JOYCE BRANDA
Acting Assistant Attorney General
Civil Division

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney
UNITED STATES ATTORNEY'S OFFICE
2601 Second Avenue North, Suite 3200
Billings, MT 59101
(406) 247-4633
victoria.francis@usdoj.gov

ERIC R. WOMACK
Assistant Branch Director
JAMES D. TODD, JR.
JOSEPH E. BORSON
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
(202) 514-3378
james.todd@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NORTHERN ARAPAHO TRIBE,

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR;

KEVIN HAUGRUD, in his official capacity as Acting Secretary, United States Department of the Interior; and

DARRYL LaCOUNTE, in his official capacity as Director, Rocky Mountain Regional Office, BIA

Defendants.

No. 1:16-cv-60-BMM
No. 1:16-cv-11-BMM
(consolidated)

DEFENDANTS' COMBINED BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Having obtained a preliminary injunction that prevents the Bureau of Indian Affairs ("BIA") from awarding a contract under the Indian Self Determination Act ("ISDA" or "Act"), Pub. L. No. 93-638 ("638"), 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 *et seq.*),[1] to operate shared BIA programs on the Wind River Reservation to one tribe without the consent of the other tribe, the Northern Arapaho Tribe ("NAT") now asks this Court to allow it to effectively do just that. Without seeking consent of the Eastern Shoshone Tribe ("EST"), the NAT has submitted proposals for 638 contracts to take between 70 percent and 100 percent of funds currently allocated for shared services on Wind River to create new NAT-administered programs on the Reservation. The ISDA, however, only allows a tribe to take over operation of an existing program. It does not empower the NAT to unilaterally demand funds previously dedicated to programs that served both the NAT and the EST, particularly when the NAT's proposals do not explain how the BIA or the EST could continue to provide services for EST tribal members with the remaining funds. To hold otherwise would permit a tribe receiving shared service to dictate to the agency not only what funds it should receive but how funds for other tribes should be reduced. Such a result is not only contrary to this Court's prior decision but also the text and spirit of the ISDA. In this case, a review of the record of the NAT's proposals and the BIA's decision-making demonstrates that the BIA correctly declined each proposal identified in the NAT's Amended Complaint. Accordingly, this Court should deny the NAT's motion for partial summary judgment and should grant the BIA's cross motion.

[1] On August 1, 2016, the U.S. House of Representatives, Office of the Law Revision Counsel, transferred the codification of the ISDA from 25 U.S.C. § 450 *et seq.* to 25 U.S.C. § 5301 *et seq.* All ISDA cites in this filing have been updated to reflect their new codification.

II. BACKGROUND

A. Statutory Background

At the request of a tribe, the ISDA "direct[s]" the Secretary of the Interior to enter into a self-determination contract (also known as a "638 contract") with a tribe or tribal organization to administer any program or service that is currently provided by the Secretary for the benefit of the tribe. *See* 25 U.S.C. § 5321(a)(1). The Act defines "tribal organization" to include, inter alia, "any legally established organization of Indians which is controlled, sanctioned, or chartered by" "the recognized governing body of any Indian tribe." 25 U.S.C. § 5304(*l*). The definition further provides that "in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." *Id.* BIA regulations accordingly require that an "initial contract proposal"—that is, one for "programs . . . the Indian tribe or tribal organization is not now carrying out"—include "[a] copy of the authorizing resolution from the Indian tribe(s) to be served." 25 C.F.R. §§ 900.6, .8.

When awarding a 638 contract, the Act requires the BIA to transfer the funds that it "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).[2] The agency, however, "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." *Id.* § 5325(b).

The Act enumerates the bases for the agency to decline a proposal, three of which are at issue here:

[2] The ISDA also requires the BIA to pay each tribe's Contract Support Costs ("CSC") associated with administering the contract. *See* 25 U.S.C. § 5325(a)(2)-(3). Congress appropriates CSC separately, and CSC is not at issue in this case.

> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
>
> * * *
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract; [or]
>
> (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.

Id. § 5321(a)(2)(A), (C)-(D). The Act further requires the agency to approve any severable portion of a proposal, but—when the amount of funds sought is in excess of applicable funding level—the agency and tribe must *agree* to an alteration of the scope of the proposal before the agency must award a contract. *Id.* § 5321(a)(4).

The Act provides the agency 90 days after receipt of a proposal to approve or decline it. *Id.* § 5321(a)(2). If the BIA declines a proposal, the agency must notify the tribe in writing and provide assistance to the tribe to overcome the objection. *Id.* § 5321(a)(2), (b). A tribe may request an informal conference, begin an administrative appeal, or proceed directly in federal district court. *Id.* §§ 5321(b)(3), 5331(a); 25 C.F.R. § 900.31; 25 C.F.R. §§ 900.153–.157.

In addition to "direct[ing]" the BIA to transfer control of existing BIA programs and services to a tribe at that tribe's request, the ISDA separately "authorize[s]," but does not "direct," the BIA to "contract with or make a grant to any tribal organization" for "the improvement of tribally funded programs or activities." 25 U.S.C. § 5322(a)(1). Discretionary contracts or grants awarded pursuant to § 5322(a) are not subject to the 90-day timeline or the declination criteria set out in § 5321(a)(2). Unlike contracts awarded pursuant to § 5321(a)(1), discretionary contracts or grants awarded under § 5322(a) need not be for a program or service that is otherwise being provided by the agency. These discretionary contracts or grants can, for example, be used as "matching shares for any other Federal grant programs

which contribute to the purposes for which grants under this section are made." *Id.* § 5322(c).

B. Factual Background

The BIA–a component of the Department of the Interior–provides a broad range of programs and services, both directly and through 638 contracts with tribes and tribal organizations, to 2.3 million American Indian and Alaska Natives who are members of 567 federally-recognized tribes. *See* Decl. of Norma Gourneau ¶ 3 ("Gourneau Decl.") [filed herewith]. The BIA is one of 20 federal agencies that provides federal funds to the tribes. *Id.*

Congress annually appropriates money to fund BIA services in a lump-sum appropriation. *Id.* ¶ 4. Congress bases its appropriation on the President's budget request for BIA which, in turn, is based on the agency's consultation with the tribes regarding tribal needs. *Id.* The result of that consultation is the proposed Tribal Priority Allocation ("TPA") for the operation of Indian programs. The TPA is attached to the annual Indian Affairs Budget Justification. *See* U.S. Dep't of Interior, Indian Affairs, Budget Justifications & Performance Info., Fiscal Year 2017, TPA Base Funding, App'x. 4, www.indianaffairs.gov/cs/groups/public/documents/text/idc1-033225.pdf. The TPA process furthers Indian self-determination by giving each tribe the opportunity to establish its own priorities and to move certain funds allocated for its benefit among certain programs.[3] Gourneau Decl. ¶ 4. The TPA consultation process is also the vehicle through which a tribe can request that newly-appropriated funds be allocated to the tribe. *Id.*

The Eastern Shoshone Tribe and the Northern Arapaho Tribe are federally-recognized Tribes that share the Wind River Indian Reservation, located in Fremont

[3] Funds for certain programs, such as law enforcement, education, and the Indian Child Welfare Act, are also included in the annual lump-sum appropriation, but are not part of the TPA because tribes cannot reallocate funds for those programs to other uses.

