

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

NO. 22-5100

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NAVAJO NATION,

Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Appellees.

CORRECTED BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 16-cv-00011
JUDGE TANYA S. CHUTKAN

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GLOSSARY

“Act” is the Indian Self-Determination and Education Assistance Act

“AFA” is an Annual Funding Agreement

“BIA” is the Bureau of Indian Affairs

“ISDEAA” is the Indian Self-Determination and Education Assistance Act

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 25 U.S.C. § 5331(a) and 28 U.S.C. § 1331. On March 21, 2022, the district court issued a Memorandum Opinion and Order denying, in whole or part, the Navajo Nation's motion for summary judgment in four of these six consolidated cases and granting Appellees' cross-motion for summary judgment. The Navajo Nation filed a timely notice of appeal on April 13, 2022. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The 2014 annual funding for the Navajo Nation's self-determination contract with the Department of the Interior ("Department") increased from approximately \$1.3 million to \$17 million. The district court held that, by law, this increase carried over to 2015 and 2016, requiring funding at the \$17 million level for each of those years, as well.

The issue presented is whether the district court erred in ruling that the increased annual funding level did not carry over to the successor contract covering 2017 and subsequent years.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), pertinent statutes and regulations are set forth in an addendum to this brief (hereinafter "Add.").

STATEMENT OF FACTS

A. Background

The Navajo Nation annually receives funding for the operation of its tribal courts through a contract with the Department under the Indian Self-Determination and Education Assistance Act (“ISDEAA” or “Act”), 25 U.S.C. § 5301 *et seq.* “The ISDEAA permits Indian tribes to assume responsibility for federally funded programs or services that a federal agency would otherwise provide to the tribes’ members.” *Menominee Indian Tribe of Wisconsin v. U.S.*, 614 F.3d 519, 522 (D.C. Cir. 2010). “After the tribe and agency memorialize the transfer of authority in a ‘self-determination contract,’ they negotiate annual funding agreements, which become part of the contract.” *Id.*

B. The Original Funding Dispute (*Navajo Nation I*)

In 2012, the parties entered into a contract which covered the years 2012 through 2016. Each year, they negotiated an Annual Funding Agreement (“AFA”) to establish the amount of funds to be paid to the Navajo Nation.

A dispute arose between the parties over the amount of funding to which the Navajo Nation was entitled for 2014. Because the existing funding level covered less than 10% of the actual cost of the Nation’s judicial system,¹ the Nation sought

¹ See *Navajo Nation v. Department of the Interior*, No. 1:14-cv-1909 (D.D.C.), Complaint, Exh. A, Attachment B.

a substantial increase (from \$1,292,532 to \$17,055,517) in the proposed AFA that it submitted to the Bureau of Indian Affairs (“BIA”) for 2014. The BIA had 90 days to approve or decline this proposal. A proposal that is not declined within 90 days is deemed approved. *See* 25 U.S.C. § 5321(a)(2); 25 C.F.R. § 900.18.

The BIA failed to act on the Navajo Nation’s proposed 2014 AFA within 90 days of its submission, and then belatedly declined the funding increase. The Navajo Nation asserted that the AFA had been deemed approved. The BIA countered that it was entitled to additional time because, due to a partial government shutdown, the agency was not fully staffed when the proposed AFA was submitted.

The Navajo Nation filed suit in the district court to enforce the proposed AFA and obtain the additional funding. *Navajo Nation v. Department of the Interior*, No. 1:14-cv-1909 (D.D.C.) ("*Navajo Nation I*"). The district court ruled that the Nation was equitably estopped from asserting the 90-day deadline. The Nation appealed to this Court, which reversed the district court’s decision. *Navajo Nation v. Department of the Interior*, 852 F.3d 1124, 1130 (D.C. Cir. 2017).

When the case was remanded, however, the district court simply sat on it and did not enter a final judgment in conformance with this Court's decision. After waiting 15 months for the district court to act, the Navajo Nation filed a petition in this Court for a writ of mandamus in August 2018. *In re Navajo Nation*, No. 18-5252 (D.C. Cir.). The Court denied this petition, finding that the district court’s

delay had not been “so egregious or unreasonable as to warrant the extraordinary remedy of mandamus.” (Order of Feb. 11, 2019).

The district court continued to sit on the case and, after another 21 months elapsed, the Nation filed a second mandamus petition on May 18, 2020. *In re Navajo Nation*, No. 20-5142 (D.C. Cir.). While this petition was pending, the district court finally issued a final judgment on June 12, 2020. The district court ruled that the Nation’s proposed 2014 funding increase to \$17,055,517 had been approved by operation of law and awarded the Nation damages in the amount of \$15,762,985 for that year.

