



DEPARTMENT OF THE INTERIOR HEARINGS DIVISION

Three Affiliated Tribes of the Fort Berthold Reservation v. Great Plains Regional Director,
Bureau of Reclamation

Docket No. IBIA 05-7-A (12/22/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division

139 East South Temple, Suite 600

Salt Lake City, Utah 84111

TELEPHONE (801) 524-5344

FAX: (801) 524-5539

December 22, 2005

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,	:	IBIA 05-7-A
	:	
Appellant	:	Appeal of April 22, 2004, decision issued by the Regional Director, Great Plains Region, Bureau of Reclamation.
v.	:	
	:	Indian Self Determination Act (ISDA)
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF RECLAMATION,	:	25 U.S.C. §§ 450-450n
	:	
Appellee	:	

RECOMMENDED DECISION

The Three Affiliated Tribes of the Fort Berthold Reservation (the Tribes) have timely appealed an April 22, 2004, letter of the Bureau of Reclamation (BOR) which partially declined the Tribes' "best and final offer" for an Annual Funding Agreement (AFA) for fiscal year (FY) 2004. The proposed AFA was for \$2,075,313 in funding for construction on the Fort Berthold Rural Water Supply Project (FB Project) under an Indian Self-Determination and Educational Assistance Act (ISDA) contract between the parties (Parties' Contract), with an additional \$69,000 to be retained by the BOR to cover its technical and oversight costs. The proposed AFA included a provision that the Tribes may use the funds to repay the principal and interest owing on a loan obtained by the Tribes from the United States Department of Agriculture (USDA) and used to fund construction on the FB Project. The BOR approved only \$902,000 of the requested \$2,075,313 in funding, retaining \$148,000 to cover its technical and oversight costs, and refused to authorize the Tribes' use of the funds for repayment of the loan.

By Order dated October 28, 2004, the Interior Board of Indian Appeals ("IBIA") referred the Tribes' appeal to the Hearings Division, Office of Hearings and Appeals, for assignment to an Administrative Law Judge ("ALJ"). This appeal, which arises under the auspices of Title I of the ISDA, as amended, Public Law 93-638, 25 U.S.C. §§ 450 *et seq.*, was thereafter assigned to the undersigned for adjudication. On July 1, 2005, the Tribes' counsel informed this office, by letter, that the parties had mutually agreed that a hearing on the appeal would not be necessary and that they would instead proceed on a written record. In response, the undersigned issued an amended Scheduling Order on July 6, 2005, which reiterated that "[b]oth of the parties have

mutually agreed to adjudicate this matter on the administrative record, as more fully described in Mr. Glaze's letter filing of July 1, 2005." (Ex. U.14) The following Recommended Decision is therefore based solely on the administrative record.

Under the ISDA and its implementing regulations, a tribe may propose to contract with the BOR so that the tribe may plan, conduct, and administer programs, functions, services, and activities (PFSAs) administered by the BOR for the benefit of the tribe. See 25 U.S.C. § 450f and 25 CFR part 900. The BOR must contract with the tribe unless the BOR finds that one of the five statutorily delineated reasons for declination exist. 25 U.S.C. § 450f(a)(2).

In this case, the BOR relied upon the following two statutorily delineated grounds for partially declining the Tribes' FY 2004 proposed AFA: (1) that the Tribes' proposed funding exceeds the applicable funding level for the contract, as determined under 25 U.S.C. § 450j-1(a), see 25 U.S.C. § 450f(a)(2)(D), and (2) that the proposed AFA included activities that cannot lawfully be carried out by the Tribes, see 25 U.S.C. § 450f(a)(2)(E). The applicable funding level under § 450j-1(a) includes an appropriate amount for carrying out the contracted PFSAs, see § 450j-1(a)(1) (hereinafter the "PFSA amount"), and amounts for contract support costs and other items, see §§ 450j-1(a)(2)-(6).

The funding for these other items is not in dispute; the parties' disagreement regarding ground (1) pertains only to the level of the PFSA amount. The point of contention regarding ground (2) is whether the Tribes are authorized under the Parties' Contract to use the funding provided by the BOR to repay the principal and interest on the USDA loan¹ and, if so, whether that authorization is legal under applicable law. For the reasons set forth below, the BOR's partial declination must be affirmed to the extent it declined to authorize funding exceeding \$981,000 and the remainder of the partial declination must be reversed.

STATEMENT OF FACTS

The FB Project is a drinking water distribution project for the entire Fort Berthold Reservation which is part of the larger Garrison Diversion Unit (GDU) Project in North Dakota. In 1965, Congress authorized the construction of the GDU Project. Act of August 5, 1965, Pub. L. No. 89-108, 79 Stat. 433 (Garrison Diversion Act). The Act authorized the development of 250,000 acres of land for irrigation and infrastructure to deliver water to those lands. § 101, 79

¹ In its briefs, the Tribes have referenced both the USDA loan and other loans. To the extent, if any, that the Tribes are raising the issue of whether the FY 2004 funding can be used to repay loans other than the USDA loan, that issue cannot be addressed in this recommended decision because the Tribes did not suggest in the proposed AFA that funding should be available for that purpose and therefore the issue is not properly before the undersigned. (See Ex. B.2, Att. 2 at ¶ (f))

Stat. at 433. It also authorized projects for flood control, recreation, and fish and wildlife enhancement purposes. See Nat'l Audubon Soc'y v. Watt, 678 F.2d 299, 302 (D.C. Cir. 1982) (discussing general GDU Project background and authorization). Although section one of the Garrison Diversion Act authorized development for municipal, rural, and industrial (MR&I) purposes, by 1986 no funding had yet been provided for the FB Project, apparently because Congress directed the Secretary to construct the GDU Project “substantially in compliance” with project plans that had been submitted to Congress² and those plans did not include the FB Project. (Ex. W.4 at 16; Declaration of Dennis E. Breitzman (Breitzman Decl.) at ¶ 4)

Congress did not specifically authorize construction of the FB Project as part of the larger GDU Project until 1986. In section five of the Garrison Diversion Unit Reformulation Act of 1986, Pub. L. No. 99-294, 100 Stat. 418 (Garrison Reformulation Act), Congress “authorized and directed” the Secretary of the Interior to:

construct, operate, and maintain such municipal, rural, and industrial water systems as [s]he deems necessary to meet the economic, public health, and environmental needs of the Fort Berthold, Standing Rock, and Fort Totten [now “Spirit Lake”] Indian Reservations.

(Emphasis added).

Section eight of the Garrison Reformulation Act authorized future appropriations of \$61 million for the MR&I water projects on the three Indian reservations (Indian MR&I projects) and one State water project on the Cheyenne River and \$200 million in additional funding for other

² Section one of the Garrison Diversion Act authorized:

the construction of a development providing for the irrigation of two hundred fifty thousand acres, municipal and industrial water, fish and wildlife conservation and development, recreation, flood control, and other project purposes * * * substantially in accordance with the plans set out in the Bureau of Reclamation report dated November 1962 (revised February 1965) supplemental report to said House Document Numbered 325.

§ 101, 79 Stat. at 433.

State MR&I water projects. Through a contract with the Bureau of Indian Affairs (BIA) and a Cooperative Agreement with the BOR,³ the Tribes undertook initial planning and construction of the FB Project. (Breitzman Decl. at ¶¶ 16, 31) By 1997, the total construction ceiling for the FB Project, including adjustments for indexing, had been expended, and the BOR could allocate no more money to the FB Project without new authorization and appropriations from Congress. (*Id.* at ¶ 12)

From FY 1998 through FY 2003, the BOR received write-in funds from Congress to continue transferring funds to the Tribes for FB Project construction. (Breitzman Decl. at ¶¶ 13, 31-33) In all, \$11,018,803 was allocated to the FB Project from 1987 to 2000, with \$10,036,271 transferred directly to the Tribes for construction. (*Id.* at ¶ 13)

Under section 610 of the Dakota Water Resources Act of 2000, Public Law 106-554, tit. VI, 114 Stat. 2763A-286 (DWRA), Congress authorized additional funding of \$200 million for MR&I water projects on Indian reservations in North Dakota, with \$70 million, \$30 million, \$80 million, and \$20 million designated specifically for the Fort Berthold Reservation, Fort Totten Reservation, Standing Rock Reservation, and Turtle Mountain Reservation, respectively. Similar to the Garrison Reformulation Act, the DWRA directs the Secretary to:

construct, operate, and maintain such municipal, rural and industrial water systems as the Secretary determines to be necessary to meet the economic, public health, and environmental needs of the Fort Berthold, Standing Rock, Turtle Mountain (including the Trenton Indian Service Area), and Fort Totten Indian Reservations and adjacent areas.

§ 607, 114 Stat. at 2763A-287.

Sections 608 and 610 of the DWRA also increased the appropriation ceilings for the State MR&I program by \$200 million, directed the Secretary to complete a Needs and Options Report and an Environmental Impact Statement for a Red River Valley water supply, and provided an appropriation ceiling of \$200 million for construction of the Red River Valley water supply. Thus, the overall GDU Project includes both Indian and non-Indian recipients of funds for the construction of water delivery systems for MR&I water supplies. The additional construction for the FB Project covered by the DWRA is referred to as “Phase II,” and it is Phase II construction that is implicated in the instant appeal.

³ In 1986, the BOR did not have authority to enter into ISDA contracts. Therefore, the BOR provided funds to the Tribes for construction by transferring money to the BIA which, in turn, provided the funds to the Tribes through a BIA contract. Later, when the ISDA was amended to allow all bureaus and offices at the Department of the Interior to enter into ISDA contracts, the BOR began working with the Tribes to establish a formal ISDA agreement for construction on the FB Project. (Breitzman Decl. at ¶ 16)

The upshot of this historical background is to point out that the Tribes were not the only recipients of funding for such water-related projects. Relatedly, Congressional funding for all GDU projects has been in the form of annual, lump-sum appropriations (Breitzman Decl. at ¶ 26), leaving the BOR with the administrative responsibility to allocate and distribute funds among the various GDU projects. The BOR's partial declination decision with respect to the amount of funds to be provided in response to the Tribes' proposed AFA request emanates from this responsibility.