County, Wyoming. *Id.* ¶ 5. Both Tribes hold a joint, undivided interest in most land within the Reservation, and social and family relationships on the Reservation are interconnected. *Id.* However, the two Tribes have not formed a confederated tribal government. *Id.* The Wind River Reservation is the only shared reservation in the United States on which the Tribes have not done so. *Id.*

The interconnectedness of the two Tribes generally makes it infeasible for the agency to provide all programs or services separately to each Tribe. *Id.* ¶ 6. To maintain law and order, for example, the Reservation must have a shared court system capable of adjudicating disputes concerning members of the two Tribes. *Id.*[4] Similarly, wildlife and resource management occur on a Reservation-wide basis. *Id.* More generally, because of fixed costs, the funding provided for a single federally-operated program may be insufficient to provide adequate services if divided among two separate tribal programs. *Id.*

The BIA directly provides a number of Reservation-wide programs and services on Wind River. *Id.* ¶ 7. These are known as "shared services" or "shared programs." *Id.* For Fiscal Year 2017, the BIA has requested $2,397,669 for agency-provided or "direct" shared services on the Wind River Reservation. *See* FY 2017 TPA Base Funding, App'x 4-6. These direct services include: (i) Law Enforcement and Detention Services; (ii) Executive Direction and Administration, (iii) Facilities Management; (iv) Agriculture; (v) Forestry; (vi) Trust Services; (vii) Probate; (viii) Irrigation; and (ix) Real Estate Services. *Id.*[5] Because the agency has requested these funds for the benefit of both Tribes and their respective Tribal members, both Tribes must be consulted on reallocation of these funds for other uses or for their division, to the extent practicable, between the Tribes. *Id.*

---

[4] *See also infra*, at 7-8.

[5] Historically, the BIA also directly provided territorially-based shared programs for: (i) Judicial Services; (ii) Wildlife Resource Management; (iii) Water Resource Management; and (iv) Road Maintenance. These are discussed in greater detail below.

638 Contracts on the Wind River Reservation

Over the years, both the EST and the NAT have entered into separate 638 contracts to take over operation of certain BIA programs operated solely for the benefit of that Tribe's members. Gourneau Decl. ¶ 8. For Fiscal Year 2017, the BIA has requested $271,948 in program funds for various 638 contracts or grants with the EST. *Id.* *See* FY 2017 TPA Base Funding, App'x 4-6. The BIA has requested $651,885 in program funds for 638 contracts or grants with the NAT. Gourneau Decl. ¶ 8. *See* FY 2017 TPA Base Funding, App'x 4-6. The BIA has thus proposed to divide between the Tribes certain tribally-based programs that the Tribes can separately operate under 638 contracts. Gourneau Decl. ¶ 8.

Both Tribes are represented by business councils: the Shoshone Business Council ("SBC") and the Northern Arapaho Business Council ("NABC"). *Id.* ¶ 9. For more than 70 years, the SBC and the NABC worked together to manage certain jointly held assets and certain shared programs via a Shoshone and Arapaho ("S&A") Joint Business Council ("JBC"). *Id.* The JBC consisted of a quorum of members from both the SBC and NABC. *Id.* It also consisted of a professional staff, known as the Joint Finance Office ("JFO"). *Id.*

In 1987, the EST and the NAT authorized the Law and Order Code of the Shoshone and Arapaho Tribes of the Wind River Reservation ("S&A LOC"), www.shoshone-arapaho-tribal-court.org; Gourneau Decl. ¶ 10. The Tribes promulgated the Code to "provide all individuals living within the Wind River Indian Reservation with an effective means of redress for both civil and criminal conflicts." S&A LOC § 1-2-1. The Tribes found it was necessary to promulgate a joint code because of the "confusion and conflicts caused by the increased contact and interaction between the tribes, their members, and other residents of the reservation and other persons and entities over which the tribes have not previously elected to exercise jurisdiction." *Id.* The Tribes thus decided that "to insure maximum

protection for the tribes, their members and other residents of the reservation," the Code's jurisdictional reach "should be applied equally to all persons." *Id.*

To further the purposes of the Code, the S&A LOC established the S&A Tribal Court as a court of civil and criminal jurisdiction within the exterior boundaries of the Wind River Reservation and gave the JBC a significant role in the administration of the court. S&A LOC §§ 1-2-5, 1-3-1.[6] The S&A LOC also contained a Code of Tribal Offenses and a Fish and Game Code. *Id.* Titles VII, XVI. The Code makes 108 references to the JBC. *See* S&A LOC *passim*.

Shortly after passage of the S&A LOC, both Tribes authorized the JBC, as a tribal organization, to take over operation of judicial services on the Wind River Reservation via a 638 contract. Gourneau Decl. ¶ 10. Both Tribes also authorized the JBC to take over operation of four other shared programs on Wind River: (i) Fish and Game; (ii) Tribal Water Engineers; (iii) Road Maintenance; and (iv) Johnson O'Malley education grants. *Id.* In addition, the BIA awarded to the JBC a discretionary grant pursuant to 25 U.S.C. § 5322(a) to help fund its Meadowlark Youth Drug Court program. Gourneau Decl. ¶ 10. Each of these initial contracts and the initial grant was supported by tribal resolutions issued by both Tribes. *Id.*; *see also* 25 C.F.R. §§ 900.6, .8. These contracts were issued for renewable three-year terms, the last of which expired at the end of FY 2014, on September 30, 2014 (the Road Maintenance contract expired at the end of FY 2015, on September 30, 2015). *Id.* Pursuant to BIA regulations, the agency did not require requests from the JBC to renew these contracts to be accompanied by tribal resolutions from both Tribes. *See* 25 C.F.R. §§ 900.6, .8. Gourneau Decl. ¶ 10.

[6] The Code provides the JBC with the power to: (i) appoint and remove judges, S&A LOC §§ 1-3-2(2), (5), 1-3-5; (ii) appoint a court administrator, prosecutor, juvenile officer, and probation officer, *id.* §§ 1-3-12, -13, -14 -15, (iii) provide for bonding of court personnel, *id.* § 1-3-16, and (iv) prepare an annual list of eligible jurors. *Id.* § 1-6-2.

On September 10, 2014, the NABC informed the BIA that it had withdrawn from the JBC. Gourneau Decl. ¶ 11. The NABC informed the BIA that it expected shared 638 programs to "remain unaffected," but provided no further information about how it expected the agency to proceed. *Id.* In the absence of a viable alternative from the Tribes, the BIA renewed the Judicial Services, Fish and Game, and Tribal Water Engineers 638 contracts with the JBC until the end of FY 2015, and then awarded them to the SBC on behalf of the JBC, until the end of FY 2016. *Id.* ¶¶ 11-12. The agency did not renew the Road Maintenance and Johnson-O'Malley contracts—or the Meadowlark Youth Drug Court grant—after they expired on September 30, 2014 (September 30, 2015, for the Road Maintenance contract). *Id.* ¶ 11.[7]

On August 3, 2016, the BIA sent a letter to the SBC and the NABC announcing an agency decision that the BIA would no longer accept contract proposals for shared programs from either Tribe on behalf of the JBC without supporting tribal resolutions from both Tribes. *See* Ltr fr. Norma Gourneau to Darwin St. Clair & Dean Goggles, ECF No. 11-1. The letter further stated that the BIA will not accept proposals from one Tribe or tribal organization without agreement between the Tribes on the operation of that program. *Id.*

On September 30, 2016, the 638 contracts for Judicial Services, Fish and Game, and Tribal Water Engineers contracts expired. Gourneau Decl. ¶ 15. The BIA has

[7] Although the NABC has not met with the SBC since it announced its withdrawal from the JBC, the NABC has continued to involve itself, or attempted to continue to involve itself, in the operation of the professional staff on the JBC—the JFO. Gourneau Decl. ¶ 14. For example, the NABC has sought to prevent the SBC from terminating JFO employees. *See* Jt. Status Rpt. at 7, ECF No. 96. Also, at least one NABC member has continued to sign paychecks for JFO employees who manage the 638 contracts for the shared programs and for the employees for the S&A Tribal Court (until September 30, 2016), the Fish and Game Department, and Tribal Water Engineers. Gourneau Decl. ¶ 14. In addition, on September 26, 2016, the BIA awarded a 638 contract to both the Tribes for Road Maintenance after the Tribes agreed that the contract would be issued to and administered by the JFO. *Id.*

continued to allocate funds for these programs in the event the Tribes agree on a proposal to jointly operate the shared programs, and also, in the meantime, so that the BIA can directly provide shared Judicial Services on Wind River. *Id.* For FY 2017, the agency has requested $1,988,849 for the shared programs that the Tribes used to operate under 638 contracts. *See* FY 2017 TPA Base Funding, App'x 4-7.[8]

