LEGISLATIVE SUMMARY SHEET
Tracking No. 0011-21

DATE: January 15, 2021

TITLE OF RESOLUTION: AN ACT RELATING TO BUDGET AND FINANCE COMMITTEE, LAW AND ORDER COMMITTEE AND NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; ESTABLISHING THE NAVAJO NATION HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN BY AMENDING TITLE TWELVE OF THE NAVAJO NATION CODE; DIRECTING THAT THE AWARD RECEIVED THROUGH *NAVAJO NATION V. DEPARTMENT OF INTERIOR*, NO. 14-cv-1909 (TSC), BE DEPOSITED IN THE HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN AFTER REINBURSEMENT OF LITIGATION COSTS; DIRECTING THAT THE PROCEEDS FROM FUTURE LITIGATIONS RELATED TO THE JUDICIAL BRANCH'S P.L. 93-638 CONTRACTS OR ANNUAL FUNDING AGREEMENTS BE DEPOSITED IN THE HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN; ESTABLISHING THAT THE FIXED COST LITIGATION ACCOUNT SHALL BE REIMBURSED FOR LITIGATION COSTS

PURPOSE: This resolution, if approved, will establish a fund (Hashkééjí Nahat'á Béeso Bá Hooghan) for the benefit of the Judicial Branch from the proceeds of *Navajo Nation v.. Department of Interior*, No. 14-cv-1909 (TSC), and reimburse the Fixed Cost Litigation Account for the costs of the litigation.

This written summary does not address recommended amendments as may be provided by the standing committee. The Office of Legislative Counsel requests each committee member to review the proposed resolution in detail.

5-DAY BILL HOLD PERIOD: J Johnson
Website Posting Time/Date: 5:20pm 01/21/21
Posting End Date: 01-26-21
Eligible for Action: 01-27-21

Budget & Finance Committee
Thence
Law & Order Committee
Thence
Naabik'íyáti Committee
Thence
Navajo Nation Council

PROPOSED NAVAJO NATION COUNCIL RESOLUTION

24th NAVAJO NATION COUNCIL – Third Year, 2021

INTRODUCED BY

(Prime Sponsor)

TRACKING NO. 0011-21

AN ACT

RELATING TO BUDGET AND FINANCE COMMITTEE, LAW AND ORDER COMMITTEE AND NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; ESTABLISHING THE NAVAJO NATION HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN BY AMENDING TITLE TWELVE OF THE NAVAJO NATION CODE; DIRECTING THAT THE AWARD RECEIVED THROUGH *NAVAJO NATION V. DEPARTMENT OF INTERIOR*, NO. 14-cv-1909 (TSC), BE DEPOSITED IN THE HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN AFTER REINBURSEMENT OF LITIGATION COSTS; DIRECTING THAT THE PROCEEDS FROM FUTURE LITIGATIONS RELATED TO THE JUDICIAL BRANCH'S P.L. 93-638 CONTRACTS OR ANNUAL FUNDING AGREEMENTS BE DEPOSITED IN THE HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN; ESTABLISHING THAT THE FIXED COST LITIGATION ACCOUNT SHALL BE REIMBURSED FOR LITIGATION COSTS

BE IT ENACTED:

SECTION ONE. AUTHORITY

A. The Navajo Nation Council is the governing body of the Navajo Nation and empowered to enact positive law of the Navajo Nation. 2 N.N.C. §§ 102 (A) and 164 (A).

B. The Naabik'iyati' Committee of the Navajo Nation Council is empowered to review all proposed legislation which requires final action by the Navajo Nation Council. 2 N.N.C. §164 (A)(9).

C. The Budget and Finance Committee of the Navajo Nation Council is empowered to review and recommend to the Navajo Nation Council the budgeting, appropriation, investment, and management of all funds. 2 N.N.C. § 301 (B)(2).

D. The Law and Order Committee of the Navajo Nation Council is empowered to provide oversight over the Judicial Branch of the Navajo Nation and the Navajo Nation Department of Justice. 2 N.N.C. §§ 601 (C)(1) and (2).

SECTION TWO. FINDINGS

A. In the 1950s, the Navajo Nation shifted from a federal Court of Indian Offenses court system to a tribal court system due to Congress enacting Public Law 83-280 which granted certain states criminal jurisdiction over Indians on reservations and allowed civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts. N.N.C. Resolution No. CO-69-58.

B. Since its inception, the independence and strength of the Navajo Nation Judicial Branch has been a cornerstone for protecting the sovereignty of the Navajo Nation. N.N.C. Resolution No. CD-94-85.