As part of the funding process for a rural water project, the BOR requires the project sponsor to prepare a detailed engineering report, commonly referred to as a Final Engineering Report (FER). (Breitzman Decl. at ¶ 20) The FER is used to define the scope of the project, identify the features to be constructed, list the engineering parameters used for the designs, establish a logical sequence of work activities, and determine annual construction capabilities. (Id.) Prior to execution of the Parties' Contract, the Tribes prepared a FER entitled "Fort Berthold Rural Water System Water Development Engineering Report" which is dated May 2002. (Ex. R.2)

Before executing the contract, the Tribes also began applying for loans and grants from the USDA to help fund the FB Project. (See, e.g., Ex. M.2) Ultimately, in November 2003, after the effective date of the Parties' Contract, the Tribes obtained funding from the USDA consisting of a \$1,000,000 grant and a 40-year loan in the amount of \$2,509,000 at an interest rate of 4.5%. (Exs. M.27, M.28) The grant was contingent upon the Tribes' execution of the loan. (Ex. S at ¶ 32; Ex. T at ¶ 22)

The USDA loan funds have been used entirely for approved costs of the FB Project. (Ex. L at 12-14; Ex. T at ¶ 22) Furthermore, to minimize interest expenses, the Tribes make draws on the USDA loan only when they need the funds, and interest only begins to accrue on the drawn amounts at that time. (Ex. T at ¶ 22) Any interest that the Tribes earn on funds drawn from the loan is also used to cover expenses of the FB Project. (Id.)

On March 21, 2003, the Tribes informed the BOR of their intent to negotiate two ISDA contracts with the BOR, one for planning, design, and construction of the FB Project and the other for operation, maintenance, and replacement activities (OM&R) associated with the project. (Breitzman Decl. at ¶ 39) On January 9, 2004, the BOR and the Tribes finalized the Parties' Contract, with a retroactive effective date of October 1, 2003, and a termination date of September 30, 2008. (Ex. A.1 at ¶¶ (b)(1)-(2))

The contract contemplates that the scope of work and funding for each fiscal year will be negotiated for inclusion in an AFA if possible, and if no agreement can be reached, that the declination criteria and procedures of 25 CFR part 900, subpart E, will apply. (See, e.g., Ex. A.1 at ¶¶ (b)(5)(A), (b)(9), (f)) The parties' discussions regarding funding for the FY 2004 AFA were hampered by the facts that the President's FY 2004 budget did not include a request for

funds for the State MR&I program or the Indian MR&I program and that the BOR's FY 2004 budget was not approved until December 3, 2003, see FY 2004 Energy and Water Development Appropriations Act, Pub. L. No. 108-137, 117 Stat. 1827 (2003) (Energy Act). (Breitzman Decl. at ¶ 39)

The Parties' Contract also provides:

The funds advanced [to the Tribes] cannot be used for any purpose other than an authorized project expenditure, even on a temporary basis. Authorized project expenditures are those costs which are considered allowable, allocable, and reasonable pursuant to the provisions of OMB Circular A-87 and section 106 of the ISDEA (26 U.S.C. 450j-1).

(Ex. A.1 at ¶ (b)(6)(D)). The parties disagree as to whether repayment of the principal and interest on the USDA loan is an authorized project expenditure under this contractual provision and Office of Management and Budget (OMB) Circular A-87, entitled "Cost Principles for State, Local and Indian Tribal Government," as amended at 62 Fed. Reg. 45,934 (August 29, 1997) (OMB Circular A-87),⁴ and whether the BOR can legally authorize the use of funds for such repayment.

Ultimately, by letter dated March 17, 2004, the Tribes submitted their "best and final" proposal for the FY 2004 AFA. (Ex. B.2) As previously noted, the Tribes proposed funding of \$2,075,313 plus \$69,000 to be retained by the BOR for technical and oversight costs. (Ex. B.2, att. 2 at ¶ (e)) They also sought authority to use funds provided under the FY 2004 AFA to pay back the principal and interest on the USDA loan. (Id. at ¶ (f)) By letter dated April 22, 2004, the BOR partially declined the Tribes' proposed FY 2004 AFA by authorizing only \$902,000 in funding and refusing to authorize the Tribes' use of the funds to pay back the principal and interest on the USDA loan. (Ex. B.3)

A complete explanation of how the BOR determined that \$902,000 was the appropriate FY 2004 PFSA amount is detailed in the Discussion section below. To summarize, the BOR received under the Energy Act a lump-sum appropriation of \$857,498,000 for management, development, and restoration of water and related natural resources and for related activities, including fulfilling related Federal responsibilities to Native Americans. Tit. II, 117 Stat. at

⁴ OMB Circular A-87 has since been revised at 69 Fed. Reg. 25,970 (May 10, 2004). The version of the Circular in force at the time of the creation of the Parties' Contract, the Nation's FY 2004 AFA proposal, and the Secretary's declination decision was the revised version from May 4, 1995, as further amended on August 29, 1997. Therefore, it is the 1995 version of Circular A-87, as amended by the 1997 version, which is applicable to the subject appeal and which is referenced in this Recommended Decision.

1827. A House-Senate conference committee designated \$27,386,000 in funding for all GDU projects in FY 2004, but no earmark for GDU projects was carried into the Energy Act itself. (Exs. B.4, W.3; Breitzman Decl. at ¶ 27) Relying upon the committee designation, the BOR determined that \$27,386,000 was available for all GDU projects. (Breitzman Decl. at ¶ 27) The BOR then assessed the funding needs of all of the GDU projects and allocated the \$27 million accordingly. (Id. at ¶¶ 25-38)

Based upon the stated purpose of the Parties' Contract, the Tribes argue that the estimated costs and funding schedule set forth in Table 10.9.2(a) of the Tribes' FER establish the agreed, annual PFSA amount which the BOR must provide under the contract. The purpose of the contract reads as follows:

Each provision of the ISDEA (25 U.S.C. 450 et seq.) and each provision of this Agreement shall be liberally construed for the benefit of the Tribes to transfer to the Tribes the funding and the related engineering, design and construction programs, functions, services and activities (or portions thereof) * * * that are otherwise contractible under 25 U.S.C. §450f, for the Fort Berthold Rural Water Supply System as authorized by the [DWRA] and as described in the Tribes' Final Engineering Report (hereafter "FER") entitled the Fort Berthold Rural Water System Development Engineering Report, dated May 2002.

(Ex. A.1 at ¶ (a)(2)).

However, as more fully discussed below, this argument is belied by several facts, including that the FER identifies Table 10.9.2(a) as a "tentative schedule of projects." (Ex. R.2 at § E of Executive Summary of Report)(emphasis added) Also, the FER indicates that its cost estimates are based upon the assumption that the entire authorized funding of \$70 million will be appropriated within 10 years, are solely for planning purposes, and are preliminary and subject to change based upon future developments and conditions and more project specific review and design. (See, e.g., Ex. R.2 at § F of Executive Summary of Report, 182, 213, 216, 263-65) Finally, the Parties' Contract contemplates that funding amounts, budgets, schedules, performance periods, and scope of work are to be revised or determined annually in AFA's. (See, e.g., Ex. A.1 at ¶¶ (b)(5)(A), (b)(9), (c)(3)(B)(vi), (c)(3)(B)(vii), (d)(2), and (f)(2))

DISCUSSION

A. Proposed Funds for FY 2004 AFA.

The first issue on appeal is whether the BOR has clearly demonstrated the validity of its partial declination of the Tribes' proposed FY 2004 AFA on the ground that "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under § 450j-1(a) of this title." 25 U.S.C. § 450f(a)(2)(D). As explained previously,

the “applicable funding level” for the Parties’ Contract under § 450j-1(a) includes the PFSA amount, see 25 U.S.C. § 450j-1(a)(1), as well as amounts for contract support costs and other items (the “contract support costs”), see 25 U.S.C. § 450j-1(a)(2)-(6).

Each AFA is to include the PFSA amount and the annual contract support costs. However, the annual contract support costs are not at issue in this proceeding, as they are a contracted fixed sum to be adjusted annually pursuant to an inflation adjustment formula.⁵ (Ex. A.1 at ¶¶ (b)(5)(B)(i), (f)(2)) Thus, only the calculation of the PFSA amount for the FY 2004 AFA is at issue. The BOR sometimes refers to this amount as the “applicable funding level” for the FY 2004 AFA.

The Parties’ Contract provides that the PFSA amount “shall not be less than the applicable amount determined pursuant to section 106(a) of the ISDEA (25 U.S.C. 450j-1 and 25 C.F.R. 900.128.” (Ex. A.1 at ¶ (b)(5)(A)) Under 25 U.S.C. § 450j-1(a), the PFSA 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” (the “Secretarial amount”). The Secretarial amount therefore establishes the minimum level at which the PFSA amount must be funded.

In this regard, the parties repeatedly refer to the PFSA amount as the “Secretarial amount.” However, the PFSA amount is the amount to be provided pursuant to the terms of the Parties’ Contract, whereas the Secretarial amount is the amount the Secretary would have otherwise provided for the PFSA in the absence of a contract. The Secretarial amount is crucial in this case both because the PFSA amount cannot be less than the Secretarial amount under the Parties’ Contract and the ISDA and because the Parties’ Contract does not define the PFSA amount or establish parameters for its determination.

According to the Tribes, the Parties’ Contract clearly provides that the applicable PFSA amount is the fiscal year funding amount set forth in the funding table provided in the Tribes’ FER. The Tribes contend that because its funding request for FY 2004 did not exceed the contracted PFSA amount, and because there was sufficient FY 2004 appropriations with which to pay this proposed amount, the BOR has not clearly demonstrated the validity of its partial declination of the Tribes’ proposed FY 2004 AFA.

