

are remanded for further proceedings consistent with this opinion.

So ordered.



**NAVAJO NATION, a federally recognized Indian tribe, Navajo Nation
Department of Justice, Appellant**

v.

UNITED STATES DEPARTMENT OF the INTERIOR and Ryan Zinke, in his official capacity as Secretary, United States Department of the Interior, Appellees

No. 16-5117

United States Court of Appeals,
District of Columbia Circuit.

Argued December 9, 2016

Decided April 4, 2017

Background: Indian tribe brought action alleging that Bureau of Indian Affairs (BIA), an agency within Department of the Interior (DOI), violated Indian Self-Determination and Education Assistance Act (ISDEAA) by failing to disperse certain funding. The United States District Court for the District of Columbia, No. 1:14-cv-01909, Tanya S. Chutkan, 174 F.Supp.3d 161, entered summary judgment in favor of DOI. Indian tribe appealed.

Holdings: The Court of Appeals, Sentelle, Senior Circuit Judge, held that:

- (1) deadline for BIA to approve or reject tribe's proposal began to run on date tribe hand delivered proposal during partial government shutdown to exempted employee at BIA regional office, rather than date furloughed BIA employee who was responsible for such proposals returned to office;
- (2) tribe's silence, in face of repeated assertions by BIA concerning deadline,

did not equitably estop tribe from disputing timeliness of BIA's response; and

- (3) partial government shutdown did not equitably toll deadline.

Reversed.

Kavanaugh, Circuit Judge, filed concurring opinion.

1. Indians ⇌139

Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA) to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes' members. 25 U.S.C.A. § 5301 et seq.

2. Indians ⇌139

Under the Indian Self-Determination and Education Assistance Act (ISDEAA), the transfer of authority from the Department of the Interior (DOI) to a tribe for programs or services that a federal agency would otherwise provide to the tribes' members is memorialized in a self-determination contract. 25 U.S.C.A. § 5329(c).

3. Indians ⇌140

Ninety-day deadline under Indian Self-Determination and Education Assistance Act (ISDEAA) for Bureau of Indian Affairs (BIA) to approve or reject Indian tribe's funding proposal, that was submitted pursuant to self-determination contract with BIA, began to run on date tribe hand delivered proposal during partial government shutdown to exempted employee at BIA regional office, rather than date furloughed BIA employee who was responsible for such proposals returned to office, even if exempted employee violated Anti-Deficiency Act by accepting proposal that he was not authorized to work on during shutdown, since BIA was bound by consequences of exempt employee's acceptance

of tribe's proposal. 25 U.S.C.A. § 5321(a)(2); 31 U.S.C.A. §§ 1341(a), 1342.

4. Statutes ⇌1079, 1368

Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.

5. Public Contracts ⇌109

United States ⇌550

While the Anti-Deficiency Act's requirements, which prevent agencies from incurring obligations in excess of appropriations, apply to a government official, they do not affect the rights in a court of a citizen honestly contracting with the government. 31 U.S.C.A. §§ 1341(a), 1342.

6. Public Contracts ⇌109

United States ⇌550

Although the Anti-Deficiency Act prohibits a government agency from incurring obligations in excess of appropriations, if the agency nevertheless obligates itself to spend in excess of appropriations, the Act does not cancel the agency's obligations nor defeat the rights of other parties. 31 U.S.C.A. §§ 1341(a), 1342.

7. Equity ⇌54

Equitable doctrines are grounded in fairness and justice, and their application implies the occurrence of atypical circumstances.

8. Estoppel ⇌95

Indian tribe's silence, in face of repeated assertions by Bureau of Indian Affairs (BIA) concerning deadline for BIA to respond to tribe's funding proposal that was submitted pursuant to self-determination contract with BIA, did not equitably estop tribe from disputing timeliness of BIA's response under Indian Self-Determination and Education Assistance Act (ISDEAA), since it was inappropriate for government, that had consistently taken position that estoppel did not apply against

sovereign United States, to seek to impose estoppel against another sovereign entity, especially one that it owed distinctive obligation of trust. 25 U.S.C.A. § 5321(a)(2).

9. Indians ⇌140

United States ⇌320

Partial government shutdown did not equitably toll deadline under Indian Self-Determination and Education Assistance Act (ISDEAA) for Bureau of Indian Affairs (BIA) to approve or reject Indian tribe's funding proposal, that was submitted pursuant to self-determination contract with BIA, since government stoppages were not unforeseeable, and BIA did not make any effort to prevent its employees who worked during partial shutdown from accepting such proposals or to inform Indian tribes that it would not accept such proposals during partial shutdown. 25 U.S.C.A. § 5321(a)(2).

