UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NAVAJO NATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.* Defendants.	)	Civil Action No. No. 20-1093 (DLF)

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This is a simple, straightforward case. The Navajo Nation ("Nation") is entitled to declaratory and injunctive relief to effectuate its proposed 2020 Successor Annual Funding Agreement ("SAFA") and Statement of Work ("SOW") for its Forestry Management contract under the Indian Self-Determination and Education Assistance Act ("ISDEAA"). Defendants ("Department") have no legitimate argument on the merits and resort to mischaracterizing the Nation's complaint and making spurious contentions about the applicable law.

THE MATERIAL FACTS

The Bureau of Indian Affairs ("BIA") declined the Nation's proposed 2020 SAFA for two reasons. One was that the proposed funding exceeded the applicable funding level. The second was based on revisions the Nation had made to the SOW. The BIA asserted that these revisions constituted a substantial change from the previous AFA and that, because of them, the proposed project or function could not be properly completed or maintained by the proposed contract.

The Nation then sought an informal conference before the Secretary's Designated

Representative. "An informal conference is a way to resolve issues as quickly as possible, without the need for a formal hearing." 25 C.F.R. § 900.153. The Designated Representative issued a Recommended Decision in which he concluded that the BIA's reasons for declining the proposed 2020 SAFA were insufficient. He "did not find" either that the proposed 2020 SOW is substantially different from the 2019 SOW, or that the proposed project or function cannot be properly completed or maintained by the proposed contract. As a remedy, however, he decided that the parties should convene and make a good faith effort to negotiate an agreed 2020 SAFA and SOW and, meanwhile, that the 2019 SAFA and SOW should remain in place. He resolved the funding declination by deciding that the BIA should immediately approve and award the available 2020 funding of $717,736.77, subject to modification once the full 2020 appropriations were known. The Recommended Decision became final for the Department on March 30, 2020.

The Nation then filed this action to establish that the proposed 2020 SAFA and SOW are approved as a matter of law and to enforce the BIA's funding obligation. Thereafter, the Department approved and awarded the available 2020 funding, resolving the funding dispute. Thus, the only issue now before the Court is whether the proposed 2020 SAFA and SOW are approved as a matter of law.

ARGUMENT

The Department's arguments are predicated on mischaracterizing the Nation's complaint and misstating the law. The Department contends that the Nation seeks, but cannot obtain, relief with respect to the BIA's "initial declination decision" because it has been superseded by the Recommended Decision. (Defs' Br. at 10-11). The Department contends that the Nation has not sought relief with respect to the Recommended Decision and cannot obtain it because the ISDEAA does not limit the remedy that can be ordered by the Designated Representative following an

informal conference. (*Id.* at 12-14). The Department further contends that the Nation is precluded from now seeking relief in this Court because of supposed procedural defaults on its part: (1) the Nation "forfeited" its ability to challenge the BIA's initial decision once the Recommended Decision became final (*id.* at 11); and (2) "[i]f [the Nation] objected to any aspect of the Recommended Decision, it had the right to appeal that decision before it became final." (*Id.* at 13-14 n.5). None of these contentions withstand scrutiny.

A. The Nation Has Properly Pled Its Claims

The Department seeks to re-write the Nation's complaint so that it can attack claims the Nation has not made. Contrary to the Department's contention, the Nation does not "seek[] injunctive relief against the initial declination decision by BIA's Navajo Regional Director." (Defs' Br. at 10). That declination already has been invalidated by the Recommended Decision, which "eliminate[d] the NRO Director's declination that 'the services proposed to be contracted for could not be properly completed or maintained by the proposed contract.'" (ECF No. 1-3 at p. 8).

Rather, the Nation seeks "a judgment declaring that the 2020 SAFA and Statement of Work as proposed by the Nation on September 28, 2019 are approved" (Complaint ¶ 23), and "injunctive relief compelling the Defendants to approve the 2020 SAFA and Statement of Work as proposed by the Nation." (*Id.* ¶ 26). The essence of the Nation's claims is that: "[w]here the BIA declines a proposal on a ground that is legally insufficient, the result is that the proposal is approved;" (Complaint ¶ 20); and "[b]ecause the BIA's grounds for declining the Nation's 2020 SAFA were legally insufficient, the SAFA and the Statement of Work as proposed by the Nation on September 28, 2019 are approved as a matter of law." (*Id.* ¶ 21). The complaint sought the appropriate remedy based on the Recommended Decision's finding that the BIA's grounds for declination

were legally insufficient.

