the Tribally Controlled Schools Act ("TCSA"), Pub. L. 100-297, 102 Stat. 385, *codified as amended at* 25 U.S.C. § 2501, *et seq*. The Tribe also receives federal funding to operate other essential tribal programs under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638, 88 Stat. 2203, *codified as amended at* 25 U.S.C. §§ 5301-10, 5321-32. The Tribe receives its allocation of TCSA funds in advance of expenditures and, for many years, the Bureau allowed the Tribe to borrow a portion of its TCSA funds to cover the operating expenses of ISDEAA programs for which federal funding was routinely delayed. When the Tribe receive its ISDEAA funding, it replenished its TCSA account. However, beginning in FY 2016, the Bureau began questioning and disallowing tribal TCSA costs in the amount of these short-term inter-governmental loans, which are called "deferred revenue deficits." Ultimately, the Bureau disallowed and sought to recoup from the Tribe millions of dollars in TCSA funds.

The Tribe appealed the adverse Findings and Determinations ("F&Ds") made by the Bureau of Indian Affairs ("Bureau") by, among other things, filing an action in the federal district court. The district court dismissed the appeal as untimely. The

Tribe asserts this was error and asks this Court to reverse the dismissal. Although the appeal was filed more than one year after the Bureau's issuance of notices of the F&Ds, the notices failed adequately to advise the Tribe of the sanctions imposed against it and of the Tribe's appeal rights. It is well-settled that, when an agency notice does not provide adequate notice of appeal rights, the notice is defective and it does not trigger the running of the limitations period under the TCSA, ISDEAA, and the Contract Disputes Act ("CDA"), Pub. L. 95-563, 92 Stat. 2383, *codified as amended at* 41 U.S.C. §§ 7101-7109.

Contrary to the Bureau's assertions, the Tribe did not waive this issue. The Tribe challenged the sufficiency of the Bureau's notices in the district court, and the Tribe's claims in this Court are encompassed in the issues raised in the district court. Further, the notices speak for themselves and their deficiency is a purely legal issue that requires no further development of the factual record.

The Court should find that the Tribe's appeal was timely and remand the case for further proceedings in the district court on the merits. The Bureau should not have disallowed or recouped the Tribe's deferred revenue deficits under its TCSA contracts. The Bureau was aware that the deficits were short-term deficits caused by delays in the Tribe's receipt of ISDEAA funds and other federal funds. There is ample evidence of this in the record, including evidence in the Tribe's audited financial statements, that when the Tribe received the delayed funds, it replenished the TCSA deferred revenue and expended that revenue on allowable program expenses. To permit the Bureau to recoup from the Tribe funds that already have been replenished to TCSA account would work an injustice. Further, the deferred revenues were fully collateralized by the value of other tribal assets, including cash assets, to ensure protection of the funds, as required by applicable law.

The Tribe also asserts that the district court erred when it entered summary judgment against the Tribe on its overcollection claim. The Tribe provided sufficient information to establish an overcollection of more than $2,000,000 above and beyond the actual amount of the Tribe's deferred revenue deficit. The Tribe consulted with the Bureau concerning the amount of its deficits and the methodology behind the Tribe's calculations. The Tribe used accepted accounting standards, with the Bureau's knowledge, and is not attempting unilaterally to adjust the amount of its short-term TCSA deficits.

## ARGUMENT

### I. THE TRIBE'S ORIGINAL CLAIMS CHALLENGING THE BUREAU'S FINDINGS AND DETERMINATIONS ARE TIMELY AND MERITORIOUS AND SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS ON THE MERITS.

The Bureau's decisions disallowing costs for FY 2016, FY 2017, and FY 2018 were defective in that they failed properly to advise the Tribe of its appeal rights. The formal notices accompanying the F&Ds for FY 2016, FY 2017, and FY 2018 failed to advise the Tribe of its right to appeal to the federal district court within twelve months of receipt of the reports. App. 44-50 (FY 2016); R. Doc. 12-1, at 1-7 (FY 2016); App. 54-57 (FY 2017); R. Doc. 12-4, at 1-4 (FY 2017); App. 63-66 (FY 2018); R. Doc. 12-7, at 1-4 (FY 2018). The Bureau now acknowledges that the right to appeal to the federal district court is, and always was, one of the Tribe's appeal rights. *See* Appellees' Brief at 7 (citing 41 U.S.C. §§ 7104(b)(3) and 25 U.S.C. § 5331(a)). The Bureau was required to notify the Tribe of that right in its formal notices, and it failed to do so.