10. Indians ⇌140

United States ⇌320

Under the Indian Self-Determination and Education Assistance Act (ISDEAA), self-determination contracts, which transfer authority from the Department of the Interior (DOI) to a tribe for programs or services that a federal agency would otherwise provide to the tribes' members, are not limited to funding for programs the government currently provides to the requesting tribe. 25 U.S.C.A. § 5321(a)(2)(D); 25 C.F.R. § 900.18.

Appeal from the United States District Court for the District of Columbia, (No. 1:14-cv-01909)

Steven D. Gordon argued the cause for appellant. With him on the briefs were Philip Baker-Shenk and Jessica Farmer, Washington, DC.

John S. Koppel, Attorney, U.S. Department of Justice, argued the cause for ap-

pellees. With him on the brief were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, and Mark R. Freeman, Attorney.

Before: KAVANAUGH and PILLARD, Circuit Judges, and SENTELLE, Senior Circuit Judge.

Concurring opinion filed by Circuit Judge KAVANAUGH.

SENTELLE, Senior Circuit Judge:

The Navajo Nation delivered a proposed funding agreement to the Bureau of Indian Affairs, an agency within the United States Department of the Interior, during a partial government shutdown. By law, the BIA had 90 days after receipt to act on the proposal or it would be deemed approved. The BIA did not consider the proposal “received” until normal government operations later resumed, and issued a partial declination 90 days after that date. The Nation filed an action to enforce the proposal, contending that the BIA’s declination was untimely. The district court granted summary judgment to the DOI, holding that because the Nation had remained silent when the BIA indicated its position on the deadline, the Nation was equitably estopped from asserting an earlier one. The Nation brought the present appeal. We reverse the judgment.

I. BACKGROUND

[1,2] Congress enacted the Indian Self-Determination and Education Assistance Act (“ISDEAA”) to help Indian tribes assume responsibility for programs or services that a federal agency would otherwise provide to the tribes’ members. 25 U.S.C. §§ 5301 *et seq.* The transfer of authority from the Department of the Interior (“DOI”) to a tribe is memorialized in a “self-determination contract.” The ISDEAA includes a model contract specifying a multi-year term, with the funding amount for each year to be determined during subsequent negotiations and incor-

porated through annual funding agreements. *Id.* § 5329(c). When a tribe submits a proposed annual funding agreement to DOI, “the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification” to the tribe that the proposal is declined for one of five reasons provided by the statute. *Id.* § 5321(a)(2). “[T]he Secretary may extend or otherwise alter the 90-day period . . . if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe” to do so. *Id.* “A proposal that is not declined within 90 days (or within any agreed extension . . .) is deemed approved . . .” 25 C.F.R. § 900.18.

In 2012, DOI Secretary Sally Jewell entered into a self-determination contract under the ISDEAA whereby the federal government would fund the Navajo Nation’s (“the Nation”) judicial operations from January 1, 2012 through December 31, 2016. The contract requires the parties to negotiate a separate funding agreement for each calendar year that it covers.

On October 4, 2013, the Nation hand-delivered a proposal to Raymond Slim, an ISDEAA Specialist in the Self-Determination Office in the Bureau of Indian Affairs (“BIA”) Navajo Regional Office. Slim marked it for intra-office mail delivery to Jeanette Quintero, a BIA official that the BIA claims is responsible for making award and declination decisions for the Nation’s contracts under the ISDEAA. However, Quintero was furloughed at that time pursuant to a partial government shutdown caused by a lapse in congressional appropriations. Quintero returned to work on October 17, 2013, when normal governmental operations resumed, and apparently received the proposal on that date.

On October 21, 2013—two business days after normal government operations resumed—the BIA sent a letter to the Nation acknowledging its receipt of the proposal. The letter stated that, due to the government shutdown, the BIA considered the proposal to have been received on October 17, 2013. The letter asserted that the BIA had until “90 days after October 17, 2013 to approve, decline, or award the proposal,” and that this “90-day period will end on *January 15, 2014*.” (emphasis in original). The letter directed the Nation to contact Quintero or her colleague Frances Price if it had any questions. The Nation did not respond to this letter.