Thus, the Department is incorrect that the Nation "did not challenge the validity of, or seek to enjoin, the Recommended Decision." (Defs' Br. at 12). To the contrary, the complaint sought declaratory and injunctive relief that are directly at odds with the remedy granted by the Recommended Decision (which was attached to the complaint as an exhibit).

In sum, the complaint properly challenged the Department's position as of April 27, 2020, with respect to the proposed 2020 SAFA, i.e., the Department's failure to implement the Recommended Decision with respect to funding, and the Department's failure to approve and put into effect the proposed 2020 SAFA and SOW. The Nation sought appropriate declaratory and injunctive relief against the Department on both fronts.[1]

B. The Designated Representative Is Bound By The Statute And The Regulations

The ISDEAA provides that "the Secretary shall, within ninety days after receipt of [a proposed SAFA], approve the proposal and award the contract unless the Secretary [declines the proposal for one of five specific reasons]. 25 U.S.C. § 5321(a)(2). A proposal that is not lawfully declined within 90 days is deemed approved. *See* 25 C.F.R. § 900.18. Further, a proposed SAFA cannot be declined if it is substantially the same as its predecessor. *See* 25 C.F.R. § 900.32. Thus, when a tribe proposes a SAFA, the agency has only two options – decline it within 90 days for a valid reason or else approve it. Where the Secretary declines a proposal for an invalid reason, the result is that the proposal is approved. *See Cook Inlet Tribal Council v. Mandregan*, 2019 WL 3816573, at * 10 (D.D.C. Aug. 14, 2019) ("Congress specifically assigned *to [the agency]* … the

[1] The Department suggests that the Nation acted inconsistently by seeking to enforce one portion of the Recommended Decision while challenging another portion. (Defs' Br. at 12). This is not so. The law encourages litigants to exhaust administrative remedies so that the agencies can correct their own mistakes. There is nothing inconsistent, or uncommon, about a litigant seeking to enforce favorable aspects of a final agency decision and to overturn the unfavorable aspects.

role of making defensible 90-day funding determinations when assessing contract proposals. [The agency's] failure to do so must result in the approval of the proposal.") (emphasis in the original; internal quotation marks and citations omitted).

Here the Recommended Decision found that there was no valid reason to decline the Nation's proposed 2020 SAFA and SOW, and that they were substantially the same as their predecessors. But, instead of approving the SAFA and SOW and putting them into effect, the Decision sent the parties back to the negotiating table to renegotiate them. This "remedy" is completely at odds with the statute and the regulations.

In a futile effort to defend this result, the Department contends that it complied with the ISDEAA because the BIA declined the Nation's proposed 2020 SAFA within 90 days, albeit for invalid reasons. (*Id.* at 14). It contends that the statute and regulations "do not relate to the remedy that the Secretary's Designated Representative may recommend after an informal conference requested by a tribe." (Defs' Br. at 13). In other words, the Department argues that the statutory and regulatory limitations apply only to the BIA's "initial decision" and that, in reviewing the validity of that decision, the Designated Representative has unbridled discretion to impose whatever "remedy" he sees fit. This remarkable interpretation would create an exception that swallows all of the statutory and regulatory provisions requiring that a proposal be accepted unless it is lawfully declined within 90 days. It violates the most elementary rules of construction. It also ignores Congress' intent to have the ISDEAA "circumscribe as tightly as possible the discretion of the Secretary[.]" *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996).

The ISDEAA and the regulations, by their terms, constrain the "Secretary," which includes both the Designated Representative and the BIA. By permitting a proposal to be declined only within 90 days of submission and only for five enumerated reasons, the statute necessarily requires

that those reasons be valid. Here, the Secretary's Designated Representative concluded, more than 90 days after the proposed 2020 SAFA had been submitted, that the announced reasons for declining it were invalid. At that juncture, the statute required him to "approve the proposal and award the contract." 25 U.S.C. § 5321(a)(2). It left him no other option.