According to the BOR, however, the Parties’ Contract does not establish a definite PFSA amount, but instead provides that the PFSA amount will be calculated annually and specified in

⁵Pursuant to paragraph (b)(5)(B) of the Parties’ Contract (Ex. A.1), the contract support costs for FY 2004 consisted of an indirect cost payment of \$90,000 in addition to pre-award costs and start-up costs. Funding for these costs is “in addition to [the PFSA amount] agreed to by the parties in the AFA.” (Ex. A.1 at ¶ (b)(5)(B)(i))

each fiscal year AFA. The BOR therefore contends that it is not contractually committed to provide the Tribes with the amount of funding set forth in the FER's funding table. The BOR further asserts that it appropriately determined that the applicable funding level for FY 2004 was \$902,000. Accordingly, it maintains that it properly declined the Tribes' proposed FY 2004 AFA on the basis that its funding request of \$2.075 million was "in excess of the applicable funding level for the contract." See 25 U.S.C. § 450(f)(a)(2)(D)

As more fully discussed below, the undersigned concurs with the BOR's interpretation of the Parties' Contract and finds that the BOR has clearly demonstrated that the Tribes' proposed FY 2004 AFA funding amount was in excess of the applicable funding level. Accordingly, it was proper for the BOR to partially decline the proposed FY 2004 AFA.

1. The Parties' Contract Provides that the PFSA Amount Is to Be Determined on an Annual Basis.

The Tribes assert that the Parties' Contract expressly provides the PFSA amount to be used in determining the applicable funding level for FY 2004. Paragraph (a)(2) of the Parties' Contract states that the "Purpose" of the Parties' Contract is to "transfer to the Tribes the funding and the related engineering, design and construction programs, functions, services and activities * * * as described in the Tribes' Final Engineering Report (hereafter "FER") entitled the Fort Berthold Rural Water System Development Engineering Report, dated May 2002." (Ex. A.1 at ¶ (a)(2) (emphasis added)) The Tribes argue that this provision makes clear the parties' intent to incorporate the FER into the Parties' Contract, and transfer funding to the Tribes in accordance with the 10-year construction and funding schedule set forth in Table 10.9.2(a) of the FER. The Tribes conclude that the construction and funding schedule listed in Table 10.9.2(a) of the FER provides the annual PFSA amount which the BOR must provide under the Parties' Contract.⁶ (See Ex. R.2, Table 10.9.2(a)) The Tribes contend that because Table 10.9.2(a) provided \$6.195 million for the FY 2004 PFSA amount, its proposed FY 2004 AFA funding request of \$2.075 million was well within the applicable funding level and should not have been declined.

The BOR rejects the Tribes' interpretation of paragraph (a)(2) of the Parties' Contract. The BOR contends that an examination of the Parties' Contract and the FER, in their entirety, makes clear that the parties did not intend to be bound to the exact funding and construction schedule set forth in Table 10.9.2(a) of the FER. (See BOR Br. at 26-30) The BOR asserts that the "Purpose" provision set forth in paragraph (a)(2) instead merely sets forth the parties' intent that the Project be constructed and funded pursuant to the general objectives set forth in the FER. (Id.)

⁶ The Tribes additionally assert that the funding schedule set forth in the FER is the "only reliable and objective measure" of the Secretarial amount. (Tribes' Br. at 36)

As the BOR asserts, the Tribes' interpretation is not supported by the plain language of the FER. The FER states that the "[r]ecommendations presented herein are solely for planning purposes." (Ex. R.2 at 216) It then describes Table 10.9.2(a) as a "tentative schedule of projects," and explains that "[a]ll costs provided herein are meant to be preliminary and subject to change based on a more project specific review and design on each identified project." (*Id.* at § E of Executive Summary of Report, 182) (emphasis added) The FER additionally explains that for the "planning purposes of this Study," it makes an assumption that the entire \$70 million authorized for the FB Project by the DWRA will be appropriated within a ten-year period. (*See id.* at § F of Executive Summary of Report, 213, 231, 263-265) The funding schedule in the FER is, therefore, by its own terms, tentative, preliminary, and subject to change.

The Tribes' interpretation is additionally contradicted by the plain language of the Parties' Contract. The contract specifically provides for an annualized process pursuant to which the parties may renegotiate the material terms of the Parties' Contract, including the construction and funding schedule. The Parties' Contract provides that the parties are to negotiate an annual funding agreement which is to contain the "terms that identify the PFSA's to be performed or administered, * * * the funds to be provided, and the time and method of payment * * *." (Ex. A.1 at ¶ (f)(2)(A)(1)) The AFA is then to be incorporated in its entirety into the Parties' Contract. (*Id.* at ¶ (f)(2)(B)) Successor AFA's are then to be negotiated each year beginning no later than 120 calendar days prior to the conclusion of the preceding AFA. (*Id.* at ¶ (b)(9)) "Each successor funding agreement shall include, at a minimum, an annual scope of work, a revised project schedule and budget, the amount of fiscal year funds to be transferred to the Tribes, and an advance payment schedule." (*Id.*) In addition, "each successor funding agreement will be subject to the declination criteria and procedures in 25 C.F.R. Part 900 subpart E." (*Id.*)

The very inclusion of the AFA negotiation process in the Parties' Contract, which allows the parties to renegotiate the construction and funding schedule on an annual basis, belies the Tribes' assertion that the BOR is contractually bound to transfer funds to the Tribes pursuant to the 10-year funding schedule set forth in Table 10.9.2(a). If the parties were already contractually bound to the 10-year construction and funding schedule set forth in the FER, there would be no reason to provide a process by which these terms are renegotiated on an annual basis.

A number of other provisions in the Parties' Contract additionally make clear that the parties did not intend to be bound to the funding schedule set forth in the FER, but intended the PFSA amount to be determined on an annual basis without reference to the FER. Paragraph (b)(5)(B)(i) of the Parties' Contract sets forth the fixed annual sum of \$90,000 to be paid to the Tribes for reimbursement of its contract support costs. The paragraph then provides a specific inflation adjustment formula to be applied to this fixed sum by the parties in "calculat[ing] an appropriate indirect cost payment for inclusion in each subsequent AFA." (Ex. A.1 at ¶ (b)(5)(B)(i)) Paragraph (b)(5)(A), which expressly provides for payment of the PFSA amount, states that:

Subject to the availability of appropriations, the Secretary shall make available to the Tribes the total amount as specified in the applicable AFA incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the ISDEA (25 U.S.C. 450j-1) and 25 C.F.R. 900.128.

(Ex. A.1 at ¶ (b)(5)(A)) (emphasis added)). Unlike the provision governing contract support costs, this provision does not provide a fixed annual sum for the PFSA amount and does not establish a formula under which the PFSA amount is to be calculated. The provision also does not reference the funding schedule set forth in the FER. It instead clearly provides that the PFSA amount is to be determined annually through the AFA negotiation process, and then incorporated into the Parties' Contract through each year's AFA.

The parties' intent that the PFSA amount be determined annually through the AFA process is further supported by paragraph (b)(6)(B) of the Parties' Contract, which provides that:

Pursuant to 25 U.S.C. 450j-1, for each fiscal year covered by this Agreement, the Secretary shall make available to the Tribes the funds specified for the fiscal year using the advance payment schedule identified in this Agreement at paragraph (b)(5)(A) and the applicable AFA.

(Id. at ¶ (b)(6)(B)). Paragraph (c)(2) of the Parties' Contract additionally states that "the Tribes shall administer the engineering, design, and construction activities identified in this Agreement and funded through the applicable AFA under subsection (f)(2)." (Id. at ¶ (c)(2) (emphasis added)) These unambiguous provisions, in combination with paragraph (b)(5)(A) of the Parties' Contract, make clear the parties' intent that funds be made available to the Tribes as determined in the applicable fiscal year's AFA, and not as set forth in the FER's funding schedule.⁷

Given the clear meaning of the Parties' Contract, including the referenced FER, it is not surprising that the Tribes largely ignore the numerous provisions of the contract and FER that disfavor their interpretation of the contract and devote their attention to arguments that are only loosely grounded, if at all, in the language of the Parties' Contract and FER. For instance, the Tribes argue that the extrinsic evidence of the parties' contractual intent (the declarations of Mr. Lone Bear and Mr. Hall) favors their interpretation of the Parties' Contract. Because the terms of the Parties' Contract are reasonably clear and unambiguous, however, it is neither necessary nor proper for the undersigned to refer to extrinsic evidence to ascertain the parties' intent. See 11

⁷ The Parties' Contract further establishes, through a number of other provisions, that the funding amounts, budgets, construction schedules, performance periods, and scope of work are all to be determined on an annual basis through the AFA negotiation process. (See Ex. A.1 at ¶¶ (c)(3)(A)(i), (c)(3)(B)(vi), (c)(3)(B)(vii) and (d)(4)(D))

Williston on Contracts § 31:4 (4th ed. 2000) (where “the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone * * *.”)

The Tribes also contend that their interpretation of the Parties’ Contract should prevail because both the ISDA regulations, as well as the provisions of the Parties’ Contract, are to be liberally construed for the benefit of the Tribes, “so long as the [Tribes] proposed construction is ‘reasonable.’” (See Tribes’ Reply Br. at 12 (citing Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1461-62 (10th Cir. 1997)); Ex. A.1 at ¶ (a)(2); 25 CFR 900.115(c)) However, the undersigned finds that the Tribes’ interpretation of the Parties’ Contract, which is not supported by the plain language of the Contract and the FER, is unreasonable.

Another assertion of the Tribes is grounded solely in the statutory and regulatory language rather than the contractual language. Citing to 25 U.S.C. § 450j(m)(4)(C) and 25 CFR 900.125, 900.127, and 900.128, the Tribes maintain that the law required the parties to include a pre-determined budget and scope of work in the Parties’ Contract because it is a construction contract. They conclude from this premise that the Table 10.9.2(a) of the FER must be the required budget and scope of work.

However, the conclusion does not follow from the premise. Assuming, arguendo, that the law does require inclusion of a budget and scope of work, the existence of this requirement does not mean that the contract actually contains or incorporates a pre-determined budget and scope of work. In fact, the Parties’ Contract contains no such budget or scope of work but relies upon annual AFA’s to determine the budget and scope of work.

The Tribes additionally contend that determining the PFSA amount on an annual basis through an AFA negotiation process would violate the ISDA and its regulations. (See Tribes’ Reply Br. at 13-14) This argument is not persuasive, however, as the ISDA regulations clearly provide for such a funding arrangement. The regulations define “annual funding agreement” as “a document that represents the negotiated agreement of the Secretary to fund, on an annual basis, the [PFSAs] transferred to an Indian tribe * * *.” 25 CFR 900.6. The regulations require that the Indian tribe submit an annual funding agreement proposal at least 90 days before the expiration date of the existing annual funding agreement. See 25 CFR 900.12. The annual funding agreement is then subjected to “the declination criteria and procedures in subpart E.” 25 CFR 900.32. Determining the PFSA amount through an annual AFA negotiation process, which is subject to the declination procedures set forth in the ISDA, is therefore clearly within the purview of the ISDA regulations.