Further, the Bureau's decision disallowing costs in FY 2017 did not advise the Tribe of all of the sanctions imposed against the Tribe. App. 54-57; R. Doc. 12-4, at 1-4. The notice informed the Tribe that the Bureau would impose payment restrictions, but it failed to inform the Tribe of the Bureau's intent to issue a bill of collection. App. 57; R. Doc. 12-4, at 4; App. 499, R. Doc. 85, at 10. It is well-established in the record that the Tribe relied to its detriment on this defect in the notice. *See* App. 324-325; R. Doc. 66-3, at 13-14. For example, the Tribe's Comptroller testified at her deposition that the FY 2017 F&D report:

> does not show on the Finding and Determination letters that it was going to collections either. It said it was going to have payment restrictions … But what we did not appeal, just to reiterate, we were not appealing the payment restrictions …

*Id*. *See also* R. Doc. 76, at 2-3. In addition to these defects, at least one of the F&Ds (FY 2016) was suspended and reconsidered. *See* App. 12; R. Doc. 1, at 12; App. 39, R. Doc. 12, at 4.

The Tribe argued in its opening brief that, when a contracting officer's "final decision does not afford a contractor adequate notice of appeal rights, that notice is defective and does not trigger the running of the limitations period." *J-Way S., Inc. v. United States*, 516 F. Supp. 3d 84, 90 (D. Mass. 2021) (citing *RMA Eng'g S.A.R.L. v. United States*, 140 Fed. Cl. 191, 216 (2018)), *aff'd sub nom. J-Way S., Inc. v. United States Army Corps of Eng'rs*, 34 F.4th 40 (1st Cir. 2022). *Accord, Uniglobe Gen. Trading & Contracting Co., W.L.L. v. United States*, 115 Fed. Cl. 494, 515 (2014).

There is ample authority in this Circuit for the proposition that incorrect, incomplete, and misleading information in an administrative agency notice of appeal rights can render the notice defective and void. *See*, *e.g.*, *Atiqullah v. I.N.S.*, 39 F.3d 896, 898 (8th Cir. 1994); *Cuffee v. Sullivan*, 842 F. Supp. 1219, 1224 (W.D. Mo. 1993).

In this case, the Bureau's notices did not contain "sufficient information concerning [the Tribe's] rights to make an informed choice as to whether, and in what forum, [it] will pursue an appeal. The focus of this requirement is the protection of the contractor." *Decker & Co. v. West*, 76 F.3d 1573, 1579–80 (Fed. Cir. 1996). Without such information, the notices were void.

The Bureau argues that the Tribe waived these arguments by failing to raise them in the district court. The Bureau is mistaken. The Tribe challenged the F&Ds and accompanying notices in its complaint, App. 1-26; R. Doc. 1, at 1-26, and in its amended complaint, App. 115-131; R. Doc. 32, at 1-17. The Tribe noted the requirement that the Bureau "must issue a formal notice to the to the Tribe, by certified mail," and the "formal notice must advise the Tribe of its right to appeal" under federal law. App. 8; R. Doc. 1 at 8. *See also* App. 120-121; R. Doc. 32 at 6-7. The Tribe's complaint and amended complaint both noted deficiencies in the Bureau's notices, including the deficient statement of sanctions in the FY 2017 notice. *See*, *e.g.*, App. 12-17; R. Doc. 1 at 12-17; App. 122-126; R. Doc. 32 at 8-12.

