TONY WEST
Assistant Attorney General
JOHN R. GRIFFITHS
Assistant Branch Director
JAMES D. TODD, JR., DC Bar # 463511
Senior Counsel
BRADLEY H. COHEN, DC Bar #495145
Trial Attorney
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
20 Massachusetts Avenue, N.W.
Washington, DC 20001
(202) 514-3378
(202) 305-9855
james.todd@usdoj.gov
bradley.cohen@usdoj.gov
Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOS COYOTES BAND OF CAHUILLA & CUPENO INDIANS,

Plaintiff,

v.

KEN SALAZAR, Secretary of the Department of the Interior, *et al.*,

Defendants.

Case No. 3:10-CV-1448-AJB (NLS)

Hon. Anthony J. Battaglia
Room: 12
Date & Time: October 14, 2011, 1:30 p.m.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

This is a challenge, brought under § 450m-1 of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* ("ISDEAA"), to the decision of the Office of Justice Services ("OJS") in the Bureau of Indian Affairs ("Bureau") to decline to enter into Los Coyotes Band of Cahuilla and Cupeno Indians' ("Los Coyotes") proposed self-determination contract for law enforcement services. OJS had a valid basis for declining to enter into a self-determination contract for law enforcement services with Los Coyotes pursuant to 25 U.S.C. § 450f(a)(2)(D) because the amount of the proposed contract would exceed the amount of funds that the Bureau devotes to law enforcement services for the tribe. Plaintiff does not challenge the Bureau's determination that the amount of funds plaintiff proposed to use for law enforcement services exceeds the amount of funds the Bureau expends on direct law enforcement services for the tribe (one of the five permissible statutory reasons for declining to enter into a self-determination contract). Instead, plaintiff frames its APA and constitutional challenge to the Bureau's declination solely in terms of larger policy arguments regarding what it believes should be the budgetary priorities of the agency. For the reasons set forth herein, this Court should deny plaintiff's motion for summary judgment and grant defendants' motion for summary judgment.

II. BACKGROUND

The Bureau provides a broad range of services, both directly and through funding agreements with tribes and tribal organizations, to 1.9 million American Indian and Alaska Natives who are members of one of 565 federally-recognized tribes. *See* Declaration of George T. Skibine ("Skibine Decl.") at ¶ 2 [attached hereto as Exhibit A]. Among other services, the Bureau may provide or contract with tribes to provide education, social services, and repair and maintenance of roads and bridges, as well as law enforcement, detention services, and administration of tribal courts. *See, e.g.*, 25 U.S.C. § 13 ("Snyder Act"). *See also* ISDEAA, Pub. L. No. 93-638 ("638"), 88 Stat. 2203 (*codified as amended at* 25 U.S.C. §§ 450 *et seq.*); Skibine Decl. ¶ 9. No federal statute, however, requires the Bureau to expend money on any particular service on tribal lands. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir.

2005). Instead, the Bureau works with tribes through an informal process known as Tribal Priority Allocation through which tribes choose to allocate federal funds to specified Bureau services. Skibine Decl. ¶¶ 8, 11. Historically, funds for law enforcement programs were part of the TPA process, but funds currently appropriated for law enforcement are now listed as separate budget program elements. *Id.* ¶ 12. For fiscal year 2010, Congress appropriated $2,335,965,000 for the operation of Indian programs authorized by, among other statutes, the Snyder Act, the ISDEAA, and the Tribally Controlled Schools Act of 1988. *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904, 2916-2917 (Oct. 30, 2009); Skibine Decl. ¶ 2. Although Congress in that year and in other years designated a certain amount of appropriated funds for "public safety and justice programs," it has not otherwise imposed any limitations or directives as to how those public safety and justice funds should be allocated. *See* Skibine Decl. ¶ 3.

A. Indian Self Determination and Education Assistance Act

A tribe's or tribal organization's authority to contract with the Bureau to perform Bureau services arises under the ISDEAA. On the request of a tribe or tribal organization, the ISDEAA requires the Bureau to enter into a self-determination ("638") contract with the tribe to administer any program, function, service or activity ("PFSA") that is currently provided by the Bureau for the benefit of the tribe. 25 U.S.C. § 450f(a)(1).[1] However, the ISDEAA prohibits award of a 638 contract that would (excluding contract support costs) exceed the amount of funds that the Bureau expends on the particular program or service for the tribe. *Id.* § 450f(a)(2)(D). Nor can the Bureau be required to reduce funding for PFSAs for one tribe in order to enter into a 638 contract with another tribe. *Id.* § 450j-1(b).[2]

[1] Once a tribe obtains a 638 contract, so long as it remains substantially the same and the PFSA has not been completed, the Bureau must renew the contract indefinitely. 25 U.S.C. §§ 450j(c), 450j-1(b)(2); 25 C.F.R. § 900.32.

[2] In addition, tribes that have met certain financial management requirements may elect to pursue self-governance pursuant to the Tribal Self-Governance Act. *See* 25 U.S.C. §§ 458aa-458hh. A self-governance tribe negotiates and enters into a Title IV funding agreement with the Office of Self-Governance in the Department of the Interior. The funding agreement authorizes the tribe to administer specified services for the benefit of the tribe. *Id.* § 458cc(b). A self-governance tribe has broad authority to allocate the funds awarded in a funding agreement

B. Enforcement of Criminal Laws in Indian Country

Federally-recognized tribes, states, and the federal government each have certain authority when it comes to law enforcement on tribal lands, and in some respects that authority varies depending on the state in which the tribal lands are located.[3] Of particular relevance here is the question of whether a state has the authority to enforce its criminal laws against Indians on tribal lands. All states have the power to enforce their criminal laws against non-Indians on tribal lands within state boundaries, *see, e.g.*, *New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946), but most of them cannot exercise jurisdiction over Indians on tribal lands. *See, e.g., United States v. Baker,* 894 F.2d 1144, 1146 (10th Cir. 1990). Congress, however, has given California, Oregon, Minnesota, Nebraska, and Wisconsin primary jurisdiction to enforce their criminal laws against Indians on tribal lands. Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (1953) (*codified as amended at* 18 U.S.C. § 1162(a)) ("Public Law 280"); *see Bryan v. Itasca Cnty.*, 426 U.S. 373, 379 (1976).[4] These states are known as "P.L. 280 states." Additionally, certain states, including California, authorize state law enforcement officials to deputize tribal police to enforce state law. *See, e.g.*, Cal. Penal Code § 830.6(b).

As for the United States, OJS, established by the Indian Law Enforcement Reform Act of 1990 ("ILERA"), has authority to enforce, or contract with tribes for the enforcement of, certain federal criminal laws on all tribal lands. *See* 25 U.S.C. §§ 2801, 2802(b)(1); *see also* 18 U.S.C. §

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among the federal services that the tribe administers. *Id*. § 458cc(b)(3). Funds that Congress earmarks for a specific activity and funds that are awarded pursuant to a formula to carry out a particular activity cannot be reallocated, however. 25 U.S.C. §§ 450cc(b)(5)-(6). Historically, some self-governance tribes located in California and other states subject to Public Law 280 have allocated funds to law enforcement services. *See* Declaration of Darren Cruzan ("Cruzan Decl.") at ¶ 11 [Attached hereto as Exhibit B].