In sum, neither the plain language of the FER, nor the plain language of the Parties’ Contract, supports the Tribes’ assertion that the BOR is contractually bound to transfer funding to the Tribes in accordance with the 10-year funding schedule set forth in Table 10.9.2(a) of the FER. The clear and unambiguous provisions throughout the Parties’ Contract instead make clear

that the Parties intended the PFSA amount to be determined annually through the AFA negotiation process, without reference to the FER. Accordingly, the undersigned finds that the BOR is not contractually obligated to transfer to the Tribes the \$6.195 million provided under the FER funding schedule for FY 2004.

Because the BOR did not contractually bind itself to transfer a certain PFSA amount to the Tribes for FY 2004, the holding in Cherokee Nation of Oklahoma v. Leavitt, 125 S. Ct. 1172, 161 L.Ed. 2d 66 (2005), is inapplicable. In Cherokee, the Court held that the Government could not avoid the binding effect of its promise to pay certain “contract support costs” on the grounds of insufficient appropriations where Congress had appropriated sufficient legally unrestricted funds to pay the contracts at issue. Id. In the present appeal, the BOR did not promise to pay the Tribes a certain PFSA amount.

2. The BOR Has Clearly Demonstrated That the Tribes’ Proposed FY 2004 AFA Amount Was in Excess of the Applicable Funding Level.

As just explained, the BOR was not contractually bound to provide the Tribes with a definite PFSA amount for FY 2004. Under the terms of the Parties’ Contract, the PFSA amount for FY 2004 was to be determined through the AFA negotiation process, and then specified in the applicable AFA. Pursuant to this process, the Tribes submitted its “best and final offer,” which the BOR partially declined on the basis that the proposed PFSA amount was “in excess of the applicable funding level for the contract * * *.” (Ex. B.3) Accordingly, a negotiated PFSA amount was not reached for FY 2004.

The Tribes argue that in the absence of a negotiated PFSA amount, that amount must be “fair and reasonable” to comply with paragraph (b)(5) of the Parties’ Contract which states that the amount specified in the applicable AFA “shall not be less than the applicable amount determined pursuant to * * * [25 U.S.C. § 450j-1] and 25 C.F.R. 900.128.” (Ex. A.1 at ¶ (b)(5)(A) (emphasis added)) 25 CFR 900.128 provides that the BOR shall provide “an amount under a construction contract that reflects an overall fair and reasonable price to the parties [including] [t]he reasonable costs to the [Tribes] of performing the contract * * *.” 25 U.S.C. § 450j(m)(4)(C) likewise provides: “The total amount awarded under a construction contract shall reflect an overall fair and reasonable price to the parties * * *.”

The Tribes further contend that the anticipated annual cost set forth in the FER funding schedule is the contracted fair and reasonable price. The Tribes conclude that its proposed PFSA amount of \$2.075 million should be awarded because it was less than the FER’s schedule of reasonably anticipated annual costs and was “fair and reasonable” for the work proposed. (Tribes’ Reply Br. at 17)

As discussed previously, however, the parties did not contract to the amounts set forth in the FER funding schedule but agreed to determine both the scope of work and the funding for

such work on an annual basis. The Tribes' proposed AFA references an "annual work plan provided in Attachment A to this AFA" but there is no Attachment A to the proposed AFA. (Ex. B.2) Not only is the proposed scope of work unknown, but also the Tribes have not argued in their appeal or briefs nor marshaled evidence that the PFSA amount determined by the BOR for FY 2004 is not "fair and reasonable" in relation to any scope of work for FY 2004, except the non-binding schedule in the FER.

Thus, the Tribes' "fair and reasonable" argument is not grounded in the § 900.128 concept that the PFSA amount should be fair and reasonable in relation to the actual scope of work but, rather, amounts to an argument that BOR's determination of the PFSA amount was not reasonable in the general sense. As stated elsewhere herein, that determination was reasonable.

Generally, the Parties' Contract does not set forth guidelines for the parties to follow in determining an appropriate annual PFSA amount, or provide what happens if the Parties are unable to reach a negotiated PFSA amount. The only relevant constraint is that the PFSA amount specified in the AFA "shall not be less than the applicable amount determined pursuant to * * * [25 U.S.C. § 450j-1]," (Ex. A.1 at ¶ (b)(5)(A)) with contract support costs to be "in addition to [the PFSA amount] in the AFA." (*Id.* at ¶ (b)(5)(B)(i)) As explained previously, the "applicable funding level" under § 450j-1 is the PFSA amount - which shall not be less than the Secretarial amount - in addition to any contract support costs. 25 U.S.C. § 450j-1. Therefore, pursuant to both the Parties' Contract and the ISDA, the minimum applicable funding level for the FY 2004 AFA is the Secretarial amount. As the Tribes assert, the BOR accordingly has no discretion to fund the Tribes' FY 2004 AFA at less than the Secretarial amount.

However, the BOR does have broad discretion to determine the Secretarial amount. This is so because the BOR is funding the contract from a lump-sum appropriation and there is no funding history for the design and construction to be completed under the Parties' Contract to guide and constrain the determination of the Secretarial amount. If the Parties' Contract were a service contract whereby the Tribes were taking over the direct operation of an existing service program from the BOR, there would be an empirical history of the amount of funds expended by the BOR for the direct operation of the program. This history would provide both a basis for and a constraint upon the determination of the Secretarial amount.

The Parties' Contract is instead a cost-reimbursable self-determination construction contract pursuant to which the BOR is transferring to the Tribes the responsibility for the design and construction of Phase II of the FB Project. (Ex. A.1) Because the Tribes are assuming the FB Project in its initial design and planning stages, there is no history of the amount of funds previously provided by the BOR for the project to serve as a basis for determining the Secretarial amount. Without such a history, there is little empirical data to assist in defining the amount of funds the BOR "would have otherwise provided" in the absence of an agreed upon AFA amount.

The Tribes argue that the FER constitutes evidence of the Secretarial amount, but that argument does not withstand scrutiny. The scope of work and amount of funding set forth in the FER for FY 2004 is clearly based upon the assumption that the BOR will allocate funds to the FB Project so that it will be completed in 10 years. (Ex. R.2 at § F of Exec. Summ. of Report, 213, 231, 263-265) What the BOR would have otherwise provided is not determined upon an assumption as to the amount of funds to be allocated, but upon the amount of funds appropriated, the competing needs for those funds, and other considerations.

The statements of Mr. Breitzman are relevant in this regard:

As part of an FER, most sponsors include a construction schedule that indicates the preferred number of years required to construct the project and the amount of annual appropriations needed to meet the preferred schedule. This schedule serves several purposes. One of the primary purposes is to establish a level of annual appropriations the sponsor believes it would be capable of spending. Another is to establish a project timeline on which to base the non-construction, administrative support costs of the project. A third purpose is to provide project beneficiaries an estimated time frame for project construction and receipt of water service. These projections are based on a best-case scenario and are clearly understood within standard pattern and practice to be a planning tool; not the establishment of a guaranteed funding allocation or of a fixed price contract.

(Breitzman Decl. at ¶ 21).

Under the circumstances, the calculation of the Secretarial amount is necessarily and appropriately left to the BOR's discretion so long as the exercise of that discretion is reasonable and rational rather than arbitrary and capricious. Congress has vested the BOR with significant discretion over the FB Project. Congress explicitly granted the BOR, through the Secretary, with the broad discretion to "construct, operate, and maintain" the Indian MR&I projects as it "determines to be necessary." DWRA, § 607, 114 Stat. at 2763A-287. In addition, as more fully discussed below, Congress committed the allocation of FY 2004 funds among all GDU projects to the BOR's discretion.

Because the BOR has the discretion to determine the appropriate Secretarial amount for FY 2004, it essentially has the discretion to determine the level at which the PFSA amount can be funded in the absence of an agreed upon AFA amount. This does not mean, as the Tribes assert, that the BOR has the unfettered discretion to set the funding level at whatever it wishes. (Tribes' Br. at 33) The BOR's exercise of its discretion is limited by the fact that the Secretarial amount determined must be rational and reasonable.

The BOR determined that the applicable Secretarial amount for FY 2004 is \$902,000, and therefore asserts that this is the “applicable funding level” for the FY 2004 AFA. In making this determination, the BOR relied on a number of factors, such as appropriations availability, Congressional direction and authorization, construction capability, the needs of other Indian and State MR&I projects, and the need of other GDU projects. (Breitzman Decl. at ¶¶ 25-38)

As detailed below, the undersigned finds that the BOR’s determination is both reasonable and rational up to the point it determined that the FY 2004 funds available to fund the FB Project was limited to \$1,050,000. Accordingly, the undersigned finds that the BOR has met its burden of clearly demonstrating that the Tribes’ proposed FY 2004 AFA amount was in excess of the applicable funding level for the FY 2004 AFA. See 25 U.S.C. § 450f(a)(2)(D).

In determining the applicable funding level for the FY 2004 AFA, the BOR first looked to the amount of FY 2004 appropriations made available for GDU projects. The President’s FY 2004 line item budget request had not included any funds for State MR&I or Indian MR&I construction projects within the GDU. (See Proposed GDU Budget, attached to Ex. I; Ex. S at ¶¶ 26-27) The House Appropriations Committee, however, specifically added additional funds “for the continuation of work on the Tribal and State [MR&I] water supply programs [within the GDU].” H.R. Rep. No. 108-212, at 93 (2003). The Senate Appropriations Committee provided “\$28,386,000 for the continued construction and operation of [the GDU project],” noting that “[t]his funding level should in no way be considered any diminution of interest or support for the project, but instead reflects the very limited resources of the Committee.” S. Rep. No. 108-105, at 75 (2003). This amount was later reduced by \$1,000,000 during the House-Senate Conference on the bill, leaving a total of \$27,386,000 designated by the conference committee for GDU projects in FY 2004. (See Congressional Budget Comparison Table, att. to Ex. B.4) The “Joint Explanatory Statement of the Committee of Conference” additionally contains a “Statement of Managers” which indicates that of the \$27,386,000 designated by the conference committee for GDU projects in FY 2004, \$24,000,000 is designated for resources management, and \$3,386,000 designated for facilities and OM&R. (See Ex. W.3; Breitzman Decl. at ¶ 27)

As previously mentioned, Congress did not pass a budget establishing the BOR’s FY 2004 appropriations until passage of the Energy Act on December 3, 2003. The Energy Act made a lump-sum appropriation of \$857,498,000 for the BOR “[f]or management, development, and restoration of water and related natural resources and for related activities, including * * * participation in fulfilling related Federal responsibilities to Native Americans, and related grants to, and cooperative and other agreements with, State and local governments, Indian tribes, and others * * *.” 117 Stat. 1827 at Title II, opening paragraph. Although the conference committee report clearly designated \$27,386,000 for GDU projects, no Congressional earmarks for GDU projects are set forth in the Energy Act itself. After subtracting specific Congressional earmarks for other projects, the BOR was left with a large lump-sum appropriation for FY 2004. Id.