Judicial Services Proposals

On January 22, 2016, the BIA received the NAT's proposal for a 638 contract to fund a new NAT tribal courts program with "at least 70 percent" of the funds allocated for shared judicial services for the Wind River Reservation. Admin. Record ("AR") at 1-11. The January 22 proposal requested a three-year contract with a contract term beginning October 1, 2016. AR 7. The proposal stated that it was "for the courts of the [NAT] but involves some redesign of the functions [and] services or activities of the [S&A Tribal] Court and related services." AR 5. The proposal stated that the new NAT tribal courts would enforce the Northern Arapaho Code ("NAC") and would handle "all cases within the jurisdiction of those [c]ourts" and would deliver "judicial services for [NAT] members … and such others as may be within the jurisdiction of the Tribe as a matter of law." AR 6. The proposal was supported by a NAT tribal resolution, but was not supported by an EST tribal resolution. AR 11.

[8] With expiration of the 638 contract to operate the S&A Tribal Court, and because the Tribes had not agreed on a proposal to jointly administer the court, the BIA announced plans to resume directly providing judicial services on the Reservation. *See generally* ECF No. 32-1. On October 3 and 4, the BIA learned that the Tribal Court was continuing to operate and that the NABC was operating the Tribal Court and paying the salaries of all former S&A Tribal Court staff with its own tribal funds. Gourneau Decl. ¶ 16. On October 6, the SBC submitted to BIA a Tribal Resolution withdrawing the EST's recognition of the Tribal Court. *Id.* The BIA thus commenced operation of a CFR Court on October 21, 2016, for the benefit of all Indians on the Wind River Reservation. *Id.* In establishing the CFR Court, the agency committed to recognizing the right of the NAT to operate its own tribal court with its own tribal funds and thus proposed a protocol to govern the allocation and transfer of cases between the CFR Court and the tribal court. *Id.* The BIA's budget for the CFR Court is using all funds allocated for judicial services on the Wind River Reservation for FY 2017. *Id.* ¶ 17.

On April 19, 2016, the BIA timely declined the NAT's January 22 proposal pursuant to 25 U.S.C. § 5321(a)(2)(C) on the grounds that, for FY 2016, the agency had already awarded a 638 contract "to the [SBC] on behalf of the [JBC] to administer judicial services for the Wind River Reservation pursuant to the express provisions of the [S&A LOC]." AR 19. The BIA noted that the S&A LOC "has not been amended to reflect a separate and new judicial code for the Wind River Reservation." *Id.*

On May 5, 2016, the BIA provided a supplemental response to the NAT's January 22 proposal. AR 21-22. The BIA stated that it was also declining the NAT's proposal pursuant to 25 U.S.C. § 5321(a)(2)(A) & (C) because the NAT's proposal did not indicate how the NAT's new judicial services program "w[ould] interact with other courts operating within this same territorial jurisdiction, including the [S&A] Tribal Court." AR 21. The agency stated that it was also declining the NAT's proposal pursuant to § 5321(a)(2)(D) because the Tribe was requesting federal funds to operate a new program on the Reservation. AR 22. Additionally, the agency noted that pursuant to § 5325(b), it is not required to reduce funding for the EST to make funds available for the NAT. *Id.* The agency offered technical assistance to overcome these objections. AR 21, 22. The NAT has not followed-up with the agency's offer of technical assistance. Gourneau Decl. ¶ 20.

On August 11, 2016, the NAT submitted a purported "supplement" to its Judicial Services proposal. AR 23. The NAT's supplement proposed to "cross-authorize judges and other court personnel and share physical facilities and filing systems." AR 24. The Tribe proposed that its courts be funded with "approximately" 70 percent of funding provided by the BIA for judicial services on Wind River, and submitted two new budget proposals outlining alternative funding for the positions. AR 27. One budget proposal assigned two-thirds of the judges and staff to the NAT, and the remaining third to the BIA or the EST, and the other proposal assigned two-

thirds of the salary of each employee to the NAT, and the remaining third to the BIA or the EST. AR 31-35.

The BIA declined the NAT's August 11 supplemental proposal on November 7, 2016, pursuant to § 5321(a)(2)(A), (C) & (D). AR 117-18. The agency found that while both Tribes had received funding for a jointly-operated court, neither Tribe has received funding for a separate tribal court. *Id.* at 117. It further found that although the August 11 proposal purports to carve out portions of an existing program for the exclusive benefit of the NAT, the contract would undermine the BIA's ability to operate the CFR Court for the benefit of the EST. *Id.* Finally, the agency found that this Court's October 17, 2016, preliminary injunction precluded the BIA from awarding a contract that would allow the NAT to exercise jurisdiction over the EST or otherwise affect EST interests. *Id.* at 118.

On September 28 and 30, 2016, respectively, the EST and the NAT each submitted a separate proposal for a 638 contract for FY 2017 funding to operate the S&A Tribal Court. AR 36-111; Gourneau Decl. ¶ 23. After evaluating both proposals, the BIA offered, on October 11, 2016, to award a 638 contract to both Tribes on the condition that both Tribes agree to sign the same contract and to jointly operate and oversee the Tribal Court. AR 113-16. Neither Tribe has indicated that it is willing to do so. Gourneau Decl. ¶ 23. The agency thus proceeded to resume direct operation of the Judicial Services program on Wind River. *Id.* In light of the BIA's obligation to accept or decline any proposal within 90 days of receipt, the BIA eventually declined the NAT's and the EST's separate proposals to operate the S&A Tribal Court on December 23, 2016. AR 12-22.

Fish and Game Proposal

On June 28, 2016, the BIA received the NAT's proposal for a 638 contract to create a new Arapaho Fish and Game program. AR 123. The NAT sought 100 percent of the funds allocated for shared wildlife resource management on Wind

River to fund a new Arapaho Fish and Game Department. AR 126. The proposal stated that it was based on the assumption that either the EST or the BIA would coordinate with the NAT. AR 128. The proposal was supported by a NAT tribal resolution, but was not supported by an EST tribal resolution. AR 137.

The BIA declined the NAT's Fish and Game proposal on September 19, 2016, pursuant to 25 U.S.C. § 5321(a)(2)(A) on the grounds that the service to the beneficiaries would not be satisfactory because, while the funds were designated for both Tribes, the NAT was proposing to provide services for the benefit of Arapaho tribal members. AR 145. The BIA also declined the proposal pursuant to § 5321(a)(2)(D) on the grounds that the Tribe was seeking more money than the agency was spending on the program and on the grounds that the NAT was seeking 100 percent of the funds designated for members of both Tribes but only intended to provide services to Arapaho tribal members. *Id.* The BIA noted that § 5325(b) does not require the agency to reduce funding to the EST to make funds available to the NAT. *Id.*

Tribal Water Engineers Proposal

On June 28, 2016, the BIA received the NAT's proposal for a 638 contract to create a new Arapaho Tribal Water Engineers program. AR 149. This proposal sought "approximately" 70 percent of funds allocated for shared water resource management on Wind River "based on the [approximate] ratio of Northern Arapaho members to total members" on the Reservation. AR 152, 154. On top of that, the NAT sought additional funds for its proposal based on its alleged "tribal share" of funds allocated to BIA "Central, Regional, or Agency," but did not seek to take over its "share" of any of these headquarters, regional, or local agency functions. AR 156. The proposal further acknowledged that both Tribes had previously contributed approximately 60 percent of the total operating funds for the shared Tribal Water Engineers Program but stated that the NAT would be unable to contribute tribal

funds to this new program. *Id.* The proposal was supported by a NAT tribal resolution, but was not supported by an EST tribal resolution. AR 164.