[3] In all states, federally-recognized tribes have the sovereign power to enforce their own laws against Indians on their own tribal lands, *see, e.g., U.S. v. Wheeler,* 435 U.S. 313, 322 (1978), but they cannot enforce their laws against non-Indians. *See, e.g., Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

[4] Public Law 280 expressly exempts the Metlakatla Indian community in Alaska, the Red Lake Reservation in Minnesota, and the Warm Springs Reservation in Oregon from its coverage. *See* 18 U.S.C. § 1162(a).

1162(c).[5] In addition, OJS has primary responsibility for enforcing, on tribal lands in non-P.L. 280 states (all except California, Oregon, Minnesota, Nebraska, and Wisconsin), the Indian Country Crimes Act, 18 U.S.C. § 1152, [6] and the Major Crimes Act, 18 U.S.C. § 1153.[7] Tribes may also authorize OJS to enforce their respective tribal laws on their lands. 25 U.S.C. § 2803(2)(b).

In light of the authority of California and other P.L. 280 states to enforce their respective criminal laws against Indians on tribal lands, and because of competing demands on OJS's limited resources, OJS has directed fewer resources for direct law enforcement services on tribal lands in P.L. 280 states as compared to non-P.L. 280 states. Cruzan Decl. ¶ 5. But OJS still provides consultation, training, certification, and supervision of tribal law enforcement officers operating under SLECs in California and other P.L. 280 states. *See*, *e.g.*, *id.* ¶ 13.

C. ISDEAA Administrative Process

A tribe or tribal organization that wants to enter a self-determination contract to take over PFSA(s) performed by the Bureau can begin the contracting process either by submitting a contract proposal to the Bureau or by requesting technical assistance from the Bureau to help the tribe develop a contract proposal. 25 U.S.C. § 450f(a)(2); 25 C.F.R. §§ 900.7-.8. The proposal must be supported by a tribal resolution, 25 U.S.C. § 450f(a)(1); 25 C.F.R. § 900.8(d), and must describe the PFSA(s) that the tribal organization proposes to perform. 25 C.F.R. § 900.8(g). The proposal must identify the funds requested for the PFSA(s) to be performed, including the tribal

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[5] These include, among others: (1) embezzlement and theft from tribal organizations, 18 U.S.C. § 1163; (2) hunting, trapping, or fishing on Indian lands, 18 U.S.C. § 1165; (3) felon in possession of a firearm, 18 U.S.C. § 922(g); (4) interstate (crossing tribal borders) domestic violence, 18 U.S.C. § 2261(a)(1)-(2); (5) interstate (crossing tribal borders) violation of a protective order, 18 U.S.C. § 2262; (6) trafficking in Native American human remains and cultural items, 18 U.S.C. § 1170; (7) controlled substances, 21 U.S.C. §§ 841(a), 844; and (8) bribery of a tribal official. 18 U.S.C. § 666(a)(2). Tribal officers holding SLECs are authorized to enforce these same laws on tribal lands.

[6] The Indian Country Crimes Act extends the general criminal laws of the United States to Indian Country, but does not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe. 18 U.S.C. § 1152.

[7] The Major Crimes Act prohibits many major felonies, including homicide, assault, felony child abuse, burglary and robbery committed by an Indian. 18 U.S.C. § 1153.

organization's share of Bureau funds related to the PFSA(s). *Id.* § 900.8(h). The proposal must also identify the contract support costs, including one-time start-up costs or pre-award costs presented by major categories such as personnel, equipment, materials, etc. *Id.* § 900.8(h)(2).

The Bureau must approve or decline a proposal within 90 days of receipt. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.16. On approval of a proposal, the Bureau awards the contract and the full amount of funds to which the contractor is entitled. 25 C.F.R. § 900.19.

The Bureau can decline a proposal for only one or more of five enumerated reasons:

> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
>
> (B) adequate protection of trust resources is not assured;
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
>
> (D) the amount of funds proposed under the contract *is in excess of the applicable funding level for the contract,* as determined under section 450j-1(a) of [Title 25 U.S.C.]; or
>
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under [25 U.S.C. § 450f(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(a)(2) (emphasis added); *see also* 25 C.F.R. § 900.22 (same).

The declination of a proposal must be in writing, must contain "a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that" one or more of the five declination reasons applies, and must notify the tribe of its appeal rights. 25 U.S.C. §§ 450f(a)(2), (b). The Bureau must offer assistance to the tribal organization to overcome objections to contracting, *id.* § 450f(b)(2); 25 C.F.R. §§ 900.29, 900.31, and must approve any severable portion of a proposal that does not support a declination finding. 25 U.S.C. § 450f(a)(4); 25 C.F.R. § 900.25.

A tribal organization has two options to begin an administrative appeal of a declination. Within 30 days of the declination, the tribal organization may either: (1) appeal the declination to the Interior Board of Indian Appeals ("IBIA"), 25 C.F.R. §§ 900.150, 900.152; or (2) request an informal conference as "a way to resolve issues as quickly as possible, without the need for a

formal hearing." 25 C.F.R. § 900.153.

An informal conference is conducted by a designated representative of the Bureau. 25 C.F.R. § 900.155(c). Within 10 days of the conference, the designated representative must provide a written report summarizing what happened at the conference and containing a recommended decision. *Id.* § 900.156(a). If the tribal organization is dissatisfied with the recommendation, it may appeal the recommendation to the IBIA within 30 days. *Id.* §§ 900.156(b)-900.158. If the tribe does not appeal the designated representative's recommendation, it becomes final for the tribe. *Id.* § 900.157. Although a recommended decision is final for the Bureau (meaning that the Bureau cannot seek review before the IBIA), it is only a recommended decision, and is not binding on the Bureau. *See id.* §§ 900.166, 900.167; AR 355, 357.

When a declination decision is appealed to the IBIA, an administrative law judge conducts a hearing. 25 C.F.R. § 900.161(a). At the hearing, the Bureau has the burden of proof of "clearly demonstrating the validity of the grounds for declining the contract proposal." *Id.* § 900.163. After the hearing or any post-hearing briefing schedule, the ALJ sends the parties a recommended decision containing findings of fact and conclusions of law on all issues. *Id.* § 900.165(a). Any party to the appeal may file written objections to the recommended decision within 30 days of receiving the recommended decision. *Id.* § 900.166. If no party files written objections within that time, the recommended decision of the ALJ becomes final. *Id.*

If written objections are filed, the IBIA may modify, adopt or reverse the ALJ's recommended decision. 25 C.F.R. § 900.167(a). The IBIA's decision constitutes the final decision of the Department. *Id.* §§ 900.167(b)-(c), 900.169.