On November 7, 2013, the BIA sent another letter to the Nation, this time identifying substantial changes between the proposal and the CY 2013 annual funding agreement, including the fact that the Nation’s requested budget amount had increased from about \$1.3 million to over \$17 million. The letter requested that the Nation respond to the BIA’s concerns by November 29, 2013, so that the BIA could complete its review of the proposal, and stated that the BIA would “hold the approval” of the proposal until the Nation submitted the requested documents. The letter directed the Nation to contact Quintero, Price, or their colleague Daniel Largo, Jr., if it had any questions. The Nation did not respond to this letter.

If the proposal was properly “received” on the date it was hand-delivered (October 4), rather than on the date government operations resumed (October 17), then the 90-day window for the Secretary to act on it closed on January 2, 2014, rather than January 15 as asserted by the BIA. But the BIA neither approved nor denied the proposal by January 2, 2014, nor did it ever receive the Tribe’s “express written consent” to an extension of time within which to do so.

On January 9, 2014, the BIA sent a letter to the Nation requesting a 45-day extension to the 90-day window. The BIA stated that it was requesting the extension so that the Nation could have additional time to respond to the issues raised in the BIA’s November 7 letter. Again, the letter directed the Nation to contact Quintero, Price, or Largo with any questions. The Nation did not respond to this letter.

On January 15, 2014—according to the BIA, the last day of the 90-day window—the BIA sent the Nation a letter partially declining the proposal. The BIA authorized approximately \$1.3 million in funding rather than the approximately \$17 million requested.

On January 27, 2014, the Nation sent the BIA a letter asserting that the 90-day review window had actually closed on January 2, 2014—*i.e.*, 90 days after the Nation delivered the proposal to the Regional Office. The letter stated that the BIA’s partial declination was therefore untimely and that the proposal was automatically deemed approved as a matter of law.

On February 7, 2014, the BIA sent the Nation a letter explaining that the partial declination was timely because delivery of the proposal to Slim did not constitute receipt by the Secretary as Slim was only authorized to perform work for contracts relating to road construction during the partial shutdown. The BIA contended that during the partial shutdown no BIA employee was authorized to receive or work on the Nation’s proposal, so the 90-day review period did not begin until the authorized employees returned to work on October 17, 2013.

The Nation filed the instant action in November 2014 seeking to enforce the proposal. The district court denied the Nation’s motion for summary judgment and granted the BIA’s cross-motion for summary judgment, finding that because the

Nation was silent in response to the BIA's letters announcing its position on the deadline for action, the Nation was equitably estopped from asserting an earlier deadline. The Nation appealed.

II. DISCUSSION

A. Receipt

[3] The BIA asserts that the Nation's proposal was not "received" by the agency on October 4, 2013, notwithstanding that, on that day, the Nation hand-delivered the proposal to an agency employee at the BIA's Navajo Regional Office. Although the district court did not reach this question, it is nonetheless appropriate for this Court to resolve it. *See Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 325-26 (D.C. Cir. 1982) (citing *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)).

[4] "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Assn. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (internal quotation marks omitted). The word "receive" is not defined in the ISDEAA. Considering the plain meaning of the word, it is difficult to escape the conclusion that Slim's unconditional acceptance of the Nation's proposal hand-delivered to him on October 4, 2013, constituted receipt on that day. *See Webster's Third New Int'l Dictionary* 1894 (3d ed. 2002) (defining "to receive" as "to take possession or delivery of" or "to admit or accept in some character or capacity").

DOI's "Internal Agency Procedures Handbook for Non-Construction Contracting Under Title I of the [ISDEAA]" ("Handbook") notes that the 90-day deadline for action begins upon "receipt by the agency." The Handbook defines "agency"

as "the individual operating divisions or bureaus of . . . the DOI," including "offices." The Handbook, then, suggests that a proposal's arrival at any BIA office constitutes receipt. A subsequent section titled "Receipt of Initial Contract Proposal" also supports this straightforward reading by suggesting that "receipt" immediately precedes the date-stamping of a proposal upon "arriv[al] in any office." Indeed, the Handbook notes that the BIA is required to respond within 90 days of receipt even by an office without the authority to process proposals. *See Yurok Tribe v. United States Dep't of Interior*, 785 F.3d 1405, 1410-11 (Fed. Cir. 2015) (rejecting the government's argument that a proposal must be sent to a particular office within the BIA).