C. The Funding Dispute In Succeeding Years

Meanwhile, the unresolved funding dispute for 2014 triggered the same dispute each year thereafter. As will be shown below, an increase in contract funding under the ISDEAA carries over to succeeding years. The Navajo Nation asserted that the contract funding level had increased by \$15.7 million in 2014, and sought the same increase each year thereafter. The BIA denied that contract funding had increased in 2014 and refused to provide that increase in succeeding years. In response, the Nation filed a series of suits in the district court, challenging the BIA's funding declinations for each of these years.

1. The 2015 AFA (*Navajo Nation II*)

For 2015, the Navajo Nation submitted a proposed AFA with a budget of \$19,130,869. (App. 8-31). The BIA declined all funding above \$1,295,735, i.e., the \$1,296,448 in funding it had actually provided in 2014 reduced by \$713 due to a reduction in congressional appropriations.² (App. 32-37). The Nation challenged this partial declination in *Navajo Nation v. Dep't of Interior*, No. 1:16-cv-00011 (D.D.C.) (“*Navajo Nation II*”).

2. The 2016 AFA (*Navajo Nation III*)

For 2016, the Navajo Nation submitted a proposed AFA with a budget of \$17,055,477.³ (App. 38-73). The BIA declined all funding above \$1,436,301, the amount it had actually provided for 2015. (App. 74-83). The Nation challenged this partial declination in *Navajo Nation v. Dep't of Interior*, No. 1:17-cv-00513 (D.D.C.) (“*Navajo Nation III*”).

3. The 2017 AFA (*Navajo Nation IV*)

In 2017, the parties entered into a successor contract (the “Renewed Contract”) covering the years 2017 through 2021. (App. 84-101). The Navajo

² The Secretary is authorized to implement across-the-board funding reductions to all self-determination contracts in response to a reduction in appropriations by Congress for the program or function to be contracted. See 25 U.S.C. § 5325(b)(2)(A).

³ Because of a typographical error, the proposal for 2016 was \$40 less than the proposed AFA for 2014. This lower amount was then used for succeeding years.

Nation proposed an AFA for 2017 with the same budget of \$17,055,477. (App. 102-126). The BIA declined all funding above \$1,429,177, the amount it had actually provided for 2016 reduced by \$7,124 due to a reduction in congressional appropriations. (App. 127-32). The Nation challenged this partial declination in *Navajo Nation v. Dep't of Interior*, No. 1:17-cv-00863 (D.D.C.) (“*Navajo Nation IV*”).

4. The 2018 AFA (*Navajo Nation V*)

For 2018, the Navajo Nation again proposed an AFA with funding of \$17,055,477. (App. 133-55). The BIA declined all funding above \$1,426,547.08, the amount it had provided for 2017 reduced by \$9,753.92 due to a reduction in congressional appropriations. (App. 156-59). The Nation challenged this partial declination in *Navajo Nation v. Dep't of Interior*, No. 1:18-cv-00774 (D.D.C.) (“*Navajo Nation V*”).

5. The 2019 AFA (*Navajo Nation VI*)

For 2019, the Nation again proposed an AFA with funding of \$17,055,477. (App. 160-82). The BIA declined all funding above the amount it had provided in 2018, i.e., \$1,452,725. (App. 183-87). The Nation challenged this partial declination in *Navajo Nation v. Dep't of Interior*, No. 1:19-cv-03612 (D.D.C.) (“*Navajo Nation VI*”).

6. The 2020 AFA (*Navajo Nation VII*)

For 2020, the Nation again proposed an AFA with funding of \$17,055,477. (App. 188-211). The BIA declined all funding above the amount it had provided in 2019, i.e., \$1,460,349. (App. 212-15). The Nation challenged this partial declination in *Navajo Nation v. Dep't of Interior*, No. 1:20-cv-01297 (D.D.C.) (“*Navajo Nation VII*”).

These six suits, *Navajo Nation II - Navajo Nation VII*, were consolidated before the district court and stayed pending a resolution of *Navajo Nation I*. When the district court resolved *Navajo Nation I* in June 2020, the parties proceeded to file cross-motions for summary judgment in *Navajo Nation II - Navajo Nation VII*. After those motions languished for another year, the Navajo Nation filed a third mandamus petition in this Court in October 2021 for a writ directing the district court to rule. *See In re Navajo Nation*, No. 21-5216. That petition was pending when the district court issued its decision on March 21, 2022.

7. The 2021 and 2022 AFAs (*Navajo Nation VII & Navajo Nation IX*)

The Navajo Nation has filed two additional follow-on suits, based on the BIA's declination of the \$15.7 million funding increase for 2021 and 2022. These actions are currently pending before the district court. *Navajo Nation v. Dep't of Interior*, No. 1:21-cv-00013 (D.D.C.) (“*Navajo Nation VIII*”) (filed January 5, 2021); *Navajo Nation v. Dep't of Interior*, No. 1:22-cv-01182 (D.D.C.) (“*Navajo*

Nation IX”) (filed April 28, 2022). They have been stayed pending the disposition of this appeal.