Furthermore, the "renegotiation" remedy imposed by the Designated Representative conflicts with another statutory provision. The statute "creates a clear non-discretionary duty for the [agency] to provide technical assistance after every declination decision: 'Whenever the Secretary declines to enter into a self-determination contract ..., the Secretary shall ... provide assistance to the tribal organization to overcome the stated objections.'" *Navajo Health Foundation-Sage Memorial Hospital, Inc. v. Burwell*, 100 F.Supp.3d 1122, 1188-89 (D.N.M. 2015) (quoting what is now 25 U.S.C. § 5321(b)(2)). Here, however, the Designated Representative found that the stated objections were invalid, which obviated any need for technical assistance. Absent a need to overcome a valid objection to a tribal proposal, the ISDEAA makes no provision for renegotiation of the proposal. Any such renegotiation would be pointless and a waste of time – if there are no valid objections to the original proposal, the tribe could simply resubmit it and the Secretary would be required to approve it. Nor could the Secretary assert new reasons for declining this proposal more than 90 days after it had originally been submitted. This further underscores that the Designated Representative lacked authority to require the Nation to renegotiate its proposed 2020 SAFA and SOW after rejecting the BIA's stated reasons for declining them. Instead, he was required to approve the proposed SAFA and award the contract.

Moreover, "[w]hen interpreting the ISDEAA, courts must heed the Indian canon of construction." *Swinomish Indian Tribal Community v. Azar*, 408 F.Supp.3d 18, 25 (D.D.C. 2019); *see* 25 U.S.C. § 5392(f) (the ISDEAA "shall be liberally construed for the benefit of the Indian

tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe."). "To succeed, the government agency 'must demonstrate that its reading is clearly required by the statutory language.'" *Id.* (citing *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194 (2012)). The Department's fanciful construction of the ISDEAA is not "clearly required by the statutory language;" to the contrary, it is fundamentally inconsistent with the statute and the regulations.

C. There Is No Procedural Bar To The Nation's Claims

Finally, there is no procedural default here that bars the Nation's claims. The Department's argument that the Nation "forfeited" its ability to challenge the BIA's initial decision once the Recommended Decision became final (Defs' Br. at 11) misses the point because, as discussed above, the Recommended Decision "eliminate[d]" the BIA's declination. The Nation does not seek to relitigate the validity of the declination in this suit or to enjoin that declination. Instead, it challenges the Department's improper remedy after determining that the declination was invalid. The Nation seeks judicial enforcement of the statutory remedy – approval and implementation of the 2020 SAFA as originally proposed by it on September 28, 2019.

The Department also implies that this action is untimely by arguing that, "[i]f [the Nation] objected to any aspect of the Recommended Decision, it had the right to appeal that decision before it became final." (*Id.* at 13-14 n.5). This contention is disingenuous and misleading. It is true that, if a tribe wants to pursue an administrative appeal of a declination, it must file a notice of appeal with the Interior Board of Indian Appeals within 30 days of receiving either the initial decision or the recommended decision following an informal conference. *See* 25 C.F.R. § 900.158(a). However, the ISDEAA specifies that a tribe "may, in lieu of filing [an administrative] appeal, exercise the option to initiate an action in a Federal district court and proceed directly to

such court pursuant to section 5331(a) of this title." 25 U.S.C. § 5321(b)(3). The limitations period for filing such an action is six years. *See* 28 U.S.C. § 2401(a). The Nation filed this suit on April 27, 2020, less than two months after the Recommended Decision was issued and less than one month after it became final for the Department. Accordingly, the Nation's claims are not time-barred.

CONCLUSION

The Nation is entitled to summary judgment on its claims for declaratory and injunctive relief providing that, aside from the funding amount, its 2020 SAFA and SOW are approved as proposed by the Nation on September 28, 2019.

Dated this 19th day of November, 2020.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: /s/ Steven D. Gordon

Philip Baker-Shenk (D.C. Bar No. 386662)
Steven D. Gordon (D.C. Bar No. 219287)
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Tel: (202) 955-3000
Fax: (202) 955-5564

Attorneys for Plaintiff the Navajo Nation