After a final decision issues from the Department, or in lieu of any administrative appeal, a tribal organization may initiate an action in federal district court or in the Court of Federal Claims within 12 months of the final declination decision. 25 U.S.C. §§ 450f(b), 450m-1(a); 41 U.S.C. § 609(a)(1), (3); 25 C.F.R. § 900.31. Among other things, the court may provide immediate injunctive relief to reverse a declination finding or to compel the Bureau to award and fund an approved self-determination contract. 25 U.S.C. § 450m-1(a).

D. Factual Background

Los Coyotes is a federally-recognized tribe located in Warner Springs, California consisting of 316 tribal members. Administrative Record ("AR") at 11, 134. The Bureau currently provides the tribe with $190,787 in annual funding, which the tribe directs toward aid to tribal government and Indian child welfare programs. Cruzan Decl. ¶ 13.[8]

On March 19, 2009, Los Coyotes submitted to the Bureau a proposed self-determination contract for law enforcement services on the tribe's land in the amount of $746,110 for personnel, equipment, and materials costs, approximately half of which consisted of start-up costs. AR 7-11. Contrary to the requirements of 25 C.F.R. § 900.8(h)(1), the proposed contract failed to identify the source of the funds for programs, functions, services, or activities funded by the Department. *See* AR 9 (requesting "additional" or "supplemental" funding without any modification of their current funding).

The Bureau denied the tribe's proposed contract on June 29, 2009, because, pursuant to 25 U.S.C. § 450f(a)(2)(D), the tribe's contract would exceed the amount of funds that the Bureau devotes to law enforcement services for the tribe. AR 11-13. The Bureau stated that neither Los Coyotes, nor any other California tribe (with a few exceptions[9]), were currently receiving any OJS law enforcement funds either through provision of direct services or 638 contracts over a three- year period. AR 12. As the Bureau explained, because OJS was not providing any law enforcement services to Los Coyotes, there were no funds to transfer to Los Coyotes pursuant to a 638 contract. *Id.*

Los Coyotes pursued an informal conference, at which time the Bureau once again documented (this time over a six-year period) that funds were not provided for either direct law

[8] OJS has issued SLECs to two of Los Coyotes' tribal law enforcement officers. These officers have been funded by Community Oriented Policing Services grants from the U.S. Department of Justice. OJS is also aware that, pursuant to the tribe's discretion provided under the Tribal Priority Allocation, Los Coyotes has used approximately $30,000 of its aid to tribal government funds received from the Bureau to fund these officers. *See* Cruzan Decl. ¶ 13.

[9] The Bureau did acknowledge that three California tribes have lands in Arizona, which is not a P.L. 280 state, and therefore had received funds for law enforcement and that OJS had previously provided one law enforcement consultant in Sacramento, California, but that position had been eliminated years before. AR 12.

enforcement services or for 638 contracts in California. *See* AR 258. After the informal conference, the designated representative issued a decision and recommendation encouraging OJS to seek further appropriations from Congress for law enforcement and enter into the 638 contract with Los Coyotes. *See* AR 302-324A. When the Bureau appealed that recommendation, the Board of Indian Appeals ("Board") held, without reaching the merits of the recommended decision, that OJS does not have a right of appeal to the Board from the recommended decision under the Bureau's current regulations. AR 350-356. Because OJS did not have funds allocated to direct law enforcement services to the tribe, OJS ultimately rejected the designated representative's recommendation.[10] AR 357. In response, Los Coyotes timely filed the present action in district court. *See* Compl., ECF No. 1.

E. Plaintiff's Complaint

Los Coyotes maintains five causes of action against the Bureau. The tribe claims that OJS's decision to decline to enter into the proposed 638 contract for law enforcement services violates: (1) Section 450k(a)(1) of the ISDEAA because OJS allegedly denied the contract for a "nonregulatory" reason, Compl. ¶ 25, (2) Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, because OJS allegedly failed to provide notice for the basis of its decision as a proposed rule in the Federal Register or accept comment on that proposed rule, Compl. ¶ 32; (3) Section 706 of the APA, because OJS's decision was allegedly arbitrary and contrary to law, Compl. ¶ 39; (4) the equal protection component of the Due Process Clause of the Fifth Amendment to the U.S. Constitution because OJS allegedly has approved other 638 contracts for law enforcement services in P.L. 280 states, including California, Compl. ¶ 42; and (5) the trust obligations of the United States because OJS allegedly has a trust obligation to keep the tribe safe and secure. Compl. ¶ 46.

III. STANDARD OF REVIEW

[10] OJS determined that the recommended decision--which called on the Assistant Secretary- Indian Affairs to seek additional funding from Congress and reassess Bureau funding priorities—failed to establish a violation of law and was not binding on the Secretary of the Interior. AR 357.

Plaintiff is challenging whether OJS's decision to decline Los Coyotes' proposed self-determination contract for law enforcement services complied with the statutory requirements placed on defendants. *See* 25 U.S.C. § 450f(a)(2). This Court derives its jurisdiction to entertain plaintiff's claims through 25 U.S.C. § 450m-1(a), a provision that does not specify a particular standard of judicial review. Plaintiff contends that the APA provides the applicable standard of review. *See* Pl.'s Mot. for Sum. J., ECF No. 21 ("Pl. MSJ") at 2-3. Notwithstanding defendants' argument that this Court does not have jurisdiction over plaintiff's APA claims, *see infra* at 12-16, defendants agree with plaintiff that if the Court does have jurisdiction, its review is governed by the APA standard of review and generally limited to the administrative record.[11] *See* Pl. MSJ at 3 (court's review is "limited to the administrative record to which Plaintiffs and Defendants have stipulated") (quoting *Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1472 (9th Cir. 1994)); ECF No. 14 (court order requiring defendants to file the administrative record and setting summary judgment briefing accordingly); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (basis for judicial review should be agency record already in existence rather than a court-created record); *Ctr. for Bio. Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (same).[12]

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[11] Defendants note that a court within this Circuit has concluded that *de novo* review applies to a tribe's challenge to agency action under ISDEAA. *See Shoshone-Bannock Tribes of Ft. Hall Res. v. Shalala*, 988 F. Supp. 1306, 1313-18 (D. Ore. 1997). However, defendants respectfully contend that the correct standard is set out in *Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d 103, 107-09 (D.D.C. 2009) (APA record review applies to challenges to agency action taken under ISDEAA). Regardless, both parties here agree that this case should be resolved based on the administrative record.