C. The Navajo Nation Council has consistently sought to ensure Navajo tradition and Diné Fundamental Law as foundational to the Diné jurisprudence practiced in the Navajo Nation Judicial Branch. CD-94-85. Diné Fundamental Law is embodied in statutes and the Courts of the Navajo Nation are required to implement the principles and practice of Diné Fundamental Law. Diné Fundamental Law distinguishes Navajo jurisprudence from Anglo-American jurisprudence because Diné Fundamental Law embodies Diné customs, traditions, values, and beliefs.

D. The Navajo Nation Council, for decades, has sought to ensure the independence of the Courts of the Navajo Nation. The Judiciary Committee, in recommending judicial reform in 1985, stated that the Navajo Nation Courts have "an inherent right to the financial support needed to carry out their duties...and the Judicial

Branch is a separate branch of government and in its duty to operate efficiently and economically must be able to make day-to-day decisions regarding operating costs and expenditures with a minimum of interference and delay." Judiciary Committee (attachment to CD-94-85).

E. In 1982, the Navajo Peacemaker Court was created by Navajo judges through vote of the Judicial Conference. The Navajo judges wanted to find an alternative to Anglo-American judicial methods that had roots in Diné Fundamental Law and that incorporated Diné wisdom, methods, and customs in resolving disputes. At the time, the Peacemaking Court did not properly reflect Diné traditions because standard court procedures, rules, and practices were applied to the Peacemaking process which made the process strongly resemble Anglo-American dispute resolution methods rather than Diné traditions and culture.

F. In early 2000, the Peacemaking Court was renamed, rules were replaced with Guidelines, and the traditional Diné Fundamental Law principles and practices were better reflected in the Courts and in Peacemaking.

G. The Judicial Branch continues to implement Title 1 of the Navajo Nation Code, Diné Bi Beenahaz'áanii, and recognize Diné jurisprudence and Fundamental Law as foundational to the entire branch and the interworking of the Courts, the Peacemaking Program, and the Probation and Parole Program.

H. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. §§ 5301 *et seq.* (P.L. 93-638, As Amended), to assist Indian tribes in assuming responsibility for federal government programs. In 2012, the Bureau of Indian Affairs (BIA) and the Navajo Nation Judicial Branch entered into a five (5) year self-determination contract (aka "638 contract") pursuant to the ISDEAA whereby the BIA funded the Judicial Branch's provision of federal government programs. This included ensuring that Diné jurisprudence was reflected throughout the Judicial Branch.

I. Judicial Branch leadership and staff have worked tirelessly for years to illuminate the grave underfunding of the Navajo Nation judicial system by the federal government, particularly the BIA. The Judicial Branch timely submitted a proposed

annual funding agreement for Calendar Year 2014 in the amount of $17,055,517 to the BIA on October 3, 2013 for its federal self-determination contract. The BIA, however, failed to respond to the Judicial Branch's proposal as statutorily required and attempted to partially decline the funding amount.

J. In 2014, the Chief Justice of the Navajo Nation requested the Navajo Nation Attorney General and Department of Justice (NNDOJ) to file a lawsuit against the U.S. Department of Interior (DOI) and Bureau of Indian Affairs (BIA) for violating the ISDEAA. The Attorney General subsequently filed suit against the DOI and other federal government programs on behalf of the Navajo Nation contending that the BIA failed to approve or decline the Calendar Year 2014 annual funding agreement within the statutorily mandated ninety (90) day window and thus, the BIA had to deem the annual funding agreement approved as a matter of law. The lawsuit was titled *Navajo Nation v. Department of Interior, et al.*, No. 14-cv-1909 (TSC)

K. On April 4, 2017, the U.S. Court of Appeals for the District of Columbia ruled in favor of the Navajo Nation and the Judicial Branch. On June 12, 2020, the U.S. District Court for the District of Columbia ruled in favor of the Navajo Nation and the Judicial Branch and awarded the Navajo Nation $15.7 million. The federal government did not appeal the decision and the final award in the amount of $18,279,923.32, attached as **Exhibit A**, includes statutory interest to the date of the award.

L. NNDOJ expended Fixed Cost Litigation Account funds to litigate against the DOI and other federal government agencies on behalf of the Judicial Branch. **Exhibit B** [Marked as "confidential" by the Navajo Nation Attorney General pursuant to 2 N.N.C. § 164 (A)(6).]