D. The District Court's Ruling In *Navajo Nation II* - *Navajo Nation VII*

The district court granted the Navajo Nation's motion for summary judgment as to *Navajo Nation II* and *Navajo Nation III*, ruling that the 2014 funding increase carried over to 2015 and 2016. The court rejected the Navajo Nation's argument that this result is compelled by the ISDEAA, itself, but the court accepted the argument that this result is mandated by a regulation, 25 C.F.R. § 900.32. (App. 227-33).

As to *Navajo Nation IV* - *Navajo Nation VII*, however, the district court reached the opposite conclusion and granted the Department's motion for summary judgment. The court reasoned that 25 C.F.R. § 900.32 is inapplicable to the years from 2017 onward because a successor contract became effective in 2017. (App. 232). And it rejected the Navajo Nation's argument that the funding increase carried over to the successor contract pursuant to another regulation, 25 C.F.R. § 900.33, reasoning that this regulation “pertains only to the agency's authority to decline renewal contracts, and not to successor AFAs.” (App. at 232-33 n. 6).⁴

⁴ The district court also decided a separate issue in *Navajo Nation VI* and *Navajo Nation VII*, which involved a dispute over the BIA's effort to unilaterally remove certain language from the AFAs for 2019 and 2020. That issue is not before this Court.

This appeal followed.

SUMMARY OF APPELLANT’S ARGUMENT

The annual funding increase for 2014, 2015, and 2016 carried over to the Renewed Contract in 2017. This result is dictated both by the ISDEAA, itself, and by the relevant regulations implementing the Act.

Funding under a self-determination contract consists of two components: direct program funding -- known as the "Secretarial amount" -- and contract support costs. *See* 25 U.S.C. § 5325(a)(1) & (2). Direct program funding, which is at issue here, "is not immutable and can be increased by the Secretary." *Navajo Nation*, 852 F.3d at 1130 (citation omitted). But the Act strictly limits an agency's ability to reduce contract funding in subsequent years. *See* 25 U.S.C. § 5325(b)(2). So long as the proposed funding does not exceed the current Secretarial amount, the agency must approve the proposal. *See* 25 U.S.C. § 5321(a)(2).

When the Nation’s proposed AFA was deemed approved by the Secretary in 2014, the Secretarial amount increased to \$17,055,517. *See* 25 C.F.R. § 900.18. This became the funding floor for subsequent years (subject to minor across-the-board reductions imposed on all self-determination contracts if congressional appropriations are reduced). It is uncontested that this increased funding level carried over to 2015 and 2016. The Act prohibits the BIA from reducing this funding level in 2017 and subsequent years. *See* 25 U.S.C. § 5325(b)(2).

The legislative history confirms that this result is exactly what Congress intended. Congress amended the statutory provisions in 1988 “to prevent tribal contract funding amounts from being unilaterally reduced by the Secretary once the contract funding amount has been established.” S. Rep. No. 100–274, at 17, *reprinted in* 1988 U.S.C.C.A.N. 2620, 2636.

In addition, the regulations mandate that funding increases carry over to succeeding years. 25 C.F.R. § 900.32 prohibits an agency from declining a tribe’s proposed successor AFA if it is substantially the same as the prior AFA. Likewise, 25 C.F.R. § 900.33 prohibits the BIA from declining a contract renewal proposal where there is no substantial change to the established scope or funding. Thus, section 900.33 precluded the BIA from reducing the funding level that had been in effect for 2014-2016 when the contract was renewed in 2017. And section 900.32 prevented the BIA from reducing that funding level in the AFAs for subsequent years.

ARGUMENT

This appeal is the Navajo Nation's fourth visit to this Court (following three petitions for mandamus) in its quest to effectuate this Court’s 2017 decision in *Navajo Nation I*, and secure the additional \$15.7 million in annual funding to which the Nation is entitled for 2014 and each year thereafter. The district court, having

ruled that this increase was inequitable,⁵ delayed implementing the 2014 increase for over three years after this Court's decision in *Navajo Nation I*. Then it delayed another two years before deciding these follow-on cases covering 2015 through 2020. The district court ultimately acknowledged that the 2014 funding increase carried over to 2015 and 2016, but ruled that it ceased to apply when the parties, as a matter of course, entered into a successor contract in 2017. This ruling -- which this Court reviews *de novo*, see *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 584 (D.C. Cir. 2016) -- contravenes the statute, its legislative history, and the applicable regulations.

I. The ISDEAA Provides That Increases In Annual Funding Carry Over To Succeeding Years

The ISDEAA is designed to “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). This is especially true of the statutory provisions relating to contract funding.

⁵ There is nothing inequitable about the Navajo Nation receiving the 2014 budget increase based on the BIA's failure to act within 90 days. As another judge has noted, “[w]hile [the 90-day provision] may seem imbalanced, Congress designed self-determination contracts to work in this manner for a specific remedial purpose” *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F.Supp.2d 135, 152 (D.D.C. 2013)) (“*Seneca Nation I*”).