[12] Although the rationale for the agency's decision must be derived from the administrative record, an agency may offer declarations or affidavits to provide background information or clarify subject matter in the record. *See Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 82 (2d Cir. 2006); *Empresa-Cubana Exportadora De Alimentos y Productos Varios v. Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009) (court may also consider agency affidavits or testimony consistent with the agency's contemporaneous rationale). Defendant has submitted two such declarations with this motion. These declarations are offered solely to provide background information and to "illuminate[] the original record." *Yale-New Haven Hosp.*, 470 F.3d at 82. They do not "advance new rationalizations for the agency's action." *Id.* Accordingly, they are properly considered for that limited purpose when deciding the parties' cross-motions for summary judgment. *See Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977) ("[T]he augmenting materials were merely explanatory of the original record. No new

As plaintiff has stated, the court's review is confined to whether the agency's action was "arbitrary, capricious, or otherwise not in accordance with the law." *See* Pl. MSJ at 2 (quoting *Northwest Motorcycle Ass'n*, 18 F.3d at 1472). An agency action is arbitrary and capricious only if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Under the arbitrary and capricious standard, our review . . . is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009); *see also Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 830-31 (9th Cir. 2002).

IV. ARGUMENT

A. Defendants Correctly Declined Plaintiff's Proposed 638 Contract for Law Enforcement Services for the Tribe

Contrary to plaintiff's suggestion, defendants correctly declined the tribe's proposed 638 contract for law enforcement services. Application of the ISDEAA and its implementing regulations to the tribe's proposed 638 contract clearly establishes that law enforcement is not a contractible program for Los Coyotes for the simple reason that the Bureau does not administer such a program for plaintiff. In other words, Los Coyotes can only receive what the Bureau spent in providing services to them, and this is a program the Bureau has never provided for them.

The ISDEAA contemplates the transfer of direct services being provided by the Bureau for the benefit of a tribe to the administration of those very same services by the tribe itself with the corresponding funding transferring as well. *See* 25 U.S.C. § 450f(a)(1)(B). If the Bureau is not providing such direct services to a tribe, then there are simply no responsibilities, and no funds, to transfer. This is made clear by the language of the statute itself. The ISDEAA requires that the Bureau only contract "for the planning, conduct and administration of programs and

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rationalization of the . . . regulations was offered by the EPA. Instead, the augmenting materials clarified a dispute that we felt was less than clear from the original record and were clearly admissible.").

services *which are otherwise provided* to Indian tribes and their members." 25 U.S.C. § 450b(j) (emphasis added). The ISDEAA effects "an orderly *transition* from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of *those* programs and services." 25 U.S.C. § 450a(b) (emphasis added). In other words, a self-determination contract "*transfer[s]* the funding and the [] related [PFSAs] (or portions thereof)" from the Bureau to a tribal organization. *Id.* § 450*l*(c), model agreement § (a)(2) (emphasis added). A self-determination contract does *not* require the Bureau to create and fund new federal programs for a tribe out of whole cloth.

The ISDEAA provides that the funding transferred pursuant to a self-determination contract "shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDEAA, *codified at* 25 U.S.C. § 450j-1]." 25 U.S.C. § 450*l*(c), model agreement § (b)(4). Put another way, the amount "shall not be less than the appropriate [Bureau] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract [if the agency had continued to provide the service itself]." *Id.* § 450j-1(a)(1). If no such funding exists, a contract proposal may be declined. *Id.* § 450f(a)(2)(D), (4)(B). In such a case, there is no contractible program.

In this case, defendants correctly declined plaintiff's proposed 638 contract. Plaintiff's contract proposal did not offer to take over or transfer direct law enforcement services and related funding provided by the Bureau for the benefit of the tribe. AR 7-9. Indeed, it could not make such a request, because there was no such funding. Rather, the only funding plaintiff identified – a one-time COPS grant it had received from the U.S. Department of Justice in 2004, *see* AR 8 – was irrelevant to OJS's determination. Plaintiff also emphasized that its law enforcement officer funded by the Department of Justice had obtained training and a SLEC commission from the Bureau under ILERA. AR 9. Neither of these details regarding the tribe's current law enforcement services establishes that the Bureau operated direct law enforcement programs or services on behalf of the tribe which the tribe would be entitled to take over pursuant to the ISDEAA. Contrary to Bureau regulations, the proposal did not identify any Bureau funds provided for the benefit of the tribe but instead proposed that the Bureau allocate what plaintiff itself described as "***additional***" funds to the tribe. *Id.* (emphasis in original). Thus, the Bureau correctly denied plaintiff's proposed 638 contract pursuant to 25 U.S.C.

§ 450f(a)(2)(D) because "the amount of funds proposed under the contract is in excess of the [Bureau's] applicable funding level for the contract." Moreover, because plaintiff does not challenge the denial of its proposed contract on this, or any other of the enumerated bases in the ISDEAA, the tribe's challenge fails and this case is at an end. The Bureau fully complied with the ISDEAA in declining plaintiff's contract proposal, and defendants therefore are entitled to summary judgment.

B. This Court Should Also Grant Summary Judgment to Defendants Because Plaintiff's Various APA and Constitutional Challenges to Defendants' Funding Allocations Have No Merit

Because plaintiff cannot dispute that there were no OJS funds being used to provide direct law enforcement services to the tribe, and thus, that there are no funds to transfer to the tribe pursuant to a 638 contract, plaintiff brings a host of legal claims centered around plaintiff's policy disagreements with defendants' allocation of law enforcement funds among tribes. Because none of these claims have merit, this Court should grant summary judgment in favor of defendants.

1. This Court Lacks Jurisdiction Over Plaintiff's APA Claims

Contrary to plaintiff's claim, the Bureau's decision not to provide funding for law enforcement services to the tribe is not susceptible to judicial review under the APA because the decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. However, "'review is not to be had' . . . where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The most common and relevant example of an administrative decision that is committed to agency discretion and thus precluded from judicial review is an agency decision about how to allocate funds from a lump-sum appropriation. *Id.* at 192.

In *Lincoln*, for example, the Supreme Court reviewed a challenge to a decision of the Indian Health Service ("IHS"), an agency within the Department of Health and Human Services, to discontinue a pilot program called the Indian Children's Program. Operated pursuant to the

Snyder Act, the program had served physically and mentally handicapped Indian children in the Southwest region of the United States. A unanimous Supreme Court held that the IHS's decision to discontinue the program was a decision about how to allocate funds from a lump-sum appropriation for other permissible statutory objectives and was therefore committed to agency discretion and precluded from judicial review. *Id.* at 193-94. The Court held that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. The Court explained:

> [A]n agency's allocation of funds from a lump-sum appropriation requires a complicated balancing of a number of factors which are peculiarly within its expertise: whether its resources are best spent on one program or another; whether it is likely to succeed in fulfilling its statutory mandate; whether a particular program best fits the agency's overall policies; and, indeed, whether the agency has enough resources to fund a program at all.

Id. at 193 (quoting *Chaney*, 470 U.S. at 831) (internal quotation marks omitted). Because the "reallocation of agency resources to assist handicapped Indian children nationwide clearly falls within the Service's statutory mandate to provide health care to Indian people," the Court concluded that "[t]he decision to terminate the Program was committed to the Service's discretion." *Id.* at 194.