The notices accompanying the F&Ds speak for themselves. They are a part of the district court record and the record on appeal. *See* App. 36-42, R. Doc. 12, at 1-7; App. 44-50 (FY 2016); R. Doc. 12-1, at 1-7 (FY 2016); App. 53-57 (FY 2017); R. Doc. 12-4, at 1-4 (FY 2017); App. 63-66 (FY 2018); R. Doc. 12-7, at 1-4 (FY 2018). *See also* App. 157-163; R. Doc. 64, at 1-7; App. 168-171 (FY 2017); R. Doc. 64-3 at 1-4 (FY 2017); App. 177-180 (FY 2018); R. Doc. 64-6 at 1-4 (Fy 2018); App. 183-184 (FY 2018 Revised); R. Doc. 64-8 at 1-2 (FY 2018 Revised). There is no dispute as to their contents. No further factual inquiry is necessary to resolve the questions before this Court.

Even if the Tribe had not argued in the district court that the Bureau's notices were defective, which it did, this Court would still have the authority to consider the issue since "the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." *Gap, Inc. v. GK Dev., Inc.,* 843 F.3d 744, 749 (8th Cir. 2016) (citing *Weitz Co. v. Lloyd's of London*, 574 F.3d 885, 891 (8th Cir. 2009)). The notices speak for themselves.

Further, this Court has "addressed new arguments raised on appeal where the new issue is encompassed in a more general argument previously raised and no new evidence is presented on appeal." *Id*. (citing *United States v. Hirani*, 824 F.3d 741, 751 (8th Cir. 2016)). In this case, the Tribe's challenge to the notices is encompassed in the arguments raised in the district court concerning the requirements for, and insufficiency of, the formal notices issued by the Bureau. *See*, *e.g.*, App. 12-17; R. Doc. 1 at 12-17; App. 122-126; R. Doc. 32 at 8-12.

The Court should consider these arguments and find that the Tribe's original claims challenging the Bureau's F&Ds are legally cognizable, within the waiver of sovereign immunity under the ISDEAA and the CDA, and not time-barred. This Court should remand those claims to the district court for resolution on the merits.

The Tribe's deferred revenue deficits should not have been disallowed. First, as noted, the deficits were short-term deficits caused by delays in the Tribe's receipt of other federal funds, and when the Tribe received the delayed funds, it replenished the TCSA deferred revenue and expended that revenue on allowable program expenses. The Tribe reports that, when the Bureau's collection activity commenced, the Tribe's the unearned revenue deficit for the TCSA account was $1,981,756, which is substantially less than the previously disallowed amount of $3,679,223. *See* App. 125; R. Doc. 32 at 11; App. 145; R. Doc. 56 at 9. *See also* App. 200, 202; R. Doc. 64-9, at 16, 18. The difference is the result of the Tribe's replenishing the TCSA account with other funds. *See* App. 14; R. Doc. 1, at 14. *See also* App. 185-265; R. Doc. 64-9 at 1-81; App. 473-476; R. Doc. 83, at 1-4; App. 478-479; R. Doc. 83-1, at 1-2; App. 480-481, R. Doc. 83-2, at 1-2; App. 482-489, R. Doc. 83-3, at 1-8.[1]

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[1] The Tribe's audited financial statements for FY 2020 are included in the record on appeal. *See* App. 185-265; R. Doc. 64-9 at 1-81. They show assets, liabilities, revenues, expenditures, and deficits for the Tribe's TCSA programs. App. 200, 202; R. Doc. 64-9 at 16, 18. There was no reported fund deficits for the Tribe's TCSA programs for FY 2020. App. 200; R. Doc. 64-9 at 16. Further, the audited financial statements for FY 2020 show millions of dollars in program expenditures on the Tribe's schools. *Id*.

The Tribe's audited financial statements for FY 2021, FY 2022, FY 2023, and FY 2024 are on file with the Civilian Board of Contract Appeals in a companion case: *Lower Brule Sioux Tribe v. Department of Interior*, Case Nos. 7261-ISDA, 8083-ISDA and 8084-ISDA. They are also on file with the Federal Audit Clearinghouse. Although those audited financial statements are not a part of the record in this appeal, the Tribe submits that they demonstrate that by FY 2022, the amount of cash and cash equivalents in the Tribe's TCSA account exceeded the

Second, the deferred revenues were fully collateralized by the value of other tribal assets, including cash assets, to ensure protection of the funds, as required by applicable law. *See*, *e.g.*, App. 9-11, 20, R. Doc. 1, at 9-11, 20; App. 92; R. Doc. 27, at 7. *See also* App. 200, 202; R. Doc. 64-9, at 16, 18.