M. Through its leadership, the Judicial Branch, with the assistance of NNDOJ, continues to fight to increase the federal self-determination contract to a level of funding that reflects the federally contracted work that the Judicial Branch performs. For years, the Judicial Branch has argued that the underfunding by the BIA of its federal self-determination contract has created a void of available

services to Navajo people. The Judicial Branch has consistently maintained that the $17,055,517 originally requested for Calendar Year 2014 was based upon the actual fiscal needs of the Judicial Branch to provide the federally contracted services on an annual basis.

N. The Navajo Nation recognizes that this initial lawsuit turned on the failure of the BIA to respond to the Judicial Branch as required by federal statute and continues to fight to that ensure that the Judicial Branch federal self-determination contracts are fully funded.

O. The Navajo Nation recognizes the substantial needs of the Judicial Branch to be fully funded to continue developing one of the most complex indigenous judicial systems throughout the world that fully contemplates Diné jurisprudence and Diné Bi Beenahaz'áanii. Navajo Nation sovereignty demands a comprehensive system that fully integrates Diné Bi Beenahaz'áanii into peacemaking and court systems to provide a judicial system to Navajo people that is reflective of Navajo traditions and culture.

P. The Navajo Nation recognizes that a fully funded, independent judiciary and peacemaking system is necessary to protect the sovereignty of the Navajo Nation and respects the expertise of the Judicial Branch leadership to identify the priorities for expending the funds awarded by the federal court through *Navajo Nation v. Department of Interior, et al.*, No. 14-cv-1909 (TSC), as well as the funds from any subsequent awards or settlements.

Q. Pursuant to 12 N.N.C. § 820 (K) of the Navajo Nation Appropriations Act, funds received in excess of the initial or current revenue projections, e.g., court awards or settlements, shall be deposited in to the General Fund Unreserved Undesignated Fund balance unless otherwise designated by the Navajo Nation Council.

R. The Navajo Nation appreciates that the Judicial Branch is a unique judicial system and has funding needs that are not considered during the annual comprehensive budget process and that funding of this nature, i.e., an award from the federal court, can and should be directed primarily to the Judicial Branch to develop long-term

planning and systems that benefit the entire Judicial Branch and enhance judicial services across the Navajo Nation.

S. Hashkéédjí Nahat'á dóó Hózhǫ́ǫjí Nahat'á t'áá sahdii béeso yee ák'inaaldzil dóó yee naalnish.

T. Hashkéédjí Nahat'á dóó Hózhǫ́ǫjí Nahat'á t'áá sahdii béeso choyooł'į dóó t'áá sahdii yee ák'inaaldzil hółdzilgo yee bik'ǫ' diltłi'doo biniyé.

SECTION THREE. ESTABLISHING NAVAJO NATION HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN

The Navajo Nation hereby establishes the Navajo Nation Hashkéédjí Nahat'á Béeso Bá Hooghan and approves its enabling legislation as follows:

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Title 12. FISCAL MATTERS

CHAPTER 28. NAVAJO NATION HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN

§ 2801. Establishment

There is established the "Navajo Nation Hashkéédjí Nahat'á Béeso Bá Hooghan", hereinafter referred to as "Fund".

A. The Navajo Nation Council hereby designates that the net proceeds and earnings thereon awarded to the Navajo Nation by the litigation captioned *Navajo Nation vs. United States Department of Interior*, No. 14-cv-1909 (TSC) shall be deposited into the Fund after the Fixed Cost Litigation Account has been reimbursed for the actual costs of said litigation, as calculated and attested to by the Attorney General of the Navajo Nation.

B. The net proceeds of all settlement or judgement awards stemming from litigation brought on behalf of the Judicial Branch of the Navajo Nation related to the underfunding of the Judicial Branch Indian Self-Determination and

Education Assistance Act contract(s) and annual funding agreement(s) shall be deposited into the Fund after the Fixed Cost Litigation Account has been reimbursed for the actual costs of such litigation, as calculated and attested to by the Attorney General of the Navajo Nation.

C. The Navajo Nation Council may make additional appropriations to the Fund from any other sources of revenue that become available to the Navajo Nation.

D. Any money deposited in or appropriated to the Fund, regardless of source, including earnings thereon, shall be used only as provided in this Chapter.