Federal courts have consistently recognized that an agency's decision as to how to allocate scarce funding resources is "committed to agency discretion by law" and therefore unreviewable under the APA so long as the allocated funding is otherwise spent on permissible statutory objectives. *See, e.g., Serrato v. Clark,* 486 F.3d 560, 568-69 (9th Cir. 2007) (prioritizing funds for BOP programs within statutory appropriations mandate was not reviewable); *Collins v. United States,* 564 F.3d 833, 839 (7th Cir. 2009) ("The prioritization of demands for government money is quintessentially a discretionary function."); *St. Tammany Parish v. FEMA,* 556 F.3d 307, 325 (5th Cir. 2009) ("Eligibility determinations, the distribution of limited funds, and other decisions regarding the funding of eligible projects are inherently discretionary and the exact types of policy decisions that are best left to the agencies without court interference."); *Bd. of Cnty. Comm'rs v. Isaac*, 18 F.3d 1492, 1498 (10th Cir. 1994) (FAA

decision to withdraw tentative funding based on a statutory authorization requiring expenditure to be "reasonably necessary for use in air commerce" was not reviewable).

For example, in *Serrato v. Clark*, the Ninth Circuit confronted a challenge to the decision of the Bureau of Prisons ("BOP") to discontinue a prison boot camp. 486 F.3d at 562. The court held that, because the BOP's decision met permissible statutory objectives, the decision was unreviewable. *Id.* at 568. The court noted that Congress provided authority for BOP to operate a boot camp under 18 U.S.C. § 4046, but in using the word "may," did not mandate that the program operate continuously. *Id.* at 569. Similarly, in *Quechan Tribe of Ft. Yuma Indian Res., v. United States*, No. 10-02261, 2011 WL 1211574 (D. Ariz. Mar. 31, 2011), *appeal docketed*, No. 11-16334 (9th Cir.), the District of Arizona confronted a claim brought by a tribe alleging that IHS had a non-discretionary duty to provide health care on its reservation. *Id.* at *4. The court found that plaintiff was really challenging the defendants' lack of funding at Fort Yuma. *Id.* at *5. Because Congress has not expressly appropriated funds to Fort Yuma but rather had allocated funds from a lump-sum appropriation to various permissible activities, the Court held that IHS's decision was not judicially reviewable. *Id.*

In this case, the appropriation provision at the heart of plaintiff's challenge, *see* Pub. L. No. 111-88, 123 Stat. 2904, 2916-2917 (Oct. 30, 2009), is subject to the very same analysis. Although Congress has, in supporting the operation of Indian programs, authorized funds for "public safety and justice programs" and "annual funding agreements entered into with the Bureau," it has not mandated the use of appropriated law enforcement funds for any particular tribe. See 123 Stat. at 2916; *see also* Skibine Decl. ¶¶ 2, 3. And although Congress has occasion to review tribal priority allocation funding made available to tribes by the Secretary of Interior, *id.*, ¶ 10, there is no appropriation by Congress that mandates that particular funds be allocated for the benefit of a particular tribe. Given the Snyder Act's general authorization of expenditures for "the benefit, care, and assistance of Indians throughout the United States," plaintiff does not (and cannot) allege that defendants are otherwise using money appropriated under the Act for impermissible purposes. AR 243. Rather, plaintiff attacks defendants' allocation of funds solely on the basis of what plaintiff asserts should be a higher budgetary priority for Congress and the

Bureau, *see, e.g.*, AR 244-245 (arguing for greater federal funding for tribal law enforcement in California given plaintiff's dissatisfaction with state and local law enforcement efforts in southern California). This, of course, ignores many other considerations that defendants have in prioritizing limited funds nationally, including setting a ratio of 2.6 officer for every 1000 inhabitants, assessing costs per officer, costs of dispatch, administrative support, and office space. *See* AR 120-121. This also ignores OJS's obligations to allocate law enforcement funds to tribes in non-P.L. 280 states with populations many times the size of Los Coyotes, for whom state and local law enforcement options are altogether unavailable. *See* Cruzan Decl. ¶ 14 (describing OJS's provision of five law enforcement officers for six tribes with a combined population of over 15,000 members in Oklahoma). Ultimately, the Bureau's allocation of funds among the various tribes for law enforcement purposes involves a discretionary decision in keeping with a permissible statutory objective. *See Int'l Union, United Autoworkers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."); *Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) ("The federal courts . . . were not established to operate the administrative agencies of government.").

In addition, there is no statutory mandate that defendants provide a certain minimal level of law enforcement to any particular tribe. Rather, the primary limitation placed upon the Secretary of the Interior is that blocks of funding must be made available for particular sets of programs operated for tribes across the nation.[13] *See* Skibine Decl.¶ 3 (describing the eight

[13] The fact that the Bureau issued a proposed regulation in 1987 regarding the allocation of law enforcement funds in Public Law 280 states, which was then addressed in a 1987 House Conference Report, *see* AR 358-362, has no relevance. As plaintiff admits, the proposal was never finalized, *see* Pl. MSJ at 10, and thus never became legally binding upon the agency. *See, e.g., Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (although agency published proposed regulation for public comment, the proposal did not impose substantive obligations on agency and agency's decision to withdraw notice did not make it a "regulation" subject to APA review). Likewise, plaintiff's attempt to highlight language in the committee report addressing this proposal is also unavailing. *See Lincoln*, 508 U.S. at 192-193 ("[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.") (citation and internal quotations omitted); *see also Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 616 (1991)

general categories of Indian programs' funding). When appropriations are enacted with such few statutory limitations, the APA is not the proper mechanism for challenging a lack of agency-instituted programmatic changes, *see, e.g.*, *Veterans for Common Sense v. Shinseki*, No. 08–16728, 2011 WL 1770944 at *17-19 (9th Cir. May 10, 2011) (statutory requirement that the Veterans Administration "furnish hospital care and medical services which the Secretary determines to be needed" did not mandate a "discrete agency action" of the Secretary subject to APA review). As the Supreme Court has explained, "[t]he principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004). Accordingly, plaintiff's claim falls outside the scope of judicial review under the APA and should be dismissed.

2. Defendants' Denial Does Not Require Notice and Comment in the Federal Register

Lincoln also controls resolution of plaintiff's notice and comment claim. In *Lincoln*, the Court held that the IHS's discontinuance of the Indian Children's Program was a general statement of policy, not subject to notice and comment, because it was a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Lincoln*, 508 U.S. at 197 (citation and internal quotation marks omitted). The Court further held: "Whatever else may be considered a 'general statemen[t] of policy,' the term surely includes an announcement like the one before us, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation." *Id.* The Ninth Circuit in *Serrato* also applied this holding of *Lincoln* to BOP's decision to terminate its boot camp program without publishing the decision for notice and comment. *Serrato*, 486 F.3d at 569. The court found that the case similarly involved "'a discretionary allocation of unrestricted funds from a lump-sum appropriation,'" not a rule subject to the APA's notice and

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(holding that statements in committee reports were not binding on the agency and do not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating").

comment procedures. *Id* (quoting *Lincoln*, 508 U.S. at 197). As the Ninth Circuit held, "[b]ecause *Lincoln* controls, BOP's decision is a general statement of policy; notice and comment simply was not required." *Id.* at 569-70.