The BIA declined the NAT's Tribal Water Engineers proposal on September 19, 2016, pursuant to 25 U.S.C. § 5321(a)(2)(A) on the grounds that the service to the beneficiaries would not be satisfactory because the Tribes have a joint, undivided interest in the management of resources on the Reservation. AR 172. The BIA also declined the proposal pursuant to § 5321(a)(2)(D) on the grounds that the Tribe was seeking more money than the agency was spending on the program, and on the grounds that the NAT was seeking 70 percent of the funds designated for members of both Tribes but only intended to provide services to Arapaho tribal members. *Id.* The BIA further noted that § 5325(b) does not require the agency to reduce funding to the EST to make funds available to the NAT. *Id.*

"Meadowlark" Proposal

On June 28, 2016, the BIA received the NAT's proposal for a 638 contract seeking 100 percent of the grant funds allocated for shared social services on Wind River in order to create a new social services program to aid Arapaho juveniles and their families. AR 176. The funding sought by the NAT had previously been awarded to the JBC via a grant pursuant to 25 U.S.C. § 5322(a) as matching funds for a tribally-created youth court-diversion program, known as the "Meadowlark program." Gourneau Decl. ¶ 29. The NAT's proposal was supported by a NAT tribal resolution, but was not supported by an EST tribal resolution. AR 187. The BIA declined the NAT's proposal on September 19, 2016. AR 192.

C. Procedural Background

Plaintiff filed the present action on May 18, 2016, challenging the BIA's declination of the NAT's January 22, 2016, proposal for a 638 contract to begin funding a new NAT tribal courts program. *NAT v. U.S. Dep't of of Interior*, No. 1:16-cv-60 (D. Mont. filed May 18, 2016), ECF Nos. 1, 1.2. On June 15, 2016, this Court

consolidated this action with the NAT's previously-filed lawsuit challenging the BIA's award of certain contracts to the SBC on behalf of the JBC. *See* Minute Entry, ECF No. 4; Compl., *NAT v. LaCounte*, No. 1:16-cv-11 (D. Mont. filed Feb. 22, 2016), ECF No. 1.

The NAT filed an Amended Complaint on October 13, 2016, to include challenges to the BIA's declinations of the Tribe's Fish and Game, Tribal Water Engineers, and "Meadowlark" proposals. *See* Am. Compl., *NAT v. Interior*, No 1:16-cv-60, ECF No. 23.

On October 17, 2016, this Court entered a preliminary injunction prohibiting the BIA from awarding a 638 contract to operate a shared service to one Tribe without the consent of the other Tribe. *See* Order at 24, ECF No. 24.

On December 13, 2016, the NAT filed a motion for partial summary judgment relating to claims set out in its Amended Complaint concerning its January 22 Judicial Services proposals and its "Meadowlark" proposal. *See* Pl.'s Mot. for Partial Sum. J., ECF No. 39. The motion did not seek summary judgment on the BIA's declinations of the Tribe's Fish and Game or Tribal Water Engineers proposals. *See id.*

III. STANDARD OF REVIEW

25 U.S.C. § 5331(a) waives sovereign immunity and supplies this Court with jurisdiction over this lawsuit but does not specify a standard of review. In the absence of an express standard of review, this Court must apply the "arbitrary and capricious" standard set out in the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. *See United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) ("[W]here Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, …consideration is to be confined to the administrative record and … no de novo proceeding may be held."); *Ninilchik Traditional Council v. United* States, 227 F.3d 1186, 1193 (9th Cir. 2000); ("[R]eviewing court must apply the deferential APA standard *in the absence of a stated* exception when reviewing federal

agency decisions." (emphasis added)); *see also id.* at 1194 ("[§] 706 of the APA functions as a default judicial review standard"); *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 107-09 (D.D.C. 2009) (APA record review applies to challenges to agency action taken under ISDA). Indeed, in reviewing agency action, the Ninth Circuit has held that de novo "review is appropriate only where *Congress has made a clear expression in its favor*." *Ninichik Traditional Council*, 227 F.3d at 1194 (emphasis added). Thus, while the ISDA provides this Court with "original jurisdiction" to review plaintiff's challenges, *see* 25 U.S.C. § 5331(a), "original jurisdiction" is not a "clear expression" in favor of a de novo standard of review. *See, e.g.*, *Ace Am. Ins. Co. v. Fed. Crop Ins. Corp.*, No. 14-1992, 2016 WL 5118279, at *2 (D.DC. Sept. 20, 2016) (rejecting claim that 7 U.S.C. § 1506, which gives district courts "exclusive original jurisdiction," creates *de novo* review). As a result, the APA's arbitrary and capricious record review standard applies to plaintiff's challenges. *Citizen Potawatomi Nation*, 624 F. Supp. 2d at 107-09.

Nevertheless urging de novo review, the NAT points to 25 U.S.C. § 5321(e)(1) as articulating the applicable standard of review. *See* Pl.'s Br. at 8, ECF No. 40 (citing *Seneca Nation of Indians v. HHS*, 945 F. Supp. 2d 135, 141 (D.D.C. 2013)). Section 5321(e)(1), however, states that the agency "shall have the *burden of proof* to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." 25 U.S.C. § 5321(e)(1) (emphasis added). By its terms, § 5321(e)(1) supplies a burden of proof, not a standard of review. *See Mondaca-Vega v. Lynch*, 808 F.3d 413, 417 (9th Cir. 2015) (differentiating between burden of proof and standard of review); *Demer v. IBM Corp. LTD Plan*, 835 F.3d 893, 913 (9th Cir. 2016) (Bybee, J., dissenting in part and concurring in the judgment) (distinguishing between burdens of proof that evaluate evidence and standards of review that evaluate agency discretion). Accordingly, a party may bear the burden of proving some fact by clear and

convincing evidence, while the reviewing court applies an arbitrary and capricious standard of review. *See, e.g.*, *Musengo v. White*, 286 F.3d 535, 539 (D.C. Cir. 2002).

An agency action is arbitrary and capricious only if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In any event, where, as here, the Court is reviewing the decision of an administrative agency, the Court's function in reviewing a motion for summary judgment "'is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did,'" *City & Cty. of San Francisco v. Dep't of the Interior*, 130 F.3d 873, 877 (9th Cir. 1997) (citing *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)), and, as may be needed, by considering affidavits by agency officials explaining their actions. *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 713-14 (9th Cir. 2012); *Presido Golf Club v. Nat'l Park. Serv.*, 155 F.3d 1153, 1165 (9th Cir. 1998); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988); *Bunker Hill v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977). It is well established that the use of "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *City & Cty. of San Francisco,* 130 F.3d at 877 (citation omitted).[9] The role of the court is not to "find facts" as "there can be no issue of material fact." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). The court is therefore limited to determining whether the movant is entitled to summary

[9] While urging de novo review, plaintiff nevertheless agrees that at least two of the challenged declinations may be resolved on summary judgment based on the record before this Court.

judgment as a matter of law. *See, e.g., NW Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994).

IV. ARGUMENT

The BIA correctly declined the NAT's Judicial Services, Fish and Game, and Tribal Water Engineers proposals because the ISDA does not require the agency to fund new programs, to reduce funding for non-contracting tribes to make funds available for the NAT, or to award a contract to perform services benefitting multiple tribes without the approval of each tribe. The BIA also correctly declined the NAT's "Meadowlark" proposal because the NAT is not entitled to turn a discretionary grant previously awarded to the JBC into a contract that would only benefit the NAT.