DOI asserts that Slim was legally incapable of accepting the proposal on behalf of the Secretary during the partial shutdown due to the Anti-Deficiency Act (the "Act"). The Act expressly prohibits agencies from incurring obligations in excess of appropriations, including the employment of federal personnel during a lapse in appropriations, such as a shutdown. 31 U.S.C. §§ 1341(a), 1342. Only excepted or exempted employees may work during a shutdown. Excepted employees are employees who are authorized to work on specific assignments to protect human life and property. *Id.* § 1342. Exempted employees are those whose salaries are paid out of a source of funding other than annual appropriations and therefore are not implicated by the Act. *See Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 43 U.S. Op. Atty. Gen. 293, 298 (1981); *see also* BIA Contingency Plan Q&A Document (Sept. 27, 2013).

According to DOI, there were no excepted or exempted employees in the BIA's Navajo Regional Office authorized to re-

ceive or work on ISDEAA contracts during the government shutdown. Slim, exempt from the Act because his salary was funded from multi-year appropriations, was “specifically authorized to receive or work on contracts related to road construction” but could not “work on contracts such as the Navajo Nation’s” DOI asserts that because no source of appropriated funds was available for Slim to receive the proposal on behalf of the Secretary during the partial shutdown, it would have been a violation of the Act for him to do so. But DOI concedes that Slim was permitted to engage in the “*de minimis* non-exempt function[]” of “marking the CY 2014 proposal for intra-office mail delivery.” DOI does not explain how he could have so processed a document not yet received.

[5, 6] Nevertheless, DOI argues, Slim lacked the authority to “receive” the proposal on behalf of the Secretary; thus, it contends, his acceptance of the proposal did not trigger the regulatory deadlines at issue in this case. However, while “the Anti-Deficiency Act’s requirements ‘apply to the official, . . . they do not affect the rights in this court of the citizen honestly contracting with the Government.’” *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 132 S.Ct. 2181, 2193, 183 L.Ed.2d 186 (2012) (quoting *Dougherty v. United States*, 18 Ct.Cl. 496, 503 (1883)). For example, although the Act prohibits a government agency from incurring obligations in excess of appropriations, if the agency nevertheless obligates itself to spend in excess of appropriations, it does not cancel the agency’s obligations nor defeat the rights of other parties. *Salazar*, 132 S.Ct. at 2193 (citing *Ferris v. United States*, 27 Ct.Cl. 542, 546 (1892)); see also *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed.Cl. 563, 570 (1997) (holding that the Act will not “shield the government from liability where the government has lawfully entered into a contract with another party”). Likewise, even if Slim violated the

Act by accepting the Navajo Nation’s proposal, the agency is nonetheless bound by the consequences of him doing so. In short, even if DOI’s position were otherwise correct, it would prove at most that its employee should not have received the document, not that he did not receive it.

B. Equitable Principles

DOI alternatively asserts two equitable principles that it argues excuse any untimeliness. First, DOI argues that the Navajo Nation is equitably estopped from disputing the timeliness of the declination after remaining silent in the face of the BIA’s repeated assertions of its position on the matter. Second, DOI argues that equitable tolling of the 90-day deadline is appropriate for the period of the government shutdown. We disagree. Such equitable relief is inappropriate in this case.

[7, 8] Equitable doctrines are grounded in fairness and justice, *Anglo-Am. Sav. & Loan Ass’n v. Campbell*, 13 App.D.C. 581, 603-04 (D.C.App.1898); *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996), and their application implies the occurrence of atypical circumstances. Equitable estoppel does not arise in this case. The government itself has consistently taken the position that estoppel does not apply against the sovereign United States. It thus ill-behooves the government to seek to impose such an uncommon action against another sovereign, especially one to which it owes a “distinctive obligation of trust.” *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480, 86 L.Ed. 1777 (1942). In its dealings with the Indians, the United States government “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be

judged by the most exacting fiduciary standards.” *Id.* at 297, 62 S.Ct. 1049.

[9] Nor does this case present the sort of “extraordinary circumstances” that justify equitable tolling. *See Menominee Tribe of Wis. v. United States*, — U.S. —, 136 S.Ct. 750, 755, 193 L.Ed.2d 652 (2016) (holding that circumstances must be sufficiently “extraordinary” to support equitable tolling). Government stoppages are hardly unforeseeable. If the government believes it cannot “receive” documents during a stoppage, it should instruct its employees not to receive them, rather than expect its citizens and its courts to “equitably” pretend it has not done so. There is no evidence in the record that the BIA made any effort to prevent personnel such as Slim from “receiving” proposals, or to inform tribes that it would not “receive” proposals during the shutdown.