Like the agency actions in *Lincoln* and *Serrato* – neither of which was designed to implement, interpret, or prescribe its policy, but rather to allocate a lump-sum appropriation – nothing about defendants' declination of plaintiffs' proposed 638 contract or its discretionary decision about how to allocate funds for law enforcement services among the tribes required notice and comment. Thus, plaintiff's notice and comment claims fail.

3. Defendants' Funding Allocation for Law Enforcement Does Not Violate 25 U.S.C. § 450k

Contrary to plaintiff's contention, OJS did not decline to enter into the tribe's proposed self-determination contract for a "non-regulatory" reason in violation of 25 U.S.C. § 450k. Declining a contract proposal because the "amount of funds proposed under the contract is in excess of the applicable funding level for the contract," is one of the five permissible reasons specified under the ISDEAA. *Id* § 450f(a)(2). With limited exceptions not applicable here, § 450k of the ISDEAA prohibits the Bureau from promulgating regulations and imposing non-regulatory requirements relating to the approval, award, or declination of self-determination contracts. The essence of Los Coyotes' claim is that the Bureau's explanation for why OJS generally has not provided law enforcement services to tribes in California was somehow equivalent to a "non-regulatory requirement" imposed upon plaintiff. However, plaintiff cannot reasonably maintain that OJS's reason for declining to enter into its proposed self-determination contract (in keeping with one of five permissible statutory grounds) imposed a non-regulatory requirement on the tribe.[14]

[14] To more fully explain the Bureau's historical role in P.L. 280 states (and hence why the Bureau had never provided plaintiff with direct law enforcement services), OJS supplied plaintiff with a financial spreadsheet detailing historical funding of 638 contracts between 2003 and 2008. AR 258. During this time period, with limited exceptions, OJS provided no funds for either direct law enforcement services or 638 contracts in California. *Id.* The point of these spreadsheets was not to announce a policy or regulation, but rather to demonstrate compliance with the statute and its implementing regulations, given that the Bureau is permitted to decline a

In support of its argument, plaintiff cites *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). *See* Pl. MSJ at 7. In *Ramah*, the D.C. Circuit addressed a challenge to a notice by the Bureau published in the Federal Register announcing that, because Congress had not provided sufficient appropriations for the Bureau to give all tribes with 638 contracts the full amount of contract support costs ("CSC") to which they were entitled under the ISDEAA, tribes that did not submit their indirect cost rates by June 30 of each year would receive only fifty percent of their CSC. *Ramah*, 87 F.3d at 1342. The court held that, because Congress had not provided the Bureau with discretion to determine the manner in which it would allocate CSC, the Bureau's notice violated the prohibition in 25 U.S.C. § 450k against promulgating regulations or imposing nonregulatory requirements (except for regulations regulating to 16 carefully delineated topics). *Id.* at 1349-50. As the basis for concluding that there was a statutory violation, the court concluded that the Secretary had effectively imposed a requirement upon the tribes to meet the new June 30 deadline or accept a 50% reduction in their CSC entitlement. *Id.* at 1350. The court likened this decision to implementing a "50% penalty" on certain tribes, exceeding the authority of the Secretary under the statute. *Id.*

Upon closer inspection, *Ramah* has no applicability to the present dispute. Unlike in *Ramah*, the Secretary has not entered into a 638 contract with Los Coyotes, and unlike *Ramah*, the Secretary is not required by statute to allocate the funds for a particular enumerated purpose as part of an existing 638 contract.[15] Instead, the Bureau's decision about how to allocate funds from its annual unrestricted lump-sum appropriation for public safety and justice programs among various tribes is committed to agency discretion. *Lincoln*, 508 U.S. at 192. *See also* Pub. L. No. 111-88, 123 Stat. at 2916; Skibine Decl. ¶ 3. Moreover, public safety and justice programs are not among the programs included in plaintiff's existing funds provided by the

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contract proposal in excess of the funding level for services that were otherwise provided by the Bureau. *See* 25 U.S.C. § 450f(a)(2)(D).

[15] *See* 25 U.S.C. § 450j-1(a)(2) (requiring Secretary to allocate CSC to cover the full administrative costs the Tribe will incur or that the federal government would have incurred in the absence of a contract in connection with the operation of these programs); *see id.* § 450j-1(g) ("[T]he Secretary shall add to the contract the full amount of funds to which the contractor [the Tribe] *is entitled* under subsection (a)." (emphasis added)).

Bureau. *See* Cruzan Decl. ¶ 13. Thus, unlike *Ramah,* because the agency has unreviewable discretion to decide how to allocate its law enforcement dollars, its decision not to allocate funds for direct law enforcement services to the tribe is not imposing a regulatory requirement or a non-regulatory requirement in violation of 25 U.S.C. § 450k.

4. Plaintiff's Equal Protection Claim Has No Merit

Plaintiff's equal protection challenge to the Bureau's allocation of funds among the tribes is subject to rational basis scrutiny. This is because, "[h]istorically, the formal relationship between the United States and American Indian tribes has been political, rather than race-based." *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1278 (9th Cir. 2004). In other words, federal regulation of Indian tribes "is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'" *United States v. Antelope,* 430 U.S. 641, 646 (1977) (internal quotation omitted). Thus, because of the lack of both a suspect class and a burden on a fundamental right, the Court must review the government classification for a rational basis. *Kahawaiolaa,* 386 F.3d at 1277, 1279-80.

Rational basis review is "highly deferential." *United States v. Hancock,* 231 F.3d 557, 566 (9th Cir. 2000). As a result, "equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic'" of the policy choices of federal agencies. *Heller v. Doe,* 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993)); *Kahawaiolaa,* 386 F.3d at 1279, 1283 (applying rational basis scrutiny to review of federal regulations). Indeed, all government programs conferring monetary benefits come with a "strong presumption of constitutionality," *Mathews v. De Castro,* 429 U.S. 181, 185 (1976), and the government's policy choices may not be "subject to courtroom fact-finding." *Beach Commc'ns,* 508 U.S. at 315; *Kahawaiolaa,* 386 F.3d at 1283. Instead, they must be sustained even if based on nothing more than "rational speculation unsupported by evidence or empirical data." *Beach Commc'ns,* 508 U.S. at 315. In other words, "[t]he absence of . . . facts explaining [a] distinction on the record has no significance in rational-basis analysis." *Id.* (quotation marks, alteration, and citation omitted). Additionally, the party attacking the program bears the burden "'to negative every conceivable basis which might support it.'" *Lehnhausen v. Lake Shore Auto Parts Co.,* 410

U.S. 356, 364 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Finally, even if the government's "assumptions underlying [its] rationales may be erroneous, . . . the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [government's] choice from constitutional challenge." *Beach Commc'ns,* 508 U.S. at 320 (quoting *Vance v. Bradley*, 440 U.S. 93, 112 (1979)).