It is a fundamental principle of appropriations law that where “Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions * * *” as to how the funds must be spent by the agency. Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (internal quotation marks omitted). By giving the BOR an unrestricted lump-sum appropriation, Congress clearly intended to commit allocation decisions to the BOR’s discretion. See id. The BOR is therefore not legally bound by “indicia in committee reports and other legislative history as to how the funds should or are expected to be spent * * *.” Id.⁸

Although not legally required to allocate the funds pursuant to the conference committee’s designations, the BOR relied on the conference committee’s rationale in determining the amount of funds to allocate to GDU projects for FY 2004. (See Breitzman Decl. at ¶ 27) In reliance on the conference committee’s “Statement of Managers,” the BOR determined that the amount of appropriations available for all GDU projects for FY 2004 was \$27,386,000, with \$24,000,000 to be spent on Resources Management (including construction) and \$3,386,000 to be spent on OM&R. (See id.) The undersigned finds that the BOR’s decision to allocate funds in reliance on such Congressional direction was both rational and reasonable.

As the Court in Lincoln recognized, even if an agency is not legally required to follow committee recommendations, “an agency’s decision to ignore congressional expectations may expose it to grave political consequences.” 508 U.S. at 193. The ISDA itself recognizes the statement of the managers accompanying a conference report on an appropriation bill as a source upon which the BOR can rely in making funding determinations. See 25 U.S.C. § 450j-1(b)(2)(B).

The \$24 million in appropriations available for GDU construction projects for FY 2004 was not sufficient to fund every authorized GDU project at full capacity. (Breitzman Decl. at ¶¶ 24, 27) The BOR was therefore required to use its discretion in determining how to allocate the limited amount of appropriations among all of the authorized GDU construction projects. See, e.g. Lincoln v. Vigil, 508 U.S. at 192. In making this determination, the BOR considered the needs and construction capabilities of the different GDU construction projects. (Breitzman Decl.

⁸The Tribes repeatedly cite to Ramah Navajo School Bd. Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), for the proposition that the BOR has no discretion to determine funding allocations. (Tribes’ Br. at 33, 37 n. 11) The undersigned finds the holding in Ramah inapposite, however, as it specifically held that the Secretary had no discretion to determine how to allocate funds where there were insufficient appropriations to satisfy the Secretary’s binding ISDA contract support cost obligations. See id. Ramah has no bearing on the issue of whether the Secretary has discretion to determine the Secretarial amount upon which an AFA PFSA amount is to be based.

at ¶¶ 25, 27-35; Ex. I at 14-17) Based on its analysis, the BOR determined that \$902,000 was the amount of funds available to fund the Project's FY 2004 AFA. (Breitzman Decl. at ¶ 36; Ex. I at 18) A detailed explanation of how the BOR reached this amount is set forth in both the declaration of the BOR's Dakotas Area Manager Dennis Breitzman and in the BOR's Response to the Tribes' Second Set of Discovery Requests. (Breitzman Decl. at ¶¶ 26-38; Ex. I at 14-18)

In examining the funding needs of each of the GDU construction projects, the BOR found that two projects required funding priority. The first project was the Arrowwood National Wildlife Refuge (Arrowwood). In February of 1998, the BOR signed a Record of Decision on an Environmental Impact Statement (EIS) which addressed the impacts of the BOR's operation of the Jamestown Dam and Reservoir on Arrowwood. The EIS determined that operational changes and mitigation features were necessary to comply with requirements of the National Wildlife Refuge System Administrative Act. Work began on these features in 1998. Due to high water conditions in the reservoir, however, the BOR was unable to complete work on these features from 1998 through 2002. During each of these fiscal years, therefore, funds that were allocated to the project at Arrowwood were not used. (Breitzman Decl. at ¶¶ 28-31; Ex. I at 15-16)

At the end of each of these fiscal years, unspent Arrowwood funds were reallocated to the State of North Dakota's MR&I Grant Program. This was done with the understanding that when conditions allowed, GDU funds would be needed to complete the work at Arrowwood. Between FY 1998 and 2002, a total of \$3,245,571 in unused Arrowwood funds were reallocated to the State MR&I Grant Program. In FY 2004, conditions were favorable for the construction at Arrowwood. The BOR therefore placed priority on completing as much construction as possible at Arrowwood. The FY 2004 budget request for Arrowwood, which had been prepared more than two years earlier, was for \$272,000. In light of the favorable construction conditions, however, the BOR decided to allocate to Arrowwood \$2,800,000 for FY 2004. (Breitzman Decl. at ¶¶ 28-31; Ex. I at 15-16)

The second project which was determined to require funding priority for FY 2004 was the Red River Valley studies and associated EIS. The DWRA authorized \$200 million to fund the Red River Valley Water Supply Project. § 610(B), 114 Stat. at 2763A-291. The DWRA then directed the Secretary to conduct a "comprehensive study of the water quality and quantity needs of the Red River Valley in North Dakota and possible options for meeting those needs" and prepare an associated EIS within one year from the enactment of the DWRA. § 608, 114 Stat. at 2763A-287. The DWRA further provided that if the Secretary cannot prepare a draft EIS within one year after the enactment of the DWRA, the Secretary "shall report to Congress on the status of this activity, including an estimate of the date of completion." *Id.* A Senate Field Hearing was held in December of 2002. (See Breitzman Decl. at ¶ 34; see also Ex. I at 17) The BOR determined that in order to complete the Red River Valley studies and associated EIS on the schedule testified to at the hearing, it was necessary to allocate \$1.7 million more to this project than was originally estimated in the budget request. (*Id.*)

In addition to the Arrowwood and Red River Valley projects, the BOR determined that an additional \$145,000 was necessary to complete the mitigation work at Lake Audubon. (Id.) In light of the increased funding needs of these projects, the BOR made several reductions in allocations to other projects. (Breitzman Decl. at ¶ 35; Ex. I at 17-18)

The BOR reduced the Principle Supply Works OM&R budget by \$938,000, reduced the Indian irrigation budget by \$600,000, and reduced OM&R to all wildlife programs by 10%. In addition, the BOR reduced the recreation program's budget from \$500,000 down to \$80,000 and completely eliminated the \$300,000 contribution slated for the Natural Resources Trust Fund. (Id.) These adjustments are detailed in a table attached to both the Breitzman Declaration and to the BOR's Responses to the Tribes' Second Set of Discovery Requests. This table compares the President's FY 2004 budget request to the FY 2004 expected expenditures for each of the GDU projects. (See Proposed GDU Budget, 1/30/04-FY 2004, att. to Breitzman Decl. and Ex. I)

After analyzing the needs and capabilities of all of the GDU projects in light of the limited amount of funds available, the BOR determined that \$6 million of the total \$24 million allocated for GDU construction projects for FY 2004 was available for MR&I projects. (Breitzman Decl. at ¶ 36; Ex. I at 18) The table reflects that this was a \$6 million adjustment upwards, as no funds for MR&I projects had been requested in the President's FY 2004 budget request. The undersigned finds that in light of the competing GDU project needs for FY 2004 funding, the BOR has clearly demonstrated that its decision to allocate \$6 million for MR&I projects was reasonable.

The BOR next divided the \$6 million appropriated to rural water projects equally between State MR&I projects and Indian MR&I projects, allocating \$3 million to each. (Breitzman Decl. at ¶ 36; Ex. I at 18) The BOR asserts that this division was made in accordance with an unwritten agreement between the MR&I Tribes and the State of North Dakota (the "State"). This assertion is supported by a number of facts. To begin, the BOR, the MR&I Tribes, and the State held a meeting on July 31, 2002, for the purpose of discussing the BOR's budget process. This was the first meeting of what became known as the Indian and State rural water "Alliance." (Breitzman Decl. at ¶ 37) At this meeting, the State proposed that since the DWRA established a \$200 million ceiling for each of the MR&I programs, State and Indian, the rural water funds appropriated in a given fiscal year for GDU should be divided evenly between the State and the Indian MR&I programs. (Id. at ¶¶ 36-38) Another "Alliance" meeting was held on August 20, 2002, where further discussions took place regarding the benefits of splitting rural water funding equally between State MR&I and Indian MR&I programs. (Id.; see also Ex. J.150)

In addition, the United Tribes of North Dakota, of which the MR&I Tribes are members, subsequently passed resolution UTND 02-12-03 entitled "Regarding Joint Tribal Water Development Plan Among North Dakota Tribes." (See UTND 02-12-03, att. to Ex. I; Breitzman Decl. at ¶ 38) This resolution specifically refers to the fact that the DWRA authorized \$200 million for Indian MR&I projects and \$200 million for State MR&I projects, and states that

“beginning in Fiscal Year 2004, the member Tribes of United Tribes of North Dakota are seeking to receive each fiscal year approximately one-half of all Federally appropriated funds for [MR&I] projects to be constructed in North Dakota * * *.” (UTND 02-12-03, attached to Ex. I) In light of these facts, the BOR has clearly demonstrated that its determination to allocate \$3 million to the Indian MR&I projects was reasonable and rational.