E. The Fund shall be a continuing account and shall not lapse on an annual basis pursuant to 12 N.N.C. 820(N).

§ 2802. Purpose

A. The purpose(s) of this Fund are to provide financial support and/or financing for the continuing development of the Judicial Branch true to its core of Diné Fundamental law by reinstating peacemaking and traditional Navajo concepts throughout the Branch's systems and facilities, including:

1. to plan, develop, purchase, and/or construct Judicial Branch facilities, including power, water, electrical, roads infrastructure, parking lots, government and traditional hogan buildings and surrounding infrastructure necessary for the use of government buildings; and
2. to meet the operational and systematic needs of the Judicial Branch, including but not limited to information technology; and
3. to develop and implement programs and projects of the Navajo Nation Courts, Peacemaking Program, Administrative Offices of the Courts, and Probation and Parole Program that enhance public services for the Navajo people and improve development of the Judicial Branch's operations and internal systems.

B. Expenditures from the Fund shall not be subject to or limited by 12 N.N.C. §§ 810 (F) and of the Appropriations Act, 12 N.N.C. § 1310 (F) of the Bond Financing Act

or the Capital Improvement Project Guidelines, Policies, and Procedures approved through TCDCJY-77-99.

§ 2803. Investment of the Fund

All monies deposited in the Fund shall be subject to the Master Investment Policies, as amended, and invested as soon as practical in accordance with the degree of care exercised by reasonable and prudent managers of investments intended to produce maximum growth of the investments with a high degree of safety necessary to fulfill the purposes and objectives of the Fund.

§ 2804. Definition of Fund Principal and Income

A. "Fund Principal" shall consist of all deposits made to the Fund pursuant to § 2801 of this Chapter.

B. "Fund Income" shall consist of all earnings (interest, dividends, etc.) generated and realized through the investment of the Fund Principal. Realized Fund Income shall be added to the Fund Principal after Fund management and administration expenses, as set forth in this Chapter, have been deducted.

§ 2805. Expenditure of the Fund

A. The Fund Principal and Income shall be expended upon recommendation by the Chief Justice of the Navajo Nation Supreme Court through an annual or multi-year expenditure plan approved by the Law and Order and Budget and Finance Committees. Any changes or modifications to an approved expenditure plan shall be approved by the Law and Order Committee and Budget and Finance Committee upon the recommendation of the Chief Justice of the Navajo Nation.

B. Any Fund amounts, whether Fund Principal or Fund Income, not included in an expenditure plan, shall remain invested as set forth in this Chapter.

§ 2806. Annual Audit

The Fund shall be audited annually by independent auditors and within 120 days of the end of each fiscal year, an audit report shall be distributed to the members of the Navajo Nation Council. The audit report shall be written in easily understandable language.

§ 2807. Expenses

All expenses directly associated with the administration and management of the Fund shall be paid from the Fund Income. Such expenses shall include investment advisory and management fees, audit costs, and other related expenses, all pursuant to duly approved contracts for such services.

§ 2808. Amendments

Any section(s) of this Chapter may be amended by a two-thirds (2/3) majority vote of the full membership of the Navajo Nation Council and approval of the President of the Navajo Nation.

§ 2809. Termination

The Fund shall expire and terminate when all Fund Principal and Fund Income have been expended.

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SECTION FOUR. APPROVING REIMBURSEMENT OF LITIGATION COSTS

A. The Navajo Nation Department of Justice expended Fixed Cost Litigation Account funds to litigate *Navajo Nation v. Department of Interior*, No. 14-cv-1909 (TSC). *See* **Exhibit B** [Marked as "confidential" by the Navajo Nation Attorney General pursuant to 2 N.N.C. § 164 (A)(6)].

B. The Fixed Cost Litigation Account is to be reimbursed for the actual litigation costs and expenses, as calculated and attested to by the Attorney General, expended on *Navajo Nation v. Department of Interior*, No. 14-cv-1909 (TSC) prior to the award

being deposited in Hashkééjí Nahat'á Béeso Bá Hooghan. The budget documents supporting the reimbursement are attached as **Exhibit C** [Marked as "confidential" by the Navajo Nation Attorney General pursuant to 2 N.N.C. § 164 (A)(6)].

C. The Fixed Cost Litigation Account is to be reimbursed for actual litigation costs and expenses out of all future awards and settlements stemming from litigation on behalf of the Navajo Nation, specifically including litigation brought on behalf of the Judicial Branch related to the underfunding of the Judicial Branch Indian Self-Determination and Education Assistance Act contract(s) and annual funding agreement(s)

SECTION FIVE. EFFECTIVE DATE

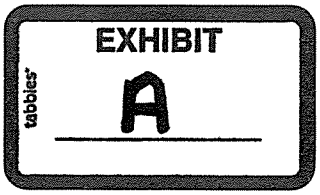
This Act is effective upon its approval pursuant to 2 N.N.C. 221(B).