A. Establishing the contract funding level

The Act provides that, when a tribe "submit[s] a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract," the Secretary "shall, within ninety days after receipt of the proposal, approve the proposal and award the contract" unless the Secretary finds that one of five reasons for declination exists. 25 U.S.C. § 5321(a)(2).

The only declination reason allegedly relevant here is that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 5325(a) of this title." 25 U.S.C. § 5321(a)(2)(D). This "applicable funding level" consists of two components: direct program costs, known as the Secretarial amount (§ 5325(a)(1)), and contract support costs (§ 5325(a)(2)). See *Southern Ute Indian Tribe v. Sibelius*, 657 F.3d 1071, 1073-74 (10th Cir. 2011); *Seminole Tribe of Florida v. Azar*, 376 F.Supp.3d 100, 103-04 (D.D.C. 2019). The AFAs and renewal proposal at issue here involve only direct program funding, i.e., the Secretarial amount; contract support costs for the Navajo Nation's self-determination contracts are negotiated separately.

The Act provides that the Secretarial amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). This "sets a floor, not a ceiling, on the amount of money that a Tribe

can receive in a self-determination contract.” *Navajo Nation*, 852 F.3d at 1130 (quoting *Yurok Tribe v. United States Dep’t of Interior*, 785 F.3d 1405, 1412 (Fed. Cir. 2015)). The “Secretarial amount is not immutable and can be increased by the Secretary.” *Id.* (citing *Seneca Nation I*, 945 F.Supp.2d at 150-51). Thus, “the secretarial amount [is] a negotiated sum that can't be less than what [the agency] would have spent on the program if it directly provided the [service].” *Cook Inlet Tribal Council, Inc. v. Dotomain*, 10 F.4th 892, 893 (D.C. Cir. 2021).

B. Reducing the contract funding level

The Act strictly limits the BIA’s ability to reduce contract funding in subsequent years. It provides that “[t]he amount of funds required by subsection (a) of this section [25 U.S.C. § 5325(a)] ... shall not be reduced by the Secretary in subsequent years except [in five circumstances].” 25 U.S.C. § 5325(b)(2) (emphasis added);⁶ see *Fort McDermitt Paiute and Shoshone Tribe v. Azar*, 2019 WL 4711401,

⁶ Those five circumstances are:

- (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted [known as an across-the-board reduction];
- (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
- (C) a tribal authorization;
- (D) a change in the amount of pass-through funds needed under a contract; or
- (E) completion of a contracted project, activity, or program.

25 U.S.C. § 5325(b)(2).

at *1 (D.D.C. 2019) ("the Act specifically states that that amount 'shall not be reduced by the Secretary in subsequent years except pursuant to' a limited set of reasons.") *aff'd & rev'd in part on other grnds*, 6 F.4th 6 (D.C. Cir. 2021). This prohibition, by its terms, applies to all "subsequent years" regardless of whether a new AFA or a renewed contract is put into place.

In summary, section 5321 requires the agency to approve a proposed contract or AFA so long as it does not exceed the established funding level, and section 5325(b) prohibits the agency from reducing the established funding level in subsequent years except for five narrow reasons. Absent one of those reasons, the funding level for any given year becomes the floor for subsequent years.

C. The contract funding level in this case

Here the Secretarial amount (the direct program funding) increased in 2014 when the Nation's proposed AFA was deemed approved by the Secretary. Once this funding increase went into effect, "the statutory scheme restricts the Secretary's ability to reduce funding from one year to the next." *Seneca Nation of Indians v. United States Dep't of Health & Human Servs.*, 144 F.Supp.3d 115, 116-17 (D.D.C. 2015). Accordingly, the annual funding of \$17,055,517 for 2014 became the funding floor for all subsequent years (subject only to across-the-board reductions if appropriations are reduced). The Nation was entitled under the Act to receive this amount each year thereafter.

The district court accepted this conclusion for 2015 and 2016 (although it erred in refusing to recognize that this result is compelled by the Act, itself, in addition to the regulations).⁷ But the court rejected this conclusion for 2017 and the following years when a successor contract took effect. The court accepted the Department's argument that the 2017 funding is not determined by the prior year's funding, but rather by the amount that the BIA would have provided for the operation of the programs at issue if the agency had "continued to provide the service itself." (App. 228). The court deemed this the "Secretarial amount" and concluded that it was the amount the agency was willing to authorize in 2014, i.e., \$1,292,532. The court further found that this "Secretarial amount" remained static from 2015 through 2020 and that, because the funding the BIA provided for 2017 and subsequent years did not go below this floor, the BIA did not contravene the Act. (App. 228-29).

This ruling resurrects the very argument that this Court rejected in *Navajo Nation I*, i.e., that "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." 852 F.3d at 1130. As the Court explained, this argument wrongly treats the statutory floor for the Secretarial amount as a ceiling.