DOI argues that the Court’s holding will lead to “absurd result[s]”—for example, if a lapse in appropriations lasted longer than 90 days, any proposals “received” at offices without excepted or exempt employees authorized to decline them would be automatically deemed approved during the lapse. Again, DOI, not its clients, has the authority to instruct its own employees on what they cannot do. Further, in this case, the BIA lost only the first 13 of the 90 days it had to act on the proposal. DOI concedes that the BIA had sufficient time to review and respond to the proposal by asserting that “the BIA’s declination analysis did not change after November 7” and the BIA “could have issued its declination decision at any time after November 7.” Yet, inexplicably, it failed to do so. The Court will not reward DOI’s lack of diligence in the name of “equity.”

C. Award Amount

[10] Finally, DOI argues that even if the proposal is deemed approved, the Nation cannot be awarded funds in excess of

the “Secretarial amount.” When a proposal is deemed approved, “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 the [IS-DEAA].” 25 C.F.R. § 900.18. DOI argues that because § 106(a) provides that the Secretary may decline a proposal if the amount of funds proposed “is in excess of the applicable funding level for the contract,” 25 U.S.C. § 5321(a)(2)(D), the BIA cannot be required to award funding in excess of the amount of funds the BIA would otherwise have expended on the particular program or service for the tribe. In short, DOI seeks to transform the funding floor into a ceiling. This argument has been oft rejected. *See Yurok Tribe*, 785 F.3d at 1412 (noting that the statute, “by its clear terms, sets a floor, not a ceiling, on the amount of money that a Tribe can receive in a self-determination contract”); *Seneca Nation of Indians v. United States Dept of Health & Human Servs.*, 945 F.Supp.2d 135, 150-51 (D.D.C. 2013) (noting that the § 106(a) or Secretarial amount is not immutable and can be increased by the Secretary). The cited portions of the ISDEAA do not “support the government’s claim that self-determination contracts are limited to funding for programs the government currently provides to the requesting tribe.” *Yurok Tribe*, 785 F.3d at 1412-13.

III. CONCLUSION

For the reasons set forth above, the district court’s decision denying the Navajo Nation’s motion for summary judgment and granting the BIA’s cross-motion for summary judgment is reversed.

So ordered.

KAVANAUGH, Circuit Judge,
concurring:

I join the Court’s opinion. I add this brief concurrence to explicitly state that

equitable tolling may apply in certain government shutdown situations. The doctrine does not apply on the facts here, however, because the BIA had plenty of time after it reopened on October 16, 2013, to meet the 90-day statutory deadline at issue in this case.



**UNITED STATES ASSOCIATION
OF REPTILE KEEPERS,
INC., et al., Appellees**

v.

Ryan ZINKE, The Honorable, in his official capacity as the Secretary of the Interior and United States Fish and Wildlife Service, Appellants

**Humane Society of the United States
and Center for Biological
Diversity, Appellees**

No. 15-5199

United States Court of Appeals,
District of Columbia Circuit.

Argued April 1, 2016

Decided April 7, 2017

Background: Nonprofit organization representing reptile breeders and certain members brought action against Department of Interior, challenging Department's rule prohibiting importation and interstate transportation of certain species of constricting snakes as contrary to Lacey Act. Plaintiffs moved for preliminary injunction to enjoin enforcement. The United States District Court for the District of Columbia, No. 1:13-CV-02007, Randolph D. Moss, J., 103 F.Supp.3d 133, and 106 F.Supp.3d 125, granted preliminary injunction, in part, to enjoin enforcement. Defendants appealed.

Holding: The Court of Appeals, Srinivasan, Circuit Judge, held that shipment clause of the Lacey Act did not bar ship-

ment of injurious species between the 49 continental United States.

Affirmed.

1. Environmental Law ⇌532, 534

A principal object and purpose of the Lacey Act is to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed. 16 U.S.C.A. § 701.

2. Federal Courts ⇌3616(2)

To the extent the district court's decision to grant a preliminary injunction hinges on questions of law, appellate review is essentially de novo.

3. Federal Courts ⇌3616(2)

When the grant of a preliminary injunction under review rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, the appellate court may resolve the merits even though the appeal is from the entry of a preliminary injunction.

4. Statutes ⇌1079

A court's interpretation of a statute must begin with the language of the statute itself.

5. Environmental Law ⇌532

The shipment clause of the Lacey Act, prohibiting any shipment of an injurious species between the continental United States, the District of Columbia, Hawai'i, the Commonwealth of Puerto Rico, or any possession of the United States, did not bar shipments of such species between the 49 continental United States, such as between Virginia and Maryland; the text of the clause was clear and unambiguous, and the interpretation permitting interstate shipments was supported by legislative history. 18 U.S.C.A. § 42(a)(1).