SECTION SIX. CODIFICATION

The provisions of this Act which amend or adopt new sections of the Navajo Nation Code shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel shall incorporate such amended provisions in the next codification of the Navajo Nation Code.

SECTION SEVEN. SAVINGS CLAUSE

Should any provision(s) of this Act be determined invalid by the Navajo Nation Supreme Court or the District Courts of the Navajo Nation, without appeal to the Navajo Nation Supreme Court, the remainder of the Act shall remain the law of the Navajo Nation.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVAJO NATION, Plaintiff, v. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	Civil Action No. 14-cv-1909 (TSC)

FINAL JUDGMENT

Consistent with this court's Memorandum Opinion (ECF No. 48; *see* ECF No. 50), the court hereby GRANTS Plaintiff's Motion for Summary Judgment, (ECF No. 15), and DENIES Defendants' Motion for Summary Judgment, (ECF No. 18).

Plaintiff is hereby awarded damages for breach of contract in the amount of $15,762,985, in addition to interest on that amount pursuant to 41 U.S.C. § 7109.

Date: August 26, 2020

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVAJO NATION, Plaintiff, v. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	)	Civil Action No. 14-cv-1909 (TSC)

ORDER

In 2014, Plaintiff Navajo Nation (the Nation) filed this action against Defendant Department of the Interior (DOI) for failing to disburse calendar year (CY) 2014 funding to the Nation according to the Nation's proposed CY 2014 annual funding agreement. In 2017, following the court's grant of summary judgment to DOI, the D.C. Circuit reversed and concluded that judgment should be entered for the Nation.

The parties therefore agree that the court should grant Plaintiff's Motion for Summary Judgment (ECF No. 15), and deny Defendants' Cross-Motion for Summary Judgment (ECF No. 18). They disagree, however, as to appropriate damages. Upon consideration of the parties' filings regarding an entry of judgment (ECF Nos. 37, 38, and 39), and the parties' filings regarding the reasonableness of Plaintiff's damages (ECF Nos. 44, 45, and 46), and for the reasons set forth below, the Nation's motion for summary judgment is hereby GRANTED, DOI's cross-motion for summary judgment is hereby DENIED, and the Nation's request for $15,762,985 in damages is hereby GRANTED.

I. BACKGROUND

This case arises from a contract between the Nation and the Navajo Regional Office of the Bureau of Indian Affairs (BIA), a federal agency within DOI, under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 5301 *et seq.* (ISDEAA). Under this contract, the parties must negotiate annual funding agreements (AFAs), which determine the annual level of funding provided to the Nation.

During its 2013 negotiations with DOI, the Nation sought $17,055,517 to fund its Tribal Courts Program for CY 2014. This was an amount substantially larger than had been proposed or awarded in previous years. The Nation submitted a "Scope of Work" document outlining the reasons for its request (ECF No. 44-1, Ex. 1 Attach. A at 3), as well as a summary of how its proposed budget would be allocated among ten different categories. (ECF No. 44-1, Ex. 1 Attach. B.)

The Nation hand-delivered the proposed AFA to the BIA on October 4, 2013. Pursuant to BIA regulations, a proposal is "deemed approved" if not declined within 90 days. 25 C.F.R. § 900.18. The BIA issued a partial declination on January 15, 2014, 13 days overdue. In the course of this litigation, DOI argued that the partial government shutdown, which lasted until October 17, 2013, delayed its receipt of the proposed AFA, pushing back the deadline; DOI additionally argued that principles of equitable estoppel barred the Nation from prevailing on its claims. The parties cross-moved for summary judgment, and the court ruled for DOI. (ECF No. 30, Mem. Op. at 15.)

The D.C. Circuit reversed, holding that the proposed AFA was received on the date it was delivered, that the BIA's partial declination was untimely, and that, therefore, the Nation's proposal was deemed approved as a matter of law. *Navajo Nation v. U.S. Dep't of Interior*, 852

F.3d 1124, 1130 (D.C. Cir. 2017). That Court did not, however, determine what damages should be awarded to the Nation. *Id.*

The parties have since agreed that the court should enter judgment for the Nation, but disagree as to appropriate damages. (ECF No. 36, Joint Status Report at 2.) Following the parties' filings regarding an entry of judgment, the court ordered that proper damages are an amount that is "facially reasonable." (Minute Order, February 15, 2019 (citing *Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, 945 F. Supp. 2d 135, 152 (D.D.C. 2013)).) The parties agreed to submit a further round of briefing as to whether Plaintiff's requested damages, totaling $15,762,985—representing the proposed AFA minus the $1,292,532 approved by the BIA—are facially reasonable. (ECF No. 43, Joint Status Report at 1.)