⁷ The Department did not cross-appeal the district court's ruling regarding 2015 and 2016.

There are multiple flaws in the district court's analysis. First, it misconstrues the Secretarial amount. The Act provides that this amount "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract." 25 U.S.C. § 5325(a)(1). At the inception of a contract, this will be the sum the agency already was spending to provide the contracted services. But, thereafter, the amount the Secretary is providing for the operation of the programs is the current funding level under the contract, not the funding level when the agency last operated those programs (which could be decades earlier), nor the amount that the agency would like to spend for them.

The district court's notion that the Secretarial amount remained static from 2014 through 2020, and was not altered by the funding increase in effect for 2014, 2015, and 2016, finds no support in the statute. Funding under the Act consists of two categories of money: (1) direct program costs, i.e., the Secretarial amount, and (2) contract support costs. Both of these categories are protected against reduction by 25 U.S.C. § 5325(b)(2). There is no third category into which the 2014 - 2016 funding increase could fit that would leave it vulnerable to reduction or elimination in 2017.

What the district court conceived as the static Secretarial amount -- the \$1,292,532 that the BIA proposed to pay for 2014 -- simply reflected the contract

funding level for 2013. While this was the Secretarial amount at that time, the Secretarial amount increased to just over \$17 million when the Navajo Nation's proposed 2014 AFA was approved by operation of law.

This construction of the statute is explicitly confirmed by 25 C.F.R. § 900.18, which provides that "[a] proposal that is not declined within 90 days ... is deemed approved and 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 Act." The 106(a) amount is the Secretarial amount. As this Court noted in *Navajo Nation I*, "the § 106(a) or Secretarial amount is not immutable and can be increased by the Secretary." 852 F.3d at 1130 (citing *Seneca Nation I*, 945 F.Supp.2d at 150-51).

Once the Secretarial amount increased in 2014, the Act prohibited its reduction in all subsequent years except for across-the-board reductions based on a reduction in appropriations. 25 U.S.C. § 5325(b)(2). The Act protects all contract funding increases against later reductions.

The district court's construction of the Act flies in the face of these statutory provisions. Further, the district court ignored the rule of construction that Congress inserted in the Act: "each provision of this chapter 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). Thus, if the Act “can reasonably be construed as the Tribe would have it construed, it must be construed that way.” *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (emphasis in the original). The district court’s interpretation flouts the congressional command.⁸

In sum, the Act prohibits any reduction of the 2014 funding increase in subsequent years except for across-the-board reductions when appropriations are reduced. The BIA could not lawfully rescind the 2014 increase three years later when the contract was renewed.

II. The Legislative History Confirms That Funding Increases Carry Over To Succeeding Years

The legislative history of the relevant ISDEAA provisions confirms that Congress intended to preclude federal agencies from unilaterally reducing established funding levels in self-determination contracts. Congress amended the Act in 1988 to address “[f]luctuations in annual funding levels for self-determination contracts.” S. Rep. No. 100–274, at 8, *reprinted in* 1988 U.S.C.C.A.N. at 2627. It enacted what is now 25 U.S.C. § 5325(b), to strictly limit the circumstances under

⁸ The district court applied this “Indian canon” of construction in interpreting one of the regulations at issue in this case, *see* App. at 230, but ignored it in construing the statute. This is surprising since the court described the statutory construction issue as a “close question[] of law on which there is a dearth of case law and guidance.” (App. at 227). While the Navajo Nation disagrees that the question is close, Congress mandated that any such question should be resolved in the Nation’s favor.

which the Secretarial amount can be reduced. Pub.L. No. 100–472, § 205(b), 102 Stat. 2293.

Congress explained the purpose of this limitation was “to prevent tribal contract funding amounts from being unilaterally reduced by the Secretary once the contract funding amount has been established. The contract funding base can be reduced only by the tribal contractors or by reductions in appropriations by Congress.” S. Rep. No. 100–274, at 17, *reprinted in* 1988 U.S.C.C.A.N. at 2636 (explaining the “contract funding base”). Section 5325(b) “protects contract funding levels provided to tribes The protection of contract funding will provide year-to-year stability for tribal contractors, and will contribute to better tribal planning, management and service delivery.” *Id.* at 30, *reprinted in* 1988 U.S.C.C.A.N. at 2649.

Congress was fully aware that this limitation on funding reductions would have long-lasting effects given the enduring nature of self-determination contracts. Indeed, it underscored its intention “that the time frame for mature contracts will be indefinite ... [and] clarif[ied] that mature contracts would have no time limit.”⁹ *Id.* at 29, *reprinted in* 1988 U.S.C.C.A.N. at 2648. Congress explained that “[t]his change is consistent with the fact that tribal government functions such as law

⁹ A “mature contract” is one that has been continuously operated for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit. *See* 25 U.S.C. § 5304(h).

enforcement, social services and health services are permanent tribal government functions.” *Id.* (emphasis added). Because most self-determination contracts cover permanent government functions, it is vital that their funding not be subject to agency reduction from one year to the next.