A. The ISDA Does Not Require the BIA to Accept and Fund Proposals for New Programs

The BIA correctly declined the NAT's January 22 Judicial Services proposal pursuant to 25 U.S.C. § 5321(a)(2)(D) because the ISDA does not require the agency to fund a new program. *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013).

The ISDA authorizes the BIA to decline a tribe's proposal when "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [§ 5325](a) of this title." 25 U.S.C. § 5321(a)(2)(D). In *Los Coyotes*, the Ninth Circuit reviewed the BIA's declination of a tribe's proposal for a 638 contract to create and fund a new law enforcement program on the tribe's reservation. 729 F.3d at 1034. The court found that the tribe was requesting a contract for a program that was not currently being funded by the BIA. *Id.* at 1035. It held that the purpose of § 5321(a)(2)(D) was clear: the ISDA does not require the BIA to award "a contract for a program that was not currently being funded by the BIA." *Id.* The court found that "[r]ather than attempting to transfer a program from the control of the BIA to the Tribe, the Tribe here is attempting to use the ISDA to

create a program that does not exist." *Id.* The court held the tribe's proposal to be "inconsistent with the ISDA," as the ISDA "requires that the Tribe first obtain BIA funding for a program, and then request a contract to operate the program." *Id.* The panel thus held that the district court erred in finding that the agency's declination violated the ISDA. *Id.* at 1036.

In this case, the BIA correctly declined the NAT's January 22 proposal to create and fund a new tribal courts program that would operate in parallel with the existing courts program on the Wind River Reservation. Although it is undisputed that the BIA had previously awarded a 638 contract to the JBC to operate the S&A Tribal Court for the benefit of both Tribes and is now operating the CFR Court for the benefit of both Tribes, it is equally clear the NAT's January 22 proposal is not proposing to continue operation of that program. The S&A Tribal Court applied, and the CFR Court now applies, the Shoshone and Arapaho Law and Order Code.[10] The S&A LOC's jurisdictional reach applies "*equally* to all persons" on the Reservation, regardless of tribal membership. S&A LOC § 1-2-1 (emphasis added). As the agency correctly found, the NAT has not withdrawn from or otherwise amended the S&A LOC "to reflect a separate and new judicial code." AR 19. Thus, the S&A LOC remains in effect for, and continues to be applied to, Arapaho tribal members on the Reservation.

Unlike the NAT's September 30, 2016, Judicial Services proposal (which the BIA offered to accept), the NAT's January 22 proposal does not seek to continue operation of the existing shared Judicial Services program on the Reservation. Rather, the NAT seeks to establish a new tribal courts program that would apply the Northern Arapaho Code to Arapaho tribal members, "*and such other persons or entities as may come within the jurisdiction of the Tribe*," AR 2 (emphasis added); *id.* at 6 (same). It

[10] *See* 25 C.F.R. § 11.449 (authorizing CFR Court to apply agency-approved tribal ordinances).

notes that the new tribal courts' "territorial jurisdiction encompasses the exterior boundaries of the Wind River Reservation." *Id.* at 3. The NAT thus proposes to apply the NAC over both Arapaho and Shoshone tribal members. Indeed, the NAT admits that its new courts would exercise "concurrent" rather than exclusive jurisdiction, Pl.'s Br. at 11; the NAT recognizes that the CFR Court will continue to apply the S&A LOC to all persons on the Reservation.

To be sure, the ISDA allows a tribe to propose to take over a portion of an existing program, 25 U.S.C. § 5321(a)(1), but that is not what the NAT is seeking to do here. The NAT cannot stop Arapaho tribal members from using the CFR Court, and it cannot unilaterally stop the CFR Court from applying the S&A LOC to Arapaho tribal members. *Accord United States v. Wheeler*, 435 U.S. 313, 332 (1978) (tribe's inherent right to exercise criminal jurisdiction over its members is not exclusive); *Tillett v. Hodel*, 730 F. Supp. 381, 383 (W.D. Okla. 1990) (CFR Court "is a valid exercise of the power of the Secretary of the Interior as delegated to him by the Congress which holds plenary power over Indian tribes."). Thus, the NAT's proposed tribal courts program would be a new program operating in parallel with the CFR Court, and would not be taking over a portion of the services provided by the CFR Court. AR 22. The agency thus properly declined the NAT's proposal pursuant to § 5321(a)(2)(D). *See Los Coyotes*, 729 F.3d at 1035 (tribe's attempt to "create a program that does not exist . . . . [i]s inconsistent with the ISDA.").

B. The ISDA Does Not Require the BIA to Award a Contract If Doing So Would Prevent it from Providing Services for Non-Contracting Tribes

The BIA also correctly declined the NAT's January 22 Judicial Services, Fish and Game, and Tribal Water Engineers proposals pursuant to § 5321(a)(2)(D) because there are not sufficient funds for it to award these contracts to the NAT and continue to provide services for the EST.

The ISDA provides that where, as here, a proposal seeks to divide an existing program provided to multiple tribes, the BIA must "ensure that services [continue to be] provided to the tribes not served" by that proposal. 25 U.S.C. § 5324(i). The ISDA, moreover, does not "require[] the [agency] to reduce funding for programs serving … a [non-contracting] tribe to make funds available to another [contracting] tribe." *Id.* § 5325(b); *see Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1325 (D. Ore. 1997) (ISDA requires agency to transfer funding to contracting tribe while "at the same time, to maintain … services to non-contracting tribes."). If the agency does not have sufficient funds to award the contract and maintain services for a non-contracting tribe, it may decline the proposal.

Nor, to be clear, can the NAT use the ISDA to force the BIA to *increase* the amount of funds that it has allocated for any of the shared services on the Wind River so that there then might be enough funds available to divide the programs. In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court addressed a tribe's challenge to the Indian Health Service's decision to discontinue funding a program for a tribe. *Id.* at 186-88. The Court held that the agency's allocation of funds from a lump sum appropriation was committed to agency discretion and therefore unreviewable. *Id.* at 192. Following *Lincoln*, the Ninth Circuit held that the BIA's allocation of funds from its lump sum appropriation is also unreviewable. *Los Coyotes*, 729 F.3d at 1038 ("The BIA's funding decisions are therefore unreviewable acts of agency discretion."). It further held that a tribe could not use the ISDA to challenge the agency's allocation of funds. *Id.* at 1039 ("The district court avoided binding precedent forbidding courts from reviewing discretionary funding decisions by framing the issue as one of eligibility for an ISDA contract."); *see also id.* at 1035 (ISDA "requires that the Tribe first obtain BIA funding for a program, and then request a contract to operate the program."); *id.* at 1037 ("The ISDA is silent on how the BIA should prioritize its funding."). Thus, the NAT cannot use the ISDA to request additional funds. Instead,

the NAT must use the TPA consultation process to request additional funds. Gourneau Decl. ¶ 4.

1. The BIA Cannot Continue to Provide Services for the EST with 30 Percent or Less of the Funds Allocated for Judicial Services on Wind River

The BIA correctly declined the NAT's proposal for "at least 70 percent" of the funds allocated for judicial services on the Wind River Reservation, AR 7, because neither the S&A Trial Court nor the CFR Court could continue to operate with only 30 percent or less of the funds designated for Judicial Services on Wind River. AR 22, 117. The NAT appears to ask for at least 70 percent of funds allocated for shared judicial services based on its belief that its tribal members on Wind River outnumber Shoshone tribal members roughly two to one, and it appears to assume that it is reasonable to divide funds allocated for judicial services on Wind River accordingly.

The NAT's proposal, however, does not explain why division of funding based on population would be a reasonable means to establish separate judicial systems, let alone that such a division would permit the BIA to continue to provide shared judicial services on the Reservation. AR 22. There are fixed costs to operating a court program, and the BIA could not adequately staff the CFR Court with 30 percent or less of funds allocated for shared judicial services on Wind River. AR 117; Gourneau Decl. ¶ 17. The BIA thus properly declined the proposal pursuant to § 5321(a)(2)(D).