II. ANALYSIS

The court finds that damages of $15,762,985 are facially reasonable.

In its brief, DOI argues that Plaintiff's requested amount is unreasonably large compared to the requested funding in previous years, and additionally that such a large award would have disproportionate and adverse effects on the BIA's budget for tribal services more generally. (ECF No. 45, Defs. Resp. at 5, 8–9.) DOI thus advocates for an unspecified award of damages using $2,130,077 and $780,418—the differences between the requested funding in 2012 and 2013, and the approved funding in 2014, respectively—as "guideposts." (*Id.* at 12.) The Nation is correct that the ISDEAA emphasizes discretion and does not require proportionality between one year's proposed funding and the next. (ECF No. 46, Pl. Reply at 4.) However, such proportionality, or disproportionality, may serve as a helpful benchmark in determining what damages are facially reasonable.

DOI contends that several items in the proposed AFA are of questionable reasonableness. For example, it points to a six-fold increase in travel expenses, several one-off expenses related to the repair and maintenance of facilities, and a 500 percent increase in requested personnel salary and fringe benefits, forming the bulk of the proposed funding—$13,323,385—despite a corresponding decrease in the Nation's judicial caseload. (Defs. Resp. at 6–7.) The Nation does not respond to these criticisms in detail, but argues that the "Scope of Work" document submitted as part of its proposal addresses its need for increased funding. (Pl. Reply at 5.)

The Nation's "Scope of Work" document adequately outlines its justifications for such an increase in funding. The document points to several "severe shortfalls" in funding, and additionally notes that the $17 million sum was not as unprecedented as DOI suggests: roughly the same amount had been proposed as part of the Nation's budget priorities two years previously. (Ex. 1 Attach. A at 3.) The only applicable case to consider a similar question, *Seneca Nation*, concluded that such an explanation of a "perceived funding gap" was facially reasonable, even if the proposed increase there was not as significant as in this case. 945 F. Supp. 2d at 152. Moreover, a decrease in caseload is not dispositive of the Nation's budgetary needs; faced with shortfalls, it is plausible that this decrease was a response to inadequate funding, not a refutation of it.

DOI's argument that the proposed amount is unreasonable because the Nation had "not even spent all the funds awarded to it" is likewise unpersuasive. (Defs. Resp. at 10–11.) As the Nation notes in its reply brief, this does not accurately describe its expenditures since 2012, which indicate that 99 percent of the funding under the contract was obligated as of December 31, 2018. (Pl. Reply at 1 n.1.) Furthermore, as with the Nation's caseload, it is not unreasonable

that the Nation would be hesitant in allocating the funding it did receive, given that it contends this funding was drastically insufficient to meet its needs.

DOI additionally argues that an award of full damages would result in more than 60 percent of the BIA's total annual funding for tribal courts being allocated to the Nation alone, a result both disproportionate and likely to divert existing resources from other tribes or programs. (Defs. Resp. at 8–9.) On this, however, the law is clear. The Supreme Court has repeatedly stressed that "as long as Congress has appropriated sufficient legally unrestricted funds to pay contracts . . . the Government normally cannot back out of a promise to pay on grounds of insufficient appropriations" absent "something special about the promises at issue." *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 632 (2005). *See also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191 (2012) (holding that tribal contractors "need not keep track of agencies' shifting priorities and competing obligations; rather, they may trust that the Government will honor its contractual promises.").

This is particularly essential in light of concerns regarding the "Government's past failure adequately to reimburse tribes' indirect administrative costs," *Cherokee Nation*, 543 U.S. at 639, as well as the historical underfunding of both the Nation's courts and tribal justice systems more generally. *See* ECF No. 44, Pl. Mem. at 2–4. Arguments that a financial windfall to the Nation would come "at the expense of other Indian tribes . . . impermissibly invite the Court to meddle with [Government] contracts and 'render its promises nonbinding.'" *Seneca Nation*, 945 F. Supp. 2d at 151 (quoting *Cherokee Nation*, 543 U.S. at 641).[1]

[1] DOI has expressed concern that any award in this case may impact the parties' positions in the related cases regarding the Nation's funding for CY 2015 and beyond, also before the court. *See* Case Nos. 1:16-cv-011-TSC, 1:17-cv-513-TSC, 1:17-cv-863-TSC, 1:18-cv-774-TSC, 1:19-cv-3612-TSC, and 1:20-cv-1297-TSC. The court's ruling here should not be taken as dispositive of