The BOR further divided the \$3 million allocated to Indian MR&I projects among the four MR&I Tribes in accordance with an agreement among the tribes. (Breitzman Decl. at ¶ 36) The MR&I Tribes had agreed to split the allocation according to the relative percentages of their portion of the \$200 million authorized in the DWRA. These percentages were 40% to Standing Rock, 35% to Fort Berthold, 15% to Spirit Lake, and 10% to Turtle Mountain. (*Id.*)⁹ In accordance with this agreement, the BOR determined that the Tribes’ share of the \$3 million, before subtraction of the BOR’s technical assistance and oversight costs, was \$1,050,000. The BOR has clearly demonstrated that this determination, which was based directly on a formula agreed to by the MR&I Tribes, was reasonable and rational.

The BOR further determined, however, that after subtraction of the BOR’s technical and oversight costs, the amount of funds available to the Tribes for FY 2004 was only \$902,000. (*Id.*) As the Tribes point out, the BOR has given no explanation as to why \$148,000 is a reasonable amount for the BOR’s technical and oversight costs, and has supplied no record documentation which supports this additional funding reduction. (Tribes’ Reply to BOR’s Record Supplement at 7 n. 16) The BOR has therefore failed to clearly demonstrate that its reduction of the Tribes’ share of funds by \$148,000 for technical and oversight costs was reasonable.

Absent such a showing, the BOR’s decision to allocate \$148,000 to its technical and oversight costs cannot be upheld. Given this finding, the undersigned will approve only the amount set forth in the Tribes’ proposed FY 2004 AFA for the BOR’s technical and oversight costs, which is \$69,000. (Ex. B.2, att. 2 at ¶ (e))

⁹ The Tribes dispute that an agreement was reached as to how to split the FY 2004 allocations among the MR&I Tribes. (See Tribes’ Response to BOR’s Record Supplement at 13) The undersigned, however, finds the Declaration of Dennis Breitzman persuasive on this issue, especially in light of the Tribes’ admission that the MR&I Tribes had entered into such an agreement for FY 2003. (*Id.*, referencing Exs. V.5 (also at Ex. J. 144)-V.7) Regardless of whether an agreement was entered, the BOR clearly demonstrated that its allocation of funds among the MR&I Tribes for FY 2004 was reasonable, as it split the allocation of Indian MR&I funds according to each tribe’s relative share of the \$200 million authorized for Indian MR&I projects under the DWRA. See § 609, 114 Stat. at 2763A-291.

In summary, the BOR clearly demonstrated that it exercised its discretion in a reasonable and rational manner in determining that the FY 2004 funds available to fund the FB Project was limited to \$1,050,000.¹⁰ Of this \$1,050,000, the BOR is to retain \$69,000, not \$148,000, to cover “technical and oversight costs.” The proper Secretarial amount for FY 2004 is therefore \$981,000, not \$902,000 as claimed by the BOR.

Because the PFSA amount cannot be less than the Secretarial amount, the undersigned concludes that the 2004 AFA should be funded at a level of \$981,000. See 25 U.S.C. § 450j-1(a)(1). Therefore, the BOR’s partial declination based upon the ground that the proposed amount of \$2,075,313 for the FY 2004 AFA was “in excess of the applicable funding level for the contract” is upheld to the extent it declined to authorize funding in excess of \$981,000, and is set aside to the extent it declined to authorize funding of \$981,000.

3. The Declination Documentation is Sufficiently Detailed to Meet the Requirements of 25 U.S.C. §§ 450j(m)(4)(C)(v) and 450f(a)(2) and 25 CFR 900.29(a), Except With Respect to the Amount Allocated for the BOR’s Technical and Oversight Costs.

The Tribes argue that any reliance upon Mr. Breitzman’s declaration is misplaced because the justification for partial declination should have been adequately detailed at the time of declination and, according to the Tribes, neither Mr. Breitzman’s declaration nor the information contained therein was provided at that time. Under 25 U.S.C. §§ 450j(m)(4)(C)(v) and 450f(a)(2), the BOR was required to approve the Tribes’ proposed AFA unless the BOR provided written notification that contained a specific finding that clearly demonstrated one of the statutory grounds for declination.

25 CFR 900.29(a) implements § 450f(a)(2) by requiring the BOR to state any objections to the Tribes’ proposed AFA in writing, including a specific finding that clearly demonstrated the existence of one of the statutory grounds for declination, “together with a detailed explanation of the reason for the decision to decline the proposal and, within 20 days, any documents relied on in making the decision[.]” The Tribes assert that the BOR did not comply with the mandates of §§ 450f(a)(2) and 900.29(a), and is prohibited under those sections from relying on the

¹⁰ The Tribes assert that the BOR’s declination was improper because the BOR had sufficiently available GDU funds at the time of the declination decision to fund the Tribes’ FY 2004 AFA at the requested level of \$2,075,313. (Tribes’ Br. at 42) However, as the BOR explained in its Response to the Tribes’ First Set of Discovery Requests, while approximately \$11 million in GDU funds was available to the BOR for expenditure at the time of its declination decision, these funds had already been allocated among the various GDU projects sharing this funding, and so could not be used to pay the Tribes’ proposed PFSA amount. (Ex. F.1 at 3)

declaration or other information or elaboration not provided at the time of declination to supplement its explanations given at the time of declination.¹¹

However, the regulations specifically provide that the Tribes and the BOR have the same rights during the appeal process, which include the rights to conduct discovery and to introduce oral and documentary evidence. 25 CFR 900.164. This clearly contemplates that the BOR may rely on information or elaboration not provided at the time of declination.

Further, the information provided at the time of declination was adequate to meet the requirements of §§ 450f(a)(2) and 900.29(a), except with respect to the amount allocated for the BOR's technical and oversight costs. The declination letter (Ex. B.3) provides in pertinent part:

The Act states a declination must occur if the Secretary of the Department of the Interior (i.e., Reclamation) finds the amount of funds proposed under the contract is in excess of the applicable level of funding for the contract, as determined under section 106(a) (25 USC 450f(a)(2)(D)), subject to the availability of Congressional appropriations. As you are aware, Congressional appropriations for this project must be allocated by the Secretary (i.e., Reclamation) among a variety of different projects, both Indian and non-Indian. In addition to your project, funds must be allocated to support similar Indian projects at Standing Rock, Spirit Lake, and Turtle Mountain. In accordance with section 106(a), the Secretary determined that \$902,000 is the applicable level of funding for Agreement No. 04NA601873 in fiscal year 2004. The AFA proposal in question specifies a funding level that is \$1,173,313 higher than the applicable funding level determined by Reclamation for the project.

Exhibit B.4 is the documentation provided to the Tribes in support of the declination letter. That documentation includes a May 11, 2004, letter of explanation from Maryanne C. Bach, the BOR's Regional Director, Great Plains Region (Ex. B.4) to Tex Hall, the Tribes' Tribal Chairman, stating:

The first set [of documents] consists of documents pertaining to the budget for the Garrison project including the Indian Municipal Rural and Industrial (MR&I)

¹¹The Tribes also argue that Mr. Breitzman's declaration and Exhibits V.1 through V.7 should be disregarded and not included in the written record because the BOR's submission of these documents was untimely under the July 6, 2005 scheduling order. By Orders dated November 21 and December 6, 2005, the undersigned noted that the submission was untimely, but that the documentation was accepted into the record. The Tribes' argument and the reasons for including the documentation in the record will not be revisited in this Recommended Decision.

construction program. This set begins with a memorandum from Dennis Breitzman * *
* to me that summarizes oral discussions between the Area Office and the Regional
Office on how decisions are made regarding budget allocations within the Garrison
Project. Garrison is an [ongoing] project that consists of a variety of programs,
including the Indian MR&I program. Funding priorities for these programs change,
often due to current status of a program, capability of a program to expend and/or
Congressional priorities.

This memorandum is accompanied by 1) The fiscal year 2004 President's Budget
Request; 2) Fiscal year 2004 House and Senate appropriation reports; and 3) the
Bureau of Reclamation's enacted fiscal year 2004 Budget and Estimate of Expenditures
for the Garrison project along with Reclamation's workplan for the Tribes' MR&I
program.

I have also included a discussion paper on the impacts of the Program Assessment
Rating Tool reduction on North Dakota Rural Water fiscal year 2004 programs,
including the tribal component and a set of Questions and Answers for the
Appropriation's Committee on funding under [DWRA] for the Garrison project,
specifically with respect to the MR&I programs and the Red River Valley study.

Finally, I have enclosed fiscal years 2003 and 2004 correspondence concerning the
Garrison project, including a letter from you with our response. As you will note, much
of this correspondence is from the Congressional delegation and concerns the Red
River Valley study, which is currently a high priority of the delegation. Further evidence
of Congressional priorities can be found in the accompanying testimony from hearings
on the Red River Valley Study. I send these to illustrate that much of our funding
decisions are driven by Executive and/or Congressional priorities.

The Executive and Congressional priorities are detailed not only in correspondence and hearing
testimony, but also in a table detailing for the GDU the President's appropriations request, the House,
Senate, and conference committee changes to that request, and the final GDU amount of \$27,386,000
approved by the committee. (Ex. B.4) As mentioned in Ms. Bach's May 11, 2004, letter, the
declination documentation (id.) also includes a Memorandum from Mr. Breitzman to Ms. Bach
explaining, as in Mr. Breitzman's declaration, the allocation adjustments made to the President's budget
request for the GDU to complete the Red River Valley study and EIS and to accomplish other activities
within budget while still providing "a reasonable amount of funds to the MR&I programs[.]" That
memorandum provides in pertinent part:

This is to document conversations between us and our staff to discuss the decisions
needed to allocate the fiscal year 2004 GDU appropriations and factors affecting the
various programs. Some historical explanation is required.

GDU construction funds are appropriated as a lump sum total amount. Although the total is based on a budget request and described in a narrative, the ultimate allocation of appropriations among the various programs frequently differs from the allocation described in the budget narrative because of changes in conditions and priorities in the two-year period between the request and the appropriation.

* * * * *

In February 1998, Reclamation signed a Record of Decision on an Environmental Impact Statement prepared to discuss the impacts of Jamestown Dam and Reservoir on the operation of the Arrowwood National Wildlife Refuge. Operational changes and mitigation features were necessary to comply with requirements of the National Wildlife Refuge System Administration Act. Included in the environmental commitments were construction of bypass and drawdown channels, fish barriers, and water management structures. Work began on these features in 1998. However, due to high water conditions in the reservoir, we have been unable to complete the work even though funds were requested and allocated in each budget year since 1998.