The district court’s ruling that the BIA could unilaterally roll back the 2014 funding increase when the contract was renewed in 2017 -- and thereby eliminate 92% of the funding that had been in place for three years -- contravenes this explicit legislative history.

III. The Regulations Provide That Funding Increases Carry Over To Succeeding Years

The ISDEAA regulations also provide that annual funding increases carry over to succeeding years. This is not surprising because the regulations implement the statutory provisions. However, the district court adopted a flawed construction of the regulations under which they prohibit funding reductions during a contract term but permit a reduction when a successor contract is put in place.

The district court recognized that 25 C.F.R. § 900.32 explicitly prohibits an agency from declining a tribe’s proposed successor AFA if it is substantially the same as the prior AFA. Thus, it correctly ruled that the BIA could not decline the Navajo Nation’s proposed AFAs for 2015 and 2016 insofar as they sought the same funding amount approved for 2014.

But the court ruled that 25 C.F.R. § 900.32 is inapplicable to 2017 because a renewal contract became effective that year. And it rejected the Navajo Nation's argument that another regulation, 25 C.F.R. § 900.33, applies when contracts are renewed and prohibits the BIA from declining a renewed contract that is substantially the same as its predecessor. The district court ruled that this regulation pertains only to the agency's authority to decline renewal contracts, and not to successor AFAs. (App. 232-33 n. 6). Once again, the district court's analysis is flawed.

Section 900.33 provides in pertinent part that “the Bureau of Indian Affairs will not review the renewal of a term contract for declination issues where no material and substantial change to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe or tribal organization.” 25 C.F.R. § 900.33. Thus, “[t]he Secretary cannot decline a contract renewal proposal ‘where no material and substantial change ... has been proposed by the Indian Tribe or Tribal organization.’” *United States v. Cleveland*, 356 F.Supp.3d 1215, 1238 (D.N.M. 2018). Just as section 900.32 precludes the BIA from declining a successor AFA that is substantially the same as the prior AFA, section 900.33 precludes it from declining a contract renewal proposal that is substantially the same as its predecessor.

Here, the BIA invoked section 900.33 when it reviewed the Navajo Nation's "Renewal Proposal" for 2017. Based on that regulation, it purported to decline all funding above the amount, \$1,436,301, that it had provided for 2016. (App. 127). The agency's position, as in previous years, was that no funding increase had occurred in 2014 or carried over to the following years. That rationale has crumbled. Accordingly, section 900.33 dictates that the funding increase in effect from 2014-2016 carried over to 2017.

The district court posits that the Navajo Nation's 2017 proposal somehow falls outside the ambit of both section 900.32 and section 900.33, but it does not explain how. Its assertion that section 900.33 limits only the agency's authority to decline a renewal contract, but not the associated AFA, ignores the fact that the AFA is part of the renewal contract. *See Menominee Indian Tribe of Wisconsin*, 614 F.3d at 522 ("annual funding agreements ... become part of the contract"). Further, the regulations contemplate that, each year after a tribe's initial contract proposal is accepted, the tribe will submit either a successor AFA or a renewal proposal for the contract. *See* 25 C.F.R. § 900.12 (providing that, in years after a contract is initially awarded, a tribe "should submit a renewal proposal (or notification of intent not to renew) or an annual funding agreement proposal"). Thus, sections 900.32 and 900.33 cover all of the alternatives.

Furthermore, the district court's regulatory construction, which enables the agency to unilaterally strip out 92% of contract funding that has been in place for three years, contravenes the rule of construction that is incorporated in the regulations. It requires that "these regulations be liberally construed for the benefit of Indian tribes and tribal organizations to effectuate the strong Federal policy of self-determination and, further, that any ambiguities herein be construed in favor of the Indian tribe or tribal organization so as to facilitate and enable the transfer of services, programs, functions, and activities, or portions thereof, authorized by the Act." 25 C.F.R. § 900.3(b)(11). The district court applied this rule of construction in interpreting section 900.32 (*see* App. 230), but not in construing section 900.33 (*see id.* at 232-33 n.6).

In sum, the regulations (like the Act, itself) dictate that funding increases for self-determination contracts carry over to succeeding years. Section 900.33 precluded the BIA from declining the funding amount that the Navajo Nation proposed for the Renewed Contract in 2017 since it was the same as for 2016. For the years following the 2017 renewal, section 900.32 required the BIA to approve the proposed successor AFAs because the funding level remained the same. Thus, for each of the years at issue here, one regulation or the other (section 900.32 or section 900.33) required the BIA to approve the continuation of the existing funding level.