Further, the district court erred when it dismissed the Tribe's remaining claims, including the Tribe's claim that the United States failed to provide the remedial and technical assistance mandated in the ISDEAA and TCSA. The Bureau misreads the law when it argues that its duty to provide technical assistance applies only in the pre-award context. By its plain terms, 25 U.S.C. § 5322(e) applies to "mature contracts," and authorizes technical assistance, among other things, for "program planning and evaluation, including the development of any management systems necessary for contract management." *Id*. Further, the TCSA provide that the "Secretary shall provide such technical assistance to enable the school and governing body to carry out … remedial actions" to prevent the revocation of eligibility for tribes already receiving funding under the TCSA. 25 U.S.C. § 2505(c)(3).

The district court erred in concluding that the Tribe was not injured by the Bureau's failure to provide such assistance. App. 108-109; R. Doc. 27, at 21-22. Indeed, the Bureau's failure promptly to notify the Tribe of the Chatmon

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amount of its deferred (unearned) revenue, demonstrating the complete replenishment of the Tribe's TCSA account.

Memorandum and to otherwise assist the Tribe in managing its deferred revenues led directly to the Tribe's continued deferred revenue deficits and disallowed costs. App. 3, R. Doc. 1, at 3.

## II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT AGAINST THE TRIBE ON ITS OVERCOLLECTION CLAIM.

It was undisputed in the district court that the Tribe's deferred revenue deficit decreased substantially between the submission of the FY 2017 and FY 2020 audits. App. 408-409; R. Doc. 75, at 1-2. This was the result of the Tribe replenishing the TCSA account. *See* App. 185-265; R. Doc. 64-9 at 1-81; App. 482-489; R. Doc. 83-3, at 1-8.

It is also undisputed that the Tribe's audit for FY 2020 further changed the calculation of the Tribe's deferred revenue deficit from FY 2017, by applying a prior period indirect cost adjustment to the calculations in the 2010 through 2019 audits. App. 234; R. Doc. 64-9, at 41; App. 408-409; R. Doc. 75, at 1-2. This prior period adjustment was explicitly or implicitly approved by the Bureau's self-determination specialist who reviewed the audit and by the awarding official who signed the F&Ds for FY 2020. App. 319-321; R. Doc. 66-3, at 8-10; App. 373; R. Doc. 74-2, at 9; App. 478-479; R. Doc. 83-1, at 1-2; App. 502; R. Doc. 85, at 13.

The Tribe does not seek unilaterally to adjust the amount of its revenue deficit. Instead, the Tribe seeks an order requiring the Bureau to recalculate the amount of the Tribe's deferred revenue deficit in light of the replenishment of funds to the TCSA account and the prior period indirect cost adjustments using accepted accounting standards.

The Tribe has provided sufficient information to establish that the Bureau has collected over $2,000,000 more than the actual amount of the Tribe's deferred revenue deficit. App. 383-401; R. Doc. 74-4, at 1-19; App. 402-403; R. Doc. 74-5, at 1-2; App. 404-407; R. Doc. 74-6, at 1-4; App. 408-409; R. Doc. 75, at 1-2; App. 482-489; R. Doc. 83-3, at 1-8. It is unjust and inequitable for the Bureau to collect an amount greater than the Tribe actually owes, especially since the Tribe depends on its funding to provide essential services to its members and other reservation residents. App. 18-19, R. Doc. 1, at 18-19.

The Tribe has provided sufficient evidence to justify amendment of the contracting officer's decisions and the refusal to amend the decisions is arbitrary, capricious, and contrary to law. *See* 5. U.S.C. § 706; *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 16 (2020).

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Tribe's opening brief, the Court should reverse the decisions of the district court and remand this case for further proceedings in the district court.

Dated: March 4, 2026

**LOWER BRULE SIOUX TRIBE**

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## CERTIFICATE OF COMPLIANCE

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I hereby certify that on March 4, 2026, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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