In this case, plaintiff claims that there is no rational basis for providing California tribes less than one percent of the funds that defendants have allocated for law enforcement. Pl. MSJ at 14. However, it is well settled that the government has broad discretion to allocate funds for programs such as law enforcement among the 565 federally-recognized tribes around the country without violating equal protection rights. *See Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("[I]t does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911))); *Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000) ("[C]ourts are compelled under rational-basis review to accept'" a government's classification, "'even when there is an imperfect fit between means and ends'" (quoting *Heller*, 509 U.S. at 321)).

In attempting to focus the Court's attention on the percent of funds that defendants devote to providing law enforcement in California, plaintiff ignores the fundamental fact that tribes in P.L. 280 states are not the same as tribes in non-P.L. 280 states. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that equal protection only applies to "persons who are in all relevant respects alike"); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167-68 (9th Cir. 2005) ("[D]ifferent treatment of unlike individuals does not support an equal protection claim."). Tribes in P.L. 280 states, for example, have the benefit of state criminal jurisdiction on tribal lands for crimes committed by Native Americans. 18 U.S.C. § 1162(a). By contrast, tribes in non-P.L. 280 states do not enjoy the benefits of state criminal jurisdiction on their tribal lands for crimes committed by Native Americans. *See, e.g., Baker*, 894 F.2d at 1146; *see also* Cruzan Decl. ¶ 5. Thus, the primary outside funding mechanism available to tribes in non-P.L. 280 states to enforce criminal laws against tribal members are either direct services provided by OJS or an

ISDEAA contract with the federal government for the tribes to perform these services. Cruzan Decl. ¶ 5.[16]

To support its equal protection claim, plaintiff cites *Rincon Band of Mission Indians v. Califano,* 464 F. Supp. 934 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Rincon Band of Mission Indians v. Harris,* 618 F.2d 569 (9th Cir. 1980). *See* Pl. MSJ at 12-13. However, *Rincon* does not advance plaintiff's case. In *Rincon,* the district court addressed an equal protection challenge to the IHS's allocation of funds to California Indians. 464 F. Supp. at 935. Citing *Morton v. Ruiz,* 415 U.S. 199 (1974), the district court held that IHS had failed to articulate a rational basis for denying California Indians health services comparable to those available to Indians in other parts of the country. *Rincon,* 464 F. Supp. at 939. On appeal, the Ninth Circuit explicitly did not address the district court's equal protection holding, *Rincon,* 618 F.2d at 570. Instead, the Court of Appeals held that IHS must allocate funds in accordance with the distribution required by the Snyder Act, *see id.* at 573, although not necessarily a *per capita* proportionate share for California Indians versus Indians in other parts of the country. *Id.* at 573 n. 4.

It is not surprising that the Court of Appeals refused to endorse the district court's equal protection reasoning in *Rincon*, as there are a number of problems with the opinion. First, although *Morton* is the legal authority upon which the district court decision relies, it was not an equal protection case, but rather an APA case decided on statutory grounds. *See* 415 U.S. at 231-32. In *Morton,* the Court confronted a challenge to the Bureau's announced policy of limiting general assistance benefits only to Indians who lived on reservations. 415 U.S. at 201. After holding that Congress intended no such limitation on general assistance payments to Indians, and noting that, in practice, the Bureau was providing general assistance payments to Indians living on or near reservations, *id.* at 213, the Court held that, under the APA, the Bureau's

[16] Nor can an equal protection violation be premised solely on a "lack of uniform geographic impact." *Hodel v. Indiana,* 452 U.S. 314, 332 (1981) (rejecting equal protection challenge to statute governing surface coal mining, even though it had disparate impact "according to the different geographical conditions present in affected States"); *see also Minn. Senior Fed'n, Metro. Region v. United States,* 273 F.3d 805, 809 (8th Cir. 2001) (rejecting equal protection challenge to Medicare Part C based on "geographic benefit discrepancies").

determination of which Indians received benefits could not be made on an *ad hoc* basis. *Id.* at 232-36. Moreover, the Court expressly declined to reach plaintiff's constitutional arguments. *Id.* at 238. Thus, *Morton* does not support the district court's equal protection holding in *Rincon.* Second, *Rincon* ignored the long, unbroken history of binding Supreme Court jurisprudence, *see supra*, establishing that, under rational basis scrutiny, equal protection does not demand perfect classifications. Finally, even if *Rincon* were good law, it would not be applicable to the present dispute. Unlike the tribe in *Rincon,* plaintiff here cannot establish that its situation is in all respects similar to those of tribes for whom OJS provides, or contracts for the provision of, direct law enforcement services. *Cf. Nordlinger,* 505 U.S. at 10; *Thornton,* 425 F.3d at 1167-68.

Plaintiff also claims that defendants' allocation of law enforcement resources violates equal protection because, regardless of P.L. 280, certain federal criminal laws apply in California. Pl. MSJ at 14-17 (citing *Hopland Band of Pomo Indians v. Norton,* 324 F. Supp. 2d 1067 (N.D. Cal. 2004)). Plaintiff is correct that certain federal criminal laws apply on tribal lands in California, *see supra* at 3 n. 5; indeed, OJS has issued SLECs to plaintiff's tribal law enforcement officers to enforce these laws. Cruzan Decl. ¶ 13. For the reasons set forth above, however, the applicability of certain federal criminal laws on tribal lands in California does nothing to advance plaintiff's equal protection claim. Nor is *Hopland* helpful to plaintiff's claim. In *Hopland,* a California tribe sought, pursuant to the ILERA, to enter into a deputation agreement with OJS and to obtain SLECs for its tribal police to enforce federal law on the tribe's land. *Hopland,* 324 F. Supp. 2d at 1069. After OJS declined to issue SLECs to the tribe's police, Hopland submitted a proposed zero-dollar 638 contract for law enforcement services in what the court characterized as an attempt "to obtain the deputation agreement authorized by the ILERA as a 'contractible' program under the ISDEAA." *Id.* at 1070. OJS declined the tribe's proposed contract pursuant to 25 U.S.C. § 450f(a)(2)(A) on the grounds that the proposed contract was not among the "programs, functions, services or activities" that are contractible under the ISDEAA, and the tribe brought suit. *Id.* The court found that certain federal criminal laws apply on tribal lands in California, *id.* at 1076-77, and held that law enforcement services were a contractible program under the ISDEAA. *Id.* at 1074.

The focus of the dispute in *Hopland* was that the tribe had 8,000 daily visitors to its casino, had applied for and received initial approval for SLECs for three officers, but was then told that the Bureau had placed a moratorium on the issuance of further deputation agreements. *Id.* at 1068-70. To compound problems, the county sheriff's department and prosecutors refused to allow the tribal officers to enforce state law until they received federal deputation. *Id.* at 1070. Unlike the situation in *Hopland,* in this case OJS *has* provided Los Coyotes with technical assistance, consultation, training, and SLEC certification of its tribal law enforcement officers so that they can enforce applicable federal criminal laws on the tribe's lands. Cruzan Decl. ¶ 13.[17] Defendants also acknowledge that, had OJS been providing direct law enforcement services to Los Coyotes, the tribe would have had the right under the ISDEAA to take over those law enforcement functions in a 638 contract. Contrary to plaintiff's implication, moreover, the *Hopland* court did not reach plaintiff's equal protection claim, or the question of whether OJS was required to allocate funding for direct law enforcement services in California. 324 F. Supp. 2d at 1077-78. Thus, *Hopland* does not advance plaintiff's equal protection claim.