The Nation's brief regarding an entry of judgment argued against a facial reasonableness standard, insisting that it was entitled to the requested damages in full by virtue of the governing regulation. (ECF No. 38, Pl. Resp. at 4.) 25 C.F.R. § 900.18 states that, when a proposal is not declined within 90 days and is thus deemed approved, the Secretary "shall award the contract . . . and add to the contract *the full amount of funds* pursuant to section 106(a) of the [ISDEAA]" (emphasis added). Indeed, the D.C. Circuit quoted this language in determining that the Nation's damages were not limited by the "funds the BIA would otherwise have expended." *Navajo Nation*, 852 F.3d at 1130. Despite the court's February 15, 2019 order that proper damages are an amount that is facially reasonable, the Nation continues to argue implicitly that this regulatory language makes its requested damages facially reasonable *per se*. *See, e.g.*, Pl. Reply at 2 ("An award in that amount is facially reasonable because it is fully supported by the applicable law.").

There is some ambiguity as to the proper standard for award of damages, and both parties have marshaled several arguments in favor of their respective theories. Although the D.C. Circuit quoted the "full amount of funds" language, it did so in the context of rejecting DOI's attempt to *cap* damages, and did not specify whether the regulatory language placed further constraints on the court's discretion in awarding damages. *Navajo Nation*, 852 F.3d at 1130. Likewise, although the court in *Seneca Nation* awarded damages that were facially reasonable, its opinion can also plausibly be read as endorsing the Nation's theory of damages. *See id.* at 151–52 ("Moreover, questioning the validity of the Nation's per-person amount is not a proper task for the Court at this juncture. . . . [T]hat is a matter properly addressed through contract negotiations or through declination of the proposed amendment.").

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those cases, and DOI may choose to argue that the one-off expenses included in this award should be excluded from any judgment in those cases.

Notwithstanding the Nation's repeated arguments against the use of a facial reasonableness standard, this court will not revisit its earlier conclusion that facial reasonableness is the applicable standard. Applying that standard, this court concludes that $15,762,985 is facially reasonable.

III. ORDER

For the reasons set forth above, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED;

ORDERED that Defendants' Cross-Motion for Summary Judgment is DENIED;

ORDERED that Plaintiff's Calendar Year 2014 Annual Funding Agreement, as proposed by Plaintiff on October 4, 2013, is deemed approved as of January 3, 2014; and

ORDERED that Plaintiff shall be awarded damages for breach of contract in the amount of $15,762,985, in addition to interest on that amount pursuant to 41 U.S.C. § 7109.

This is a final appealable order. This Clerk of the Court is respectfully requested to close this case.

Date: June 12, 2020

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

LEGISLATIVE SUMMARY SHEET

Tracking No. 0005-21

DATE: December 7, 2020

TITLE OF RESOLUTION: AN ACTION RELATING TO THE HEALTH, EDUCATION AND HUMAN SERVICES COMMITTEE, AMENDING THE PLAN OF OPERATION FOR THE OFFICE OF STANDARDS, CURRICULUM, AND ASSESSMENT DEVELOPMENT UNDER THE DEPARTMENT OF DINÉ EDUCATION

PURPOSE: The purpose of this resolution is for the Health, Education, and Human Services Committee to approve amendments to the Plan of Operation for the Office of Standards, Curriculum, and Assessment Development under the Department of Diné Education.

NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

EXHIBIT
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DOREEN N. MCPAUL
Attorney General

KIMBERLY A. DUTCHER
Deputy Attorney General

MEMORANDUM

TO: Dana Bobroff, Chief Legislative Counsel
Office of Legislative Counsel

FROM: Doreen N. McPaul
Doreen N. McPaul, Attorney General
Navajo Nation Department of Justice

DATE: January 19, 2021

SUBJECT: Confidential Exhibits for Proposed Legislation Regarding Reimbursement of the Fixed Cost Litigation Account for Litigation Costs Associated with *Navajo Nation v. Department of Interior, et al.*, No. 14-cv-1909

Generally, exhibits to legislation are posted online for public view. However, pursuant to 2 N.N.C. § 164(A)(6), "[a]ny matters or exhibits determined by the Navajo Nation Department of Justice to be confidential shall be properly marked 'confidential' and shall not be placed on the website or otherwise released." There are two Exhibits (B and C) for the above referenced legislation which DOJ deems confidential and should be kept from public view. Under 2 N.N.C. § 1964(G), only the Attorney General is authorized to waive the confidential and attorney-client privileged communication. Since these exhibits contain such sensitive information, the Attorney General maintains the confidentiality of these documents.