IV. The Court Should Require A Prompt Disposition On Remand

When this Court reversed the district court's decision in *Navajo Nation I* in 2017, “the district court ha[d] a plain legal duty to enter a conforming judgment without undue delay.” *In re Ezell*, 678 F. App’x 430, 431 (7th Cir. 2017). Yet the district court delayed for more than three years before it issued a final judgment in *Navajo Nation I*, triggering two successive petitions for mandamus by the Navajo Nation.

Thereafter, the district court delayed for almost two more years before it ruled on these six accumulated follow-on cases, *Navajo Nation II – VII*, even though several of them already had been pending for more than three years. This additional delay triggered a third petition for mandamus by the Navajo Nation.

Given this history, the Navajo Nation justifiably fears still more delay by the district court following a reversal and remand of *Navajo Nation IV - VII*. The Navajo Nation needs the withheld funding as soon as possible.¹⁰ The amount at stake exceeds \$60 million, which is more than one-third of the tribal funds that the Nation

¹⁰ The unmet needs on the Navajo Reservation are daunting. “38% of the people on the Navajo reservation live in poverty, and 19% suffer in extreme poverty On the reservation, an estimated 32% of all homes lack electricity, 31% do not have indoor plumbing, and 38% lack running water.” Vincent DeGennaro, Jr., “The systemic poverty in Navajo Nation is a national travesty,” KevinMD.com (May 10, 2019), <https://www.kevinmd.com/blog/2019/05/the-systemic-poverty-in-navajo-nation-is-a-national-travesty.html>.

spends annually for the welfare of its nearly 400,000 tribal members and to govern an area larger than ten different states.¹¹

In appropriate cases, this Court will explicitly direct a “prompt resolution” on remand in accordance with its decision. *See Arkema Inc. v. E.P.A.*, 618 F.3d 1, 10 (D.C. Cir. 2010); *Haselwander v. McHugh*, 774 F.3d 990, 993 (D.C. Cir. 2014).

Other circuits issue similar directives:

We agree with counsel for [plaintiff] that prompt disposition on remand should be urged. Inasmuch as the liability issue has been determined and all that remains is the computation of plaintiff's damages, courts should not unduly extend the length of time which an injured plaintiff must wait before receiving compensation.

Rapisardi v. United Fruit Co., 441 F.2d 1308, 1313 n.9 (2d Cir. 1971). Such a directive is appropriate in this case. The Court's decision and mandate should specify that a final judgment is to be entered promptly in accordance with the decision.

¹¹ The Navajo Nation's 2022 budget includes \$173.52 million in tribal general funds and \$1.05 billion in funding from outside sources, such as federal or state governments, that are restricted or intended for specific purposes. *See* Noel Lyn Smith, "President Nez approves fiscal year 2022 budget for Navajo Nation government," *Farmington Daily Times*, Sept. 28, 2021, <https://www.daily-times.com/story/news/local/navajo-nation/2021/09/28/nez-approves-fiscal-year-2022-budget-navajo-nation-government/5900502001/>. The Nation's enrollment reached 399,494 persons last year, and its Reservation extends over 27,000 square miles. *See* Simon Romero, "Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge." *New York Times* (May 21, 2021), <https://www.nytimes.com/2021/05/21/us/navajo-choerokee-population.html>.

CONCLUSION

The district court erred in ruling that the amount of contract funding for 2016 did not carry over to the Renewed Contract in 2017 and succeeding years. This decision should be reversed, and remanded with directions that the district court shall promptly enter a judgment in favor of the Navajo Nation in *Navajo Nation IV - VII*.

Dated: July 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a). Excluding the Table of Contents, Table of Authorities, the Glossary, the Addendum of Pertinent Statutes and Regulations, and counsel's Certificates, this Brief contains 5,845 **words**, including footnotes. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in **Microsoft Word 2003** using **Times New Roman, 14-point font**.

Dated: July 21, 2022

Respectfully submitted,

/s/ Steven D. Gordon
Steven D. Gordon

Attorney for Appellant Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2022, copies of the foregoing Appellant's Brief were served by electronic means using the Court's CM/ECF system.

/s/ Steven D. Gordon

Steven D. Gordon

Attorney for Appellant Navajo Nation

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

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25 U.S.C. § 53212
25 U.S.C. § 53257
25 C.F.R. § 900.1815
25 C.F.R. § 900.3215
25 C.F.R. § 900.3316

25 U.S.C. § 5321. Self-determination contracts

(a) Request by tribe; authorized programs

(1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs—

(A) provided for in the Act of April 16, 1934 (48 STAT. 596), as amended [25 U.S.C. 5342 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 STAT. 208) [25 U.S.C. 13], and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 STAT. 674), as amended [42 U.S.C. 2001 et seq.];

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), 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 applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

- (B) adequate protection of trust resources is not assured;
- (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
- (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under SECTION 5325(A) OF THIS TITLE; or
- (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection, if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

(A) proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or

(B) proposes a level of funding that is in excess of the applicable level determined under SECTION 5325(A) OF THIS TITLE, subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under SECTION 5325(A) OF THIS TITLE. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

- (1) state any objections in writing to the tribal organization,
- (2) provide assistance to the tribal organization to overcome the stated objections, and
- (3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such 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.