At its core, plaintiff's challenge does not state an equal protection claim, but rather raises policy issues as to the proper allocation of resources for law enforcement on Indian lands. Los Coyotes is just one of many tribes throughout the country competing for scarce resources. For example, in Oklahoma, a non-P.L. 280 state, OJS has only been able to fund five law enforcement officers to provide direct law enforcement services to six tribes with a combined population of more than 15,000 members. *See* Cruzan Decl. ¶ 14. Likewise, in Nevada, another non-P.L. 280 state, three law enforcement officers assigned by OJS must provide coverage to four tribes, driving hundreds of miles between reservations. *See id.* Both of these examples, of course, involve populations where state law enforcement officials do not have criminal jurisdiction over Native Americans on tribal lands, so the only available outside law enforcement

[17] Several tribes in California with federally-funded tribal law enforcement officers are self-governance tribes that have elected to direct a portion of their annual funding agreements to law enforcement services. Cruzan Decl. ¶ 11. There are also two California tribes that have self-governance funding agreements because, in the mid-1990s, the Bureau began providing direct law enforcement/natural resources (fisheries) enforcement services for both tribes to assist them in averting violent criminal acts relating to a dispute over fishing rights. Cruzan Decl. ¶ 10.

services and resources are provided by the federal government. *Id.* ¶ 5.[18]

In the end, the tribe's concerns are best addressed through the political process. Plaintiff cannot rely on the equal protection component of the Due Process Clause to "obtain the changes they seek through the courts." *Kirk v. Carpeneti*, 623 F.3d 889, 896 (9th Cir. 2010) (rejecting equal protection challenge to Alaska's selection of judges). Rather, no matter how "improvident" plaintiffs think defendants' budget allocations for law enforcement programs may be, the Constitution requires faith that OJS's allocations for law enforcement "'will eventually be rectified by . . . a political branch.'" *Beach Commc'ns*, 508 U.S. at 314 (quoting *Vance*, 440 U.S. at 97).

5. Defendants Do Not Have a Trust Obligation to Approve Plaintiff's Proposed Contract

Plaintiff's claim that defendants have a trust obligation to approve the tribe's proposed self-determination contract is without merit. OJS's decision to decline to enter into the contract with Los Coyotes does not violate the trust obligations of the United States. *See generally Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986).

The Indian Trust doctrine is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *United States v. Mitchell ("Mitchell II")*, 463 U.S. 206, 225 (1983) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). This doctrine does not, however, give rise to any duty on the part of the United States beyond complying with generally applicable statutes and regulations. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). Rather, the trust relationship between the United States and Indian tribes is insufficient to create legal obligations by the United States for a particular tribe. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921, 927-28 (9th Cir. 2008) (affirming

[18] In light of OJS's funding methodology, if California were not a P.L. 280 state, because of Los Coyotes' very small population, OJS would likely assign at most a single law enforcement officer to provide direct law enforcement services and would likely assign this officer and any other law enforcement personnel to cover all of the other tribes in the area. *Id.* ¶ 10. Thus, even if California were not a P.L. 280 state, it is highly unlikely that OJS would allocate sufficient funds to the tribe for law enforcement services for the tribe to take over that function under the ISDEAA.

dismissal of Plaintiff's claim that HUD violated its trust responsibility). As the Ninth Circuit has explained, "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Gros Ventre Tribe,* 469 F.3d. at 810 (quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). In other words, the government does not bear fiduciary responsibility to a particular tribe "unless it has 'take[n] full control of a tribally-owned resource and manage[d] it to the exclusion of the tribe.'" *Gros Ventre Tribe,* 469 F.3d. at 813 (quoting *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 984 (9th Cir. 2006)) (alteration in original, emphasis omitted).

When a tribe sues the government for equitable relief, it must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. *See Gros Ventre Tribe.*, 469 F.3d at 812. The Snyder Act *authorizes* the United States to provide "[g]eneral support and civilization . . . [f]or the employment of . . . Indian police . . . [f]or the suppression of traffic in intoxicating liquor and deleterious drugs[,] [f]or the purchase of . . . motor-propelled passenger-carrying vehicles for official use[,] [a]nd for general and incidental expenses in connection with the administration of Indian affairs." 25 U.S.C. § 13. But it imposes no specific legal duty to provide law enforcement services, let alone provide them to a particular tribe. *McNabb v. Bowen,* 829 F.2d 787, 792 (9th Cir. 1987); *Quechan Tribe of the Ft. Yuma Indian Reservation*, 2011 WL 1211574, at *2. Thus, the Snyder Act imposes no trust obligation on defendants to provide law enforcement services to Los Coyotes. *McNabb v. Bowen,* 829 F.2d 787, 792 (9th Cir. 1987); *Quechan Tribe of the Ft. Yuma Indian Reservation*, 2011 WL 1211574, at *2.

Plaintiff's attempts to rely on the ILERA and the Tribal Law and Order Act ("TLOA"), of 2010, Pub. L. No. 111-211, § 202(a)(1) 124 Stat. 2261, 2262 (July 29, 2010), suffer a similar fate. Plaintiff claims that the general statements in the ILERA authorizing the "Secretary, acting through the Bureau, [to] be responsible for providing, or for assisting in the provision of law enforcement services in Indian country," and in the TLOA in which Congress found that "[t]he United States has a distinct legal, treaty, and trust obligation to provide for the public safety of Indian country," also imposes trust obligation on defendants to assist them with law enforcement

on their reservation. Pl. MSJ at 19-20 (quoting 25 U.S.C. § 2802 and 25 U.S.C. § 2801 note)). But again, neither the ILERA nor the TLOA imposes a specific duty to provide law enforcement services for this particular tribe. *Cf. McNabb*, 829 F.2d at 792; *Quechan Tribe*, 2011 WL 1211574, at *2.

Plaintiff additionally claims that trust obligations of the United States arise under the ISDEAA. Pl. MSJ at 19. However, because the ISDEAA aims to foster tribal self-determination, it would be inconsistent to hold that it makes the United States exclusively responsible for law enforcement. *See United States v. Navajo Nation*, 537 U.S. 488, 508 (2003) (holding that because the Indian Mining Lease Act encouraged tribal self-determination, the statute did not impose fiduciary duties); *see also McNabb*, 829 F.2d at 792 (finding that while the federal government may have some responsibility for Indian health care, it is not the exclusive provider). Thus, plaintiff has failed to state a claim for defendants' violation of United States' trust obligations.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of defendants.

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Respectfully submitted,

/