* * * Since the last two years have been relatively dry we chose to complete as much work as possible at Arrowwood in 2004. Even though we had a budget request for only \$272,000, we are anticipating completing contracts for \$2,800,000. Those funds would therefore not be available to the MR&I programs.

* * * * *

Fiscal year 2004 is a very difficult budget year. In addition to the work at Arrowwood, we are also attempting to complete mitigation work at Lake Audubon, a GDU feature. That work is estimated to cost \$145,000 more than was requested in the budget. In addition, to complete the Red River Valley Studies and EIS on the schedule testified to in the December 2002 Senate Field Hearing, it is estimated we will need \$1,700,000 to \$2,000,000 more than was included in our budget request. Finally, we are attempting to formulate and expedite the process for providing power to the 28,000 undesignated acres of irrigation for which no budget request was made. To accomplish all of these activities within budget and provide a reasonable amount of funds to the MR&I programs, the following adjustments were made to the allocations:

- Reduced supply works OM&R (a construction account) by \$938,000
- Reduced Indian irrigation (Standing Rock) by 600,000

- Reduced OM&R to all wildlife programs by 10% (these are funds provided per agreements with Fish and Wildlife Service and ND Game and Fish Department)
- Reduced recreation program from \$500,000 to \$80,000
- Eliminated the \$300,000 contribution to the Natural Resources Trust Fund

Finally, the emergency work to replace water to Fort Yates has severely impacted our O&M budget which we will discuss in a separate report.

These adjustments are also detailed in a table in Exhibit B.4 which compares the President's FY 2004 budget request to FY 2004 expected expenditures for the GDU. That table is the same table referenced in Mr. Breitzman's declaration, and details that the Indian MR&I projects were allocated \$3 million of the \$27,386,000 of expected expenditures for the GDU in FY 2004.

Further, the April 22, 2004, declination letter states that "[i]n addition to [the Tribes'] project, funds must be allocated to support similar Indian projects at Standing Rock, Spirit Lake, and Turtle Mountain." (Ex. B.3) As previously mentioned, the Tribes were aware of the plan to split the allocation of Indian MR&I funds among the MR&I Tribes according to their relative shares of the \$200 million authorized for Indian MR&I under the DWRA. (See, e.g., Breitzman Decl. at ¶ 36; Exs. J.150, V.5-V.7) The Tribes share (\$70 million) is 35% of the \$200 million. (Breitzman Decl. at ¶ 36) The Tribes' 35% split of the \$3 million is \$1,050,000. Given the Tribes' knowledge of the plan as to how the \$3 million in Indian MR&I funds would be split, the declination documentation provided a sufficiently detailed explanation of the BOR's allocation of \$1,050,000 funds for the FB Project.

However, the declination documentation, like the rest of the written record, does not adequately explain the basis for reducing the \$1,050,000 in available funding by \$148,000 to cover the BOR's technical and oversight costs. Consequently, the inadequacy of the declination documentation constitutes an additional ground for approving only \$69,000 for the BOR's technical and oversight costs, as set forth in the Tribes' proposed FY 2004 AFA, and for finding the Secretarial amount and PFSA amount to be \$981,000.

B. Loan Reimbursement Provision of the Proposed FY 2004 AFA.

The second issue on appeal is whether the BOR properly declined the loan reimbursement provision included in the proposed FY 2004 AFA (Ex. B.2, att. 2 at ¶ (f)) on the basis that it "cannot lawfully be carried out by the contractor." 25 U.S.C. § 450f(a)(2)(E). The BOR asserts that declination of the loan reimbursement provision was proper because it "does not have legal authority to allow appropriated monies to be used for repayment of a loan obligation, including interest." (Ex. B.3 at 2) As the Tribes assert, however, OMB Circular A-87, which is expressly

incorporated into the Parties' Contract, provides the BOR with the authority to reimburse the Tribes' loan principal and interest.

In addition, the BOR presents no controlling legal authority which affirmatively prohibits such loan reimbursement. Accordingly, the BOR has failed to meet its burden of clearly demonstrating the validity of its declination of the loan reimbursement provision, as more fully discussed below. See 25 U.S.C. § 450f(e).

1. OMB Circular A-87, Which is Expressly Incorporated Into the Parties' Contract, Provides the BOR with the Authority to Reimburse the Tribes' Loan Principal and Interest.

OMB Circular A-87's stated purpose is to "establish[] principles for determining the allowable costs incurred by State, local, and federally-recognized Indian tribal governments (governmental units) under grants, cost reimbursement contracts, and other agreements with the Federal Government (collectively referred to in this Circular as 'Federal Awards')." Att. A, § A(1). The Circular sets forth general principles to be applied in determining whether a cost is allowable under Federal Awards. Att. A, § C. In addition, the Circular provides principles to be applied in establishing the allowability or unallowability of forty-two specific items of cost. Id. at Att. B. These principles are to "be applied by all Federal agencies in determining costs incurred by governmental units under Federal Awards * * *." Id. at Att. A, § A(3)(a).

OMB Circular A-87 is generally made applicable to all ISDA contracts under the ISDA financial management regulations set forth in 25 CFR 900.45(e). More importantly, Circular A-87 has been specifically incorporated into the Parties' Contract. (Ex. A.1 at ¶ (b)(6)(D)) The Parties' Contract provides that:

The funds advanced [to the Tribes] cannot be used for any purpose other than an authorized project expenditure, even on a temporary basis. Authorized project expenditures are those costs which are considered allowable, allocable, and reasonable pursuant to the provisions of OMB Circular A-87 and section 106 of the ISDEA (26 U.S.C. 450j-1j).

(Ex. A.1 at ¶ (b)(6)(D)). This clear and unambiguous language makes plain the parties' intent to incorporate OMB Circular A-87 into the Parties' Contract and be bound by its provisions in determining whether a cost constitutes an authorized project expenditure.¹² The principles set

¹² "Where a writing refers [explicitly] to another document, that other document * * * becomes constructively part of the writing, and in that respect the two form a single instrument. The incorporated matter is to be interpreted as part of the writing." 11 Williston on Contracts § 30:25 (4th ed. 2000).

forth in the Circular must therefore be applied by the BOR in determining whether the Tribes' loan principal and interest is an allowable cost. See Cherokee, 125 S. Ct. 1172 (finding that promises made by the Government in ISDA contracts are legally binding); see also Institute for Technology Develop. v. Brown, 63 F.3d 445, 451-52 (5th Cir. 1995) (determining that the parties to a Grant Agreement were legally bound to follow the principles of OMB Circular A-122 in determining the allowability of expenses where OMB Circular A-122 was specifically incorporated into the Grant Agreement).

Section 26 of Attachment B to OMB Circular A-87 sets forth principles to be applied in establishing the allowability or unallowability of "Interest" and "Financing costs." It is these specific principles which are to be applied in determining whether costs associated with the Tribes' loan are allowable.¹³ Section 26 states:

- a. Costs incurred for interest on borrowed capital or the use of a governmental unit's own funds, however represented, are unallowable except as specifically provided in subsection b. or authorized by Federal legislation.
- b. Financing costs (including interest) paid or incurred on or after the effective date of this Circular associated with the otherwise allowable costs of building acquisition, construction, or fabrication, reconstruction or remodeling completed on or after October 1, 1980 is allowable, subject to the conditions in (1)-(4).

* * * * *

- (1) The financing is provided (from other than tax or user fee sources) by a bona fide third party external to the governmental unit;
- (2) The assets are used in support of Federal awards;

¹³The "Discussion Paper," which the BOR relied upon in making its declination determination, asserts that the more specific guidance for interest and finance costs set forth in Section 26 of Attachment B to Circular A-87 is not applicable unless it is first determined that a cost is reasonable and necessary under the general principles set forth in Section C of Attachment A. (Ex. B.4, att. Discussion Paper at 8-9) The undersigned rejects this interpretation, and agrees with the Tribes' assertion that whether a particular interest or finance cost is allowable, one looks directly to Section 26 of Attachment B. (See Tribes' Br. at 59-61) Even if the BOR were correct in its interpretation, however, the interest would be determined allowable under Attachment A as it was reasonable for the Tribes to incur this cost in light of the \$1 million grant it received along with the loan. (Ex. S at ¶ 32; Ex. T at ¶ 22)

(3) Earnings on debt service reserve funds or interest earned on borrowed funds pending payment of the construction or acquisition cost are used to offset the current period's cost or the capitalized interest, as appropriate. Earnings subject to being reported to the Federal Internal Revenue Service under arbitrage requirements are excludable.

(4) Governmental units will negotiate the amount of allowable interest whenever cash payments (interest, depreciation, use allowances, and contributions) exceed the governmental unit's cash payments and other" contributions attributable to that portion of real property used for Federal awards.

OMB Circular A-87, Att. B, § 26 (emphasis added).

Based on the principles set forth in Section 26 of Attachment B, the undersigned concludes that the Tribes' loan principal and interest are allowable costs. The USDA loan was taken out by the Tribes in order to fund construction of the FB Project, the construction of which was authorized by the DWRA, in advance of Congressional appropriations. (Ex. L. at 5-6; Ex. M. 27; Ex. S at ¶ 31; Ex. T at ¶¶ 18, 20, 22) The financing costs incurred by the Tribes, which include both principal¹⁴ and interest, therefore meet Section 26(b)'s basic requirement that the financing costs be "associated with the otherwise allowable costs of * * * construction." Att. B, § 26(b).