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this chapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to

which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises (as defined in SECTION 1452 OF THIS TITLE), except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)

(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of SECTION 233 OF TITLE 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 5321 or 5322 of this title is deemed to be part of the Public Health Service in the Department of Health and

Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in SECTION 2671 OF TITLE 28 and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: Provided, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to SECTION 5331(A) OF THIS TITLE, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the “Department”) that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section shall be made either—

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

(f) Good faith requirement

In the negotiation of contracts and funding agreements, the Secretary shall—

(1) at all times negotiate in good faith to maximize implementation of the self-determination policy; and

(2) carry out this chapter in a manner that maximizes the policy of Tribal self-determination, in a manner consistent with—

(A) the purposes specified in SECTION 5302 OF THIS TITLE; and

(B) the PROGRESS for Indian Tribes Act.

(g) Rule of construction

Subject to section 101(a) of the PROGRESS for Indian Tribes Act, each provision of this chapter 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. § 5325. Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this chapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)

(A) The contract support costs that are eligible costs for the purposes of receiving funding under this chapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

- (i) direct program expenses for the operation of the Federal program that is the subject of the contract; and
- (ii) any additional administrative or other expense incurred by the governing body of the Indian Tribe or Tribal organization and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) In calculating the reimbursement rate for expenses described in subparagraph (A)(ii), not less than 50 percent of the expenses described in subparagraph (A)(ii) that are incurred by the governing body of an Indian Tribe or Tribal organization relating to a Federal program, function, service, or activity carried out pursuant to the contract shall be considered to be reasonable and allowable.

(C) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this chapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

- (A) be used to provide additional services or benefits under the contract; or
- (B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in SECTION 13A OF THIS TITLE.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall

include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

- (A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and
- (B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) Reductions and increases in amount of funds provided

The amount of funds required by subsection (a) of this section—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

- (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
- (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
- (C) a tribal authorization;
- (D) a change in the amount of pass-through funds needed under a contract; or
- (E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this chapter or as provided in SECTION 5324(C) OF THIS TITLE.

Notwithstanding any other provision in this chapter, the provision of funds under this chapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this chapter.

(c) Annual reports

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this chapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this chapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by SECTION 5324(D) OF THIS TITLE.

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) Liability for indebtedness incurred before fiscal year 1992

Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) Limitation on remedies relating to cost disallowances

Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to October 19, 1984, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to SECTION 5331 OF THIS TITLE. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31 or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to SECTION 5123 OF THIS TITLE.

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(h) Indirect costs for contracts for construction programs

In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(i) Indian Health Service and Bureau of Indian Affairs budget consultations

On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to SECTION 1105 OF TITLE 31).

(j) Use of funds for matching or cost participation requirements

Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) Allowable uses of funds without approval of Secretary

Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this chapter.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(l) Suspension, withholding, or delay in payment of funds

(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) Use of program income earned

The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) Reduction of administrative or other responsibilities of Secretary; use of savings

To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this chapter reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a) of this section, the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) Rebudgeting by tribal organization

Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

25 C.F.R. § 900.18 What happens if a proposal is not declined within 90 days after it is received by the Secretary?

A proposal that is not declined within 90 days (or within any agreed extension under § 900.17) is deemed approved and 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 Act.

25 C.F.R. § 900.32 Can the Secretary decline an Indian tribe or tribal organization's proposed successor annual funding agreement?

No. If it is substantially the same as the prior annual funding agreement (except for funding increases included in appropriations acts or funding reductions as provided in section 106(b) of the Act) and the contract is with DHHS or the BIA, the Secretary shall approve and add to the contract the full amount of funds to which the contractor is entitled, and may not decline, any portion of a successor annual funding agreement. Any portion of an annual funding agreement proposal which is not substantially the same as that which was funded previously (e.g., a redesign proposal; waiver proposal; different proposed funding amount; or different program, service, function, or activity), or any annual funding agreement proposal which pertains to a contract with an agency of DOI other than the BIA, is subject to the declination criteria and procedures in subpart E. If there is a disagreement over the availability of appropriations, the Secretary may decline the proposal in part under the procedure in subpart E.

25 C.F.R. § 900.33 Are all proposals to renew term contracts subject to the declination criteria?

Department of Health and Human Services and the Bureau of Indian Affairs will not review the renewal of a term contract for declination issues where no material and substantial change to the scope or funding of a program, functions, services, or activities has been proposed by the Indian tribe or tribal organization. Proposals to renew term contracts with DOI agencies other than the Bureau of Indian Affairs may be reviewed under the declination criteria.