Nor, contrary to the NAT's contention, is the BIA automatically required to approve a contract for whatever "portion" of the judicial services program the agency determines the tribe could take over without impairing the BIA's ability to provide judicial services for the EST. Although the ISDA generally requires the agency to approve any severable portion of a proposal, where, as here, "the amount of funds [sought] is in excess of the applicable funding level," the agency approves a severable portion "subject to any alteration in the scope of the proposal that the [agency] and the tribal organization *agree* to." 25 U.S.C. § 5321(a)(4) (emphasis added). Here, where

there is no agreement between the agency and the Tribe on an altered scope of a proposal, such approval would be premature. Furthermore, the agency may decline the entire proposal for the other reasons enumerated in its declination.[11]

2. The BIA Correctly Declined the NAT's Fish and Game Proposal Pursuant to § 5321(a)(2)(D)

The BIA also properly declined the NAT's Fish and Game proposal pursuant to § 5321(a)(2)(D). The NAT's Fish and Game proposal sought "at least" 100 percent of the funds allocated to both Tribes on Wind River for Water Resource Management. AR 126. The proposal sought this funding for a new "Northern Arapaho Fish and Game Department" and NAT Game Code enforcement. *Id.* The proposal expected either the BIA or the EST to "take responsibility" for the non-Arapaho share of the program and to "coordinate services" with the NAT, *id.* at 129, but with zero percent of funds allocated to wildlife resource management of Wind River. Putting aside the question of whether wildlife resource management could even be divided, it cannot be disputed that the BIA or the EST would be unable to manage the "non-Arapaho" share of the program with zero funding.

3. The NAT Cannot Use the ISDA to Force the BIA to Increase Funds Allocated for Water Resource Management on Wind River

Even though both Tribes, as separate sovereigns, possess a joint, undivided interest in most land on the Reservation, the NAT's Tribal Water Engineers proposal sought "approximately" 70 percent of funds allocated for both Tribes on Wind River

[11] Even if population were a reasonable means to divide funding despite these costs, the NAT's proposal ignores the reality that judicial services cannot be hermetically divided between the two Tribes. In addition to providing services for the EST and Shoshone tribal members, the CFR Court hears cases on the Reservation involving those with Shoshone criminal defendants and Arapaho crime victims and vice versa, Shoshone children and Arapaho parents and vice versa, and Shoshone family members and Arapaho family members, and, in civil cases, Shoshone plaintiffs and Arapaho defendants and vice versa. Members of other tribes also reside on the Reservation. Indeed, even though NAT is currently operating a tribal court with its own tribal funds, most Arapaho tribal members continue to use the CFR Court. Gourneau Decl. ¶ 17.

"based on the [approximate] ratio of Northern Arapaho members to total members" on the Reservation. AR 152, 154. The Tribe's proposal did not explain how the resource management services it sought to provide were based on population. *Id.* at 152, 154. On top of seeking a disproportionate share of funds allocated for both Tribes on Wind River, the NAT sought additional funds for its proposal based on its alleged "tribal share" of Central, Regional, and Agency funds. *Id.* at 156. Putting aside the question of whether such a "tribal shares" proposal is even administratively feasible in this context, the NAT's proposal did not actually seek to take over its "share" of any of these headquarters, regional, or local agency functions. *Id.* Instead, the NAT stated that while both Tribes had previously contributed approximately 60 percent of the total operating budget for the shared water resources management program, the NAT would be "unable to contribute" tribal funds to the program. *Id.* The NAT's Tribal Water Engineers proposal thus sought to use the ISDA to force the BIA to increase the amount of funds it has allocated for water resource management on Wind River. *Los Coyotes* forecloses this result, and the BIA correctly declined the proposal pursuant to § 5321(a)(2)(D).

C. As This Court Has Held, the ISDA Does Not Allow the BIA to Accept Proposals Benefiting More Than One Tribe Absent the Consent of All Tribes

The BIA also correctly declined the NAT's January 22 Judicial Service, Fish and Game, and Tribal Water Engineers proposals pursuant to 25 U.S.C. § 5321(a)(2)(A) & (C). Section 5321 allows the BIA to decline a contract proposal if "the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory" or if "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." *Id.* § 5321(a)(2)(A) & (C).

In this case, the BIA correctly declined the NAT's Judicial Service, Fish and Game, and Tribal Water Engineers proposals both because the programs the Tribe

proposed to provide would not be satisfactory and because they could not be properly maintained. AR 21, AR 145, AR 172. All three proposals sought to provide Reservation-wide services affecting both Arapaho and Shoshone tribal members. AR 2, 6; AR 128; AR 154-55. As this Court has previously held, the ISDA provides that if a 638 contract is "to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such a contract or grant." Order at 20, ECF No. 24 (quoting 25 U.S.C. § 5304(*l*)). Although the NAT provided a tribal resolution on behalf of its own tribe for each of its proposals, it did not include resolutions from the EST.

1. The NAT's Proposed Judicial Services Contract Could Not Be Properly Completed or Maintained and Could Not Be Performed Satisfactorily

As noted above, the NAT's January 22 Judicial Services proposal sought to "serve members and agencies of the Northern Arapaho Tribe and *such other persons or entities as may come within the jurisdiction of the Tribe*." AR 2 (emphasis added); *see also id.* at 3 ("The Court's territorial jurisdiction encompasses the exterior boundaries of the Wind River Reservation."); *id.* at 6 ("The Northern Arapaho Tribal Court will exercise full criminal jurisdiction over crimes allegedly committed by members of the Tribe *and such others as may be subject to the criminal jurisdiction of the Tribe*." (emphasis added)). The proposal also sought to unilaterally "reassume" and "redesign" functions of the S&A Tribal Court. *Id.* at 5. As noted above, the NAT's proposal thus seeks to exercise jurisdiction over Arapaho tribal members and Shoshone tribal members on Wind River. *Cf. United States v. Lara*, 541 U.S. 193, 199 (2004) (recognizing "each tribe's '*inherent*' *tribal* power . . . to prosecute nonmember Indians for misdemeanors"). As a result, the NAT's January 22 Judicial Services proposal required the approval of the EST, and the BIA properly declined the proposal when the NAT failed to provide a tribal resolution by the EST.

The BIA also correctly declined the NAT's January 22 Judicial Services proposal because it correctly found that in passing the S&A LOC and in authorizing the JBC to take over the judicial services on the Reservation in 1987, the NAT had already authorized the S&A Tribal Court to provide judicial services on the Wind River Reservation and had long ago authorized the JBC to administer the Judicial Services contract. AR 19; *see also* 25 C.F.R. §§ 900.6, .8 (requiring submission of tribal resolutions along with the initial proposal, but not to renew existing contracts). Additionally, the S&A LOC places the JBC in charge of many aspects of the S&A Tribal Court, *see* S&A LOC §§ 1-3-2, 1-3-5, 1-3-12, 1-3-13, 1-3-14 & 1-3-15, and the BIA correctly noted that the NAT has not rescinded or amended the S&A LOC. AR 19. The BIA further correctly found that the NAT's January 22 Judicial Services proposal did not explain how the NAT tribal courts would interact with other courts on the Reservation, or how the NAT tribal courts would interact with BIA law enforcement personnel operating on the Reservation. AR 21. The BIA thus correctly declined the NAT's Judicial Services proposal pursuant to § 5321(a)(2)(A) & (C).[12]

2. The NAT's Proposed Fish and Game and Tribal Water Engineers Contracts Could Not Be Properly Completed or Maintained and Could Not Be Performed Satisfactorily

For the same reason, the BIA also correctly declined the NAT's Fish and Game and Tribal Water Engineers proposals pursuant to § 5321(a)(2)(A) & (C). Both the NAT and the EST hold a joint, undivided interest in most of the land on the Wind River Reservation. Gourneau Decl. ¶ 5. Both wildlife management and water

[12] Plaintiff correctly notes that the BIA's initial declination stated that it was declining the NAT's January 22 proposal to provide services for FY 2016 in part because the BIA had already awarded the contract to provide judicial services to the SBC on behalf of the JBC. Pl.'s Br. at 10. This was not the sole basis for the BIA's declination of the Tribe's Judicial Services proposal. *See* AR 21-22; AR 117-18. In any event, even though this Court later found the BIA's award of the FY 2016 contract to the SBC to be invalid, *see* ECF No. 24 at 7, the agency nevertheless correctly declined the NAT's contract proposal pursuant to § 5321(a)(2)(C) because the NAT was not authorized to single-handedly reassume control of the functions of the S&A Tribal Court or to redesign the S&A Tribal Court.

resources are joint, undivided resources on the Reservation. *Id.* The NAT's Fish and Game proposal nevertheless seeks to manage the entire Reservation's wildlife resources with 100 percent of funds allocated for shared wildlife resource manage, to the apparent exclusion of the EST. AR 125 ("[Fish and Game] Services will be performed [o]n the Wind River Indian Reservation"); *id.* at 128 ("The Northern Arapaho Fish and Game Department will establish hunting seasons and permit schedules [on the Wind River Reservation.]"). Although the proposal acknowledges that the BIA or the EST might "take responsibility" for the "non-Arapaho share of the program," the proposal makes no effort to try to coordinate or to divide up those services and responsibilities, let alone provide any funds for the BIA or the EST to do so. *Id.* at 129. Nor is the proposal accompanied by an EST tribal resolution. *Cf.* 25 U.S.C. § 5304(*l*); 25 C.F.R. §§ 900.6, .8. The BIA thus correctly declined the proposal pursuant to § 5321(a)(2)(A) & (C).

The NAT's Tribal Water Engineers proposal suffers from similar defects. AR 151 ("[Tribal Water Engineer] Services will be performed on the Wind River Indian Reservation"); *id.* at 154 ("The Wind River Water Code Scope states: 'This Code applies to all persons desiring to use or using or undertaking activities on Reservation lands which affect Reservation Water.' The [NAT] maintains authority over an undivided interest in tribal water rights, its members, and their water rights."). Although the NAT proposes to "coordinate" these services with the BIA or the EST and to work under the direction of the existing Wind River Water Resources Control Board (composed of members selected by both Tribes), the NAT does not include an EST tribal resolution indicating support.

The NAT's Tribal Water Engineers proposal is also defective because it seeks to take over the funds for the alleged "tribal share" of funds allocated to the BIA's Headquarters, Rocky Mountain Region, and Wind River Agency associated with water resource management program, but does not propose to perform any of those agency

functions, much less demonstrate how such functions could be parceled out solely to the NAT. *Id.* at 156. Accordingly, the BIA correctly declined the NAT's Tribal Water Engineers proposal pursuant to § 5321(a)(2)(A) & (C).[13]

D. The Declination of the NAT's Meadowlark Grant Proposal Was a Reasonable Exercise of Agency Discretion

The BIA's declination of the NAT's proposal to receive 100 percent of funds allocated for both Tribes to fund the drug-court youth diversion program, known as the "Meadowlark" program, was proper because the Meadowlark program is not contractible under 25 U.S.C. §5321(a)(1).

Unlike the other BIA programs at issue in this case, the Meadowlark program was a tribally-created and tribally-funded program for which the BIA awarded a discretionary grant to the JBC pursuant to 25 U.S.C. § 5322(a) & (c). Gourneau Decl. ¶ 28. Section 5322(a) allows the agency "to contract with or make a grant to any tribal organization" for "the improvement of tribally funded programs or activities." 25 U.S.C. § 5322(a)(1). In contrast with contracts awarded under § 5321(a)(1), contracts or grants awarded under § 5322(a) are discretionary. *Compare* 25 U.S.C. § 5321(a)(1) ("The Secretary *is directed*, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract . . . ." (emphasis added)) *with id.* § 5322(a) ("The Secretary of the Interior *is authorized*, upon the request of any Indian tribe . . . to contract with or make a grant . . . ." (emphasis added)). Unlike contracts awarded pursuant to § 5321(a)(1), discretionary contracts or grants awarded under § 5322(a) are not for programs or services that the Secretary provides, but rather for "the strengthening or improvement of tribal government," § 5322(a)(1), or "to improve the capacity of a tribal organization to enter into a contract…pursuant to section 5321," § 5322(a)(2), or for "acquisition of land" in connection with the

[13] Because the BIA properly declined all of the NAT's 638 contract proposals, its derivative requests for pre-award costs in support of that potential contract, available pursuant to 25 U.S.C. § 5325(a)(6), were also properly declined.

previous two purposes, § 5322(a)(3). Nor are proposals for contracts or grants awarded under § 5322(a) subject to the 90-day response time or the declination criteria set out in § 5321(a)(2). *See id.* § 5322(a).

In this case, the NAT's proposes to take over via a contract under § 5321(a)(1) 100 percent of the funds previously allocated for the Meadowlark § 5322(a) discretionary grant. AR 178. The NAT states that it is not trying to "short-change funding or services to members of the other Tribe, but to open negotiations about how to expand funding for both Tribes." *Id.* The NAT proposes to use the funds to create a new social services program "relating to family functioning and interpersonal relationships. . . . for Northern Arapaho juveniles and adults, or as a family unit" *Id.* at 180-81.

Because the Meadowlark program is not a program that had ever been administered by the BIA for the benefit of the Tribes, Gourneau Decl. ¶ 28, the NAT cannot use the ISDA to obtain a contract under § 5321(a)(1). The BIA thus correctly declined the NAT's proposal to award all the Meadowlark grant funds to the NAT. *See Los Coyotes*, 729 F.3d at 1035 ("Rather than attempting to transfer a program from the control of the BIA to the Tribe, the Tribe here is attempting to use the ISDA to create a program that does not exist. This is inconsistent with the ISDA, which requires that the Tribe first obtain BIA funding for a program, and then request a contract to operate the program."). Nor can the Tribe force the agency to reallocate § 5322(a) grant funds designated for both Tribes solely for the benefit of the NAT. *Id.* at 1037 ("The ISDA is silent on how the BIA should prioritize its funding."); *id.* at 1038 ("The BIA's funding decisions are therefore unreviewable acts of agency discretion."); c*f.* 25 U.S.C. § 5325(b) (Agency "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."). Additionally, the NAT cannot use the ISDA to force the agency to provide additional § 5322(a) grant funds for both

Tribes. *Los Coyotes*, 729 F.3d at 1035 ("[T]he ISDA does not require the Secretary to in-crease the amount of money it spends on any pro-gram, it simply requires the Secretary to transfer control of that program to a requesting tribe."). This Court should thus decline to disturb the BIA's declination of the NAT's § 5321(a)(1) proposal to establish a social services program for the NAT using § 5322(a) grant funds designated for both Tribes.

E. The BIA Timely Declined the NAT's Contract Proposals, So There Is No Basis for These Proposals to be "Deemed Approved"

Contrary to the NAT's contention, Pl.'s Br. at 31, there is no basis for deeming its Judicial Services and its Meadowlark proposals approved. BIA implementing regulations provide that a proposal not declined within 90 days after it is received by the agency is "deemed approved." 25 C.F.R. § 900.18. Plaintiff, however, does not even allege that any of the BIA's declinations were untimely, thus § 900.18 does not apply. Plaintiff instead relies on *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059 (D.S.D. 2007), to support its contention. Pl.'s Br. at 31.[14] In *Cheyenne River Sioux*, the court addressed the BIA's declination of a tribe's proposal to renew an existing contract for school funds in which the agency failed to apprise the tribe of its appeal rights. 496 F. Supp. 2d at 1064. The court found that the BIA regulations prohibit the agency from declining a proposed successor Annual Funding Agreement ("AFA") if it is substantially the same as the prior AFA. *Id.* at 1067 (citing 25 C.F.R. § 900.32). It found that the agency conceded that it failed to apprise the tribe of its appeal rights. *Id.* at 1068. It also found that the agency failed to satisfy its burden of

[14] Plaintiff also cites *Seneca Nation*, 945 F. Supp. 2d at 142. *See* Pl.'s Br. at 24. *Seneca Nation*', however, was based on the fact that the government's declination was untimely, 945 F. Supp. 2d at 145, not on the fact that the *basis* for the declination was inadequate. *See id.* at 150 ("The Contract and the statute do not preserve any place for the Secretary's discretionary funding levels *post facto* of her failure to carry out a non-discretionary obligation to respond within 90 days or face the consequences of not doing so."). *Seneca Nation* is thus inapposite.

proof for declining the proposal. *Id.* The court thus held that the tribe's proposal to renew its AFA was "approved by operation of law." *Id.*

Cheyenne River Sioux is distinguishable. The NAT's proposals are initial proposals to take over operation of BIA programs; they are not proposals to renew existing AFAs that are substantially the same as prior AFAs. *Cf. Southern Ute Indian Tribe v. Sebelius*, 657 F.3d 1071, 1083 (10th Cir. 2011) (distinguishing *Cheyenne River Sioux* on the grounds that the BIA had simply "refused to continue funding an *already-executed mature contract*." (emphasis added)); *see also id.* at 1084 ("The [*Cheyenne River Sioux*] court's ruling that the contract and successor funding agreement were 'approved by operation of law,' simply reflected the tribe's right to continued funding for costs incurred under an already existing contract."). Nor did the BIA's declinations of the NAT's proposals fail to apprise the NAT of its appeal rights.[15] Finally, as shown above, the BIA more than satisfied its evidentiary burden for declining the NAT's proposals. Thus, *Cheyenne River Sioux* does not support the NAT's contention.

Additionally, the NAT's claim that an inadequately justified agency decision requires the automatic approval of a contract conflicts with the Supreme Court's holdings that remand is the appropriate remedy "[i]f the record before the agency does not support the agency action, . . . or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). As the Ninth Circuit has explained, "outside criminal prosecutions governed by double jeopardy principles, second bites are routine in litigation. If the agency decision is flawed by mistaken legal premises,

[15] The NAT also alleges that its proposals should be deemed approved because the agency failed to offer technical assistance. Pl.'s Br. at 11-12. The NAT's claim is contradicted by the administrative record. AR 21-22. The NAT further contends that it "sought engagement with defendants," but offers no record citation for this claim. To the contrary, the NAT has never followed up with the BIA's May 5, 2016, offer of technical assistance. Gourneau Decl. ¶ 20.

unsustainable subsidiary findings, or doubtful reasoning, remanding to give the agency an opportunity to cure the error is the *ordinary* course." *Soto-Olarte v. Holder*, 555 F.3d 1089, 1093 (9th Cir. 2009) (quoting *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 24-25 (1st Cir. 2007) (en banc)). Nor does the fact that the BIA must satisfy a higher burden of proof change this calculus. Courts regularly remand cases when an agency explanation is inadequate, even when the government bears the burden of proof under a higher standard. *See, e.g.*, *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1381-82 (Fed. Cir. 2010); *Pierce v. Colvin*, 565 F. App'x 621, 621-22 (9th Cir. 2014). Remand is the path other courts reviewing ISDA challenges have followed. *See, e.g., Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne*, 537 F. Supp. 2d 1, 13 (D.D.C. 2008) (remanding after concluding that "Defendants failed to meet their burden with respect to demonstrating APIA was not entitled to the Section 14(h)(1) funds for fiscal year 2006"). If this Court were to find the reasons for the BIA's declinations inadequate, remand is the appropriate remedy. [16]

F. The BIA's May 5, 2016, Supplemental Response Does Not Constitute an Improper Post-Hoc Justification

Contrary to the NAT's contention, Pl.'s Br. at 28, the BIA's May 5, 2016, supplemental response to the January 22 proposal does not constitute an improper post-hoc justification.[17] A post hoc justification concerns "belated justifications for agency action not previously asserted during the agency's own proceedings." *Louis v.*

[16] In any event, if, as the NAT urges, *see* Pl.'s Br. at 12, this Court were to conduct a de novo review of the BIA's declinations, then the agency's obligation to demonstrate the validity of its declinations would arise "in the course of subsequent litigation, not the declination process." *Navajo Health Found.-Sage Mem'l Hosp. v. Burwell*, No. 14-958, 2015 WL 9777785, at *38 (D.N.M. Oct. 26, 2015). This undercuts plaintiff's "deemed approved" contention.

[17] The NAT also claims that the BIA's declinations were deficient for allegedly relying solely on a citation to legal authority. *See* Pl.'s Br. at 9-10. Plaintiff's contention is contradicted by the administrative record. In any event, the Ninth Circuit has concluded citation to the relevant authority is in itself sufficient to justify a declination. *See, e.g.*, *Los Coyotes*, 729 F.3d at 1035 (citation to 25 U.S.C. § 5321(a)(2)(D) is sufficient); *Hopland Band of Pomo Indians v. Jewell*, 624 F. App'x 562 (9th Cir. 2015) (citation to *Los Coyotes* is sufficient).

U.S. Dep't of Labor, 419 F.3d 970, 977-78 (9th Cir. 2005). In this case, the BIA's May 5 response was a not a new justification offered for the first time in litigation. To the contrary, the agency provided the response to the Tribe thirteen days *before* the NAT even filed suit, and long before it moved for summary judgment on the declinations. *See* Compl., ECF No. 1; *accord Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6-7 (D.C. Cir. 2006) (concluding that supplemental letter reflecting "the considered views of the agency itself" and that was offered by a "proper decisionmaker" can be considered without regard to the post hoc rationalization rule). Moreover, the NAT's August 11 Judicial Services proposal, and the BIA's timely declination of that later proposal, moot out whatever post-hoc argument plaintiff might have had. Thus, the NAT's contention is without merit.

Contrary to the NAT's suggestion, moreover, the post-hoc rule is "not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning." *Local 814, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976). Thus, this Court may also properly consider the Declaration of Norma Gourneau filed herewith to better understand the background, and "further" or "amplified" articulation" of the agency's original rationales set out its declinations. *Id.*; *see San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 713-14 (9th Cir. 2012); *Presido Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1165 (9th Cir. 1998); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988); *Bunker Hill v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977).

V. CONCLUSION

This Court should deny the NAT's motion for partial summary judgment and should grant the BIA's motion for summary judgment.

Dated: January 27, 2016

Respectfully Submitted,

JOYCE BRANDA
Acting Assistant Attorney General
Civil Division

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney

ERIC R. WOMACK
Assistant Branch Director
Federal Programs Branch

s/ James D. Todd, Jr.
JAMES D. TODD, JR.
JOSEPH E. BORSON
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch

Attorneys for Defendants

L.R. 7.1(d)(2)(E) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count requirements of L.R. 7.1(d)(2)(A), as modified by this Court's January 25, 2017, order granting defendants' motion for an enlargement of the word count. *See* Order, ECF No. 48.

s/ James D. Todd, Jr.
JAMES D. TODD, JR.

CERTIFICATE OF SERVICE

I certify that on January 27, 2017, I electronically filed the foregoing filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ James D. Todd, Jr.
JAMES D. TODD, JR.