In addition, as the Tribes assert, each of the four conditions set forth in Section 26(b) were met. First, the loan came from the USDA (Ex T. at ¶ 22), an entity which constitutes a "bona fide" third party "external" to the BOR and the Tribes. See § 26(b)(1). Second, the assets were used "in support of Federal awards" since they were used exclusively to fund the planning, design, and construction of the FB Project in accordance with the Parties' Contract (Ex. T at ¶ 22). § 26(b)(2). Third, any interest earned on USDA funds before they are expended for FB

¹⁴ In making its arguments, the BOR assumes that the "financing costs" referred to in Section 26(b) of Attachment B do not include principal. The loan reimbursement provision set forth in the proposed FY 2004 AFA, however, asserts that Section 26(b) of Attachment B to the OMB Circular A-87 "allows for the payment of financing costs (principal and interest) * * * ." (Ex. B.2 at ¶ (g)(4) (emphasis added)) The undersigned concurs with the interpretation set forth in the proposed FY 2004 AFA. The undersigned additionally determines that even if loan principal does not fall within the category of "finance costs" set forth in Section 26(b), it is allowable under the general principles set forth in Section C of Attachment A to OMB Circular A-87. It is only logical that if the loan interest and other finance costs associated with the loan incurred are allowable, the underlying principal incurred to further valid construction costs is allowable as well.

project purposes are used to continue building the project (Ex. T at ¶ 22). See § 26(b)(3). As the Tribes assert, the fourth criterion is met because, pursuant to the Parties' Contract, a new AFA is negotiated every year to include a defined annual funding amount. (Ex. A.1 at ¶¶ (b)(5)(A), (b)(9), (f)(2)) In addition, the Tribes' proposed loan reimbursement provision provides that 4.5% is the maximum interest rate that the Tribes can charge as an allowable interest cost (Ex. B.2, att. 2 at ¶ (f). See § 26(b)(4).

Because the USDA loan principal and interest meet all of the criteria set forth in Section 26 of Attachment B to OMB Circular A-87, they are an "allowable cost" for which the Tribes may be reimbursed. Pursuant to the Parties' Contract, the Tribes' loan principal and interest are therefore "authorized project expenditure[s]" for which funds advanced by the BOR can be used. (Ex. A.1. at ¶ (b)(6)(D))

The BOR does not dispute that the USDA loan met the criteria set forth in Section 26(b) of Attachment B to OMB Circular A-87. The BOR instead asserts that regardless of whether the Tribes' loan interest is an allowable cost pursuant to OMB Circular A-87, the BOR lacks the legal authority to permit its repayment with BOR funds. The BOR contends that costs incurred "for interest on borrowed capital * * * are unallowable except as specifically provided" by Federal legislation. (BOR Br. at 35) The BOR argues that an OMB Circular cannot "bestow additional authority on another Executive Branch agency." (Id. at 36) The BOR concludes that because the only authority authorizing the repayment of the Tribes' interest is non-legislative, it is not lawful for the BOR to repay loan interest. (Id. at 35-38)

Upon examination, the undersigned finds that this assertion is completely unsupported. As the Tribes point out, the BOR relies on an incomplete and thus misleading excerpt from Section 26 of Attachment B to OMB Circular A-87 in support of its proposition that costs incurred for interest on borrowed capital are allowable only as specifically authorized by Federal legislation. (See Tribes' Br. at 26 n. 71) The complete text of the excerpt states: "Costs incurred for interest on borrowed capital * * * are unallowable except as specifically provided in subsection b. or authorized by Federal legislation." Att. B, § 26(a) (emphasis added). The BOR omitted the crucial underlined portion of the excerpt. As explained previously, the Tribes' loan interest costs meet the criterion "specifically provided in subsection b." Id. The payment of the Tribes' loan interest is therefore allowable regardless of whether it is authorized by Federal legislation.

The BOR's characterizations of the case law which it cites in support of its assertion are similarly misleading. The BOR cites to Library of Congress v. Shaw, 478 U.S. 310, 314-17 (1986), White Mountain Apache Tribe of Arizona v. U.S., 20 Cl. Ct. 371, 379 (Cl. Ct. 1990), U.S. v. New York Rayon Importing Co., 329 U.S. 654, 659 (1947), and United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323 (Ct. Cl. 1975), for the proposition that an award of interest cannot be made in the absence of express statutory authority. These cases, which address whether parties can recover interest on claims brought against the government, are

completely irrelevant to the facts on appeal. In addition, each of these cases specifically find that interest can be awarded pursuant to an express contractual provision.

The BOR has failed to provide any valid support for its assertion that OMB Circular A-87 does not provide the BOR with proper legal authority to pay the interest on the Tribes' loan. The Tribes, on the other hand, cite to a number of cases in which tribunals have looked to the OMB Circular as the proper guidance for determining cost allowability questions under the ISDA. See Crow Tribe of Mont. v. Mont. State Dir., 31 IBIA 16, 32-33 (1997); Ramah Navajo Chapter v. Babbitt, 50 F. Supp. 2d 1091, 1100 (D.N.M. 1999). In addition, the ISDA regulations themselves recognize that OMB Circular A-87 can be used in determining the allowability of self-determination contract costs. See 25 CFR 900.45(e). The BOR's assertion is also directly contradicted by the fact that it contracted to be bound to the principles set forth in OMB Circular A-87 in determining cost allowability issues under the Parties' Contract. (Ex. A.1 at ¶ (b)(6)(D)) The BOR's unsupported assertion fails in light of this substantial evidence to the contrary. The undersigned thereby concludes that OMB Circular A-87 does appropriately grant the BOR the authority to reimburse the Tribes' loan principal and interest.

2. The BOR Presents No Controlling Legal Authority Which Affirmatively Prohibits Such Loan Reimbursement.

Despite OMB Circular A-87's clear authorization, the BOR asserts that it is prohibited from reimbursing the Tribes' loan principal and interest on a number of other grounds. The undersigned, however, finds none of the authority referenced by the BOR controlling.

The BOR first asserts that it has no authority to reimburse the loan principal and interest because the Tribes "took out the loans under a separate federal grant program at a time when it did not have an ISDA contract with Reclamation." (BOR Br. at 33) The BOR argues that outside of the ISDA context, it has no authority to reimburse the Tribes' loan principal and interest. (Id.) This assertion is factually incorrect. By its own terms, the Parties' Contract became effective on October 1, 2003. (Ex. A.1 at ¶ (b)(2)) The administrative record clearly reflects that the Tribes closed on the USDA loan on November 7, 2003, more than a month after the Parties' Contract became effective. (See Ex. L. at 8; Ex. M.26) The loan, therefore, was not incurred prior to the Parties' Contract.

The BOR next argues that it is not legally authorized to pay back loans from other agencies because the FB Project's estimated completion cost of \$80.2 million exceeds the authorized \$70 million funding ceiling set forth in the DWRA. (BOR Br. at 34-35) The BOR argues that because the Project is underfunded, funding from sources other than the BOR is obviously needed and "[i]t is not [the BOR's] responsibility to pay back those agencies for the funds, nor would it legally be allowed to do so." (Id. at 35) Despite the BOR's attempt to recharacterize the Tribes' use of funds provided under the Parties' Contract as the BOR paying back other agencies for fund provided, the fact remains that the use of the funds is properly

characterized as the contractually authorized payment by the Tribes of financing costs on financing from a third party pursuant to OMB Circular A-87.

The BOR additionally makes the bald assertion that federal appropriations law does not permit it to reimburse the Tribes for interest costs. The BOR, however, cites to no appropriations statutes, cases, or other authority in support of this proposition. None of the grounds upon which the BOR relies for its assertion that it is prohibited from reimbursing the Tribes' loan principal and interest is supported by controlling legal authority.¹⁵ The BOR has therefore failed to demonstrate that it is affirmatively prohibited from reimbursing the Tribes' loan principal and interest.

3. The BOR Has Failed to Meet its Burden of Clearly Demonstrating the Validity of its Declination of the Loan Reimbursement Provision.

The BOR has the burden on appeal of "clearly demonstrating the validity of the grounds for declining the contract proposal." See 25 U.S.C. § 450f(e). OMB Circular A-87 specifically grants the BOR the legal authority to reimburse the Tribes' loan principal and interest. No other controlling legal authority has been presented which would otherwise prohibit the BOR from reimbursing the Tribes' loan principal and interest. The BOR has accordingly failed to meet its burden of clearly demonstrating that the loan reimbursement proposal set forth in the FY 2004 AFA "cannot lawfully be carried out." 25 U.S.C. § 450f(a)(2)(E). The undersigned therefore concludes that the BOR's declination of the cost reimbursement provision was invalid, and that the provision must be approved as proposed.¹⁶ (See Ex. B.2, att. 2 at ¶ (f))

¹⁵ The BOR relied upon a number of other alleged legal rationales set forth in the "White Paper" and "Discussion Paper" in making its declination determination. Those legal rationales do not merit a detailed discussion, as the BOR spends no time defending these rationales in its brief. Although not specifically addressed herein, those rationales have been considered and found not to constitute controlling legal authority which would prohibit the BOR from reimbursing the Tribes' loan principal and interest.

¹⁶ The "cost reimbursement provision" on appeal does not specify a certain monetary amount for which the Tribes are to be reimbursed. (Ex. B.2, att. 2 at ¶ (f)) It instead allows the Tribes to "use funds provided under the Agreement for the purpose of repaying loan(s) or other debt instrument(s), including interest" to "the extent permitted by OMB Cir. A-87" and provided that the loan amount "does not exceed \$2,509,000 and the interest rate on this principal amount does not exceed 4.5%." (*Id.*) A specific cost reimbursement amount is therefore not on appeal. The undersigned therefore does not specify a specific amount to be applied towards reimbursement, but instead approves the cost reimbursement provision as proposed.

CONCLUSION

For the above-stated reasons, \$981,000 in funding for the FY 2004 AFA is approved and the Tribes may use that funding to pay back the principal and interest on the Tribes' USDA loan. In other words, the April 22, 2005 partial declination letter is:

- (1) Affirmed to the extent that it declined to authorize funding in the FY 2004 AFA above the amount of \$981,000; and
- (2) Reversed to the extent that it declined to authorize:
 - (a) Funding in the FY 2004 AFA of \$981,000, and
 - (b) The use of funding to pay back the principal and interest on the Tribes' USDA loan.

// original signed

James H. Heffernan
Administrative Law Judge

APPEAL INFORMATION

Within 30 days of the receipt of this Recommended Decision, you may file an objection to the Recommended Decision with the Interior Board of Indian Appeals (IBIA) under 25 C.F.R. § 900.165(c). An appeal to the IBIA under 25 C.F.R. § 900.165(c) shall be filed at the following address: Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, VA 22203. You shall serve copies of your notice of appeal on the Secretary of the Interior, and on the official whose decision is being appealed. You shall certify to the IBIA that you have served these copies. If neither party files an objection to the Recommended Decision within 30 days, the Recommended Decision will become final.