If you have any questions concerning this memorandum, please contact the Office of the Attorney General at (928) 871-6345. Thank you.

EXHIBIT
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NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DOREEN N. MCPAUL
Attorney General

KIMBERLY A. DUTCHER
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Office of Legislative Counsel
Telephone: (928) 871-7166
Fax # (928) 871-7576

Honorable Seth Damon
Speaker
24th Navajo Nation Council

MEMORANDUM

TO: Honorable Eugenia Charles-Newton
24th Navajo Nation Council

FROM: Dana L. Bobroff, Chief Legislative Counsel
Office of Legislative Counsel

DATE: January 15, 2021

SUBJECT: **AN ACT RELATING TO BUDGET AND FINANCE COMMITTEE, LAW AND ORDER COMMITTEE AND NAABIK'ÍYÁTI' COMMITTEE AND NAVAJO NATION COUNCIL; ESTABLISHING THE NAVAJO NATION HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN BY AMENDING TITLE TWELVE OF THE NAVAJO NATION CODE; DIRECTING THAT THE AWARD RECEIVED THROUGH NAVAJO NATION V. DEPARTMENT OF INTERIOR, NO. 14-cv-1909 (TSC), BE DEPOSITED IN THE HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN AFTER REINBURSEMENT OF LITIGATION COSTS; DIRECTING THAT THE PROCEEDS FROM FUTURE LITIGATIONS RELATED TO THE JUDICIAL BRANCH'S P.L. 93-638 CONTRACTS OR ANNUAL FUNDING AGREEMENTS BE DEPOSITED IN THE HASHKÉÉJÍ NAHAT'Á BÉESO BÁ HOOGHAN; ESTABLISHING THAT THE FIXED COST LITIGATION ACCOUNT SHALL BE REIMBURSED FOR LITIGATION COSTS**

I have prepared the above-referenced proposed resolution and associated legislative summary sheet pursuant to your request for legislative drafting. Based on existing law and review of documents submitted, the resolution as drafted is legally sufficient. As with any action of government however, it can be subject to review by the courts in the event of proper challenge.

The Office of Legislative Counsel confirms the appropriate standing committee(s) based on the standing committees powers outlined in 2 N.N.C. §§301, 401, 501, 601 and 701. Nevertheless, "the Speaker of the Navajo Nation Council shall introduce [the proposed resolution] into the

legislative process by assigning it to the respective oversight committee(s) of the Navajo Nation Council having authority over the matters for proper consideration." 2 N.N.C. §164(A)(5).

Please ensure that his particular resolution request is precisely what you want. You are encouraged to review the proposed resolution to ensure that it is drafted to your satisfaction.

THE NAVAJO NATION
LEGISLATIVE BRANCH
INTERNET PUBLIC REVIEW PUBLICATION

LEGISLATION NO: _0011-21__ **SPONSOR:** Eugenia Charles-Newton

TITLE: An Act Relating to Budget and Finance Committee, Law and Order Committee and Naabik'íyáti' Committee and Navajo Nation Council; Establishing the Navajo Nation Hashkéédjí Nahat'á Béeso Bá Hooghan by Amending Title Twelve of the Navajo Nation Code; Directing that the Award Received Through Navajo Nation V. Department of Interior, No. 14-cv-1909 (TSC), Be Deposited in the Hashkéédjí Nahat'á Béeso Bá Hooghan After Reinbursment of Litigations Costs; Directing that the Proceeds from Future Litigations Related to the Judicial Branch's P.L. 93-638 Contracts or Annual Funding Agreements Be Deposited in the Hashkéédjí Nahat'á Béeso Bá Hooghan; Establishing that the Fixed Cost Litigation Account Shall Be Reimbursed for Litigation Costs

Date posted: January 21, 2021 at 5:20PM

Digital comments may be e-mailed to comments@navajo-nsn.gov

Written comments may be mailed to:

Executive Director
Office of Legislative Services
P.O. Box 3390
Window Rock, AZ 86515
(928) 871-7586

Comments may be made in the form of chapter resolutions, letters, position papers, etc. Please include your name, position title, address for written comments; a valid e-mail address is required. Anonymous comments will not be included in the Legislation packet.

Please note: This digital copy is being provided for the benefit of the Navajo Nation chapters and public use. Any political use is prohibited. All written comments received become the property of the Navajo Nation and will be forwarded to the assigned Navajo Nation Council standing committee(s) and/or the Navajo Nation Council for review. Any tampering with public records are punishable by Navajo Nation law pursuant to 17 N.N.C. *§374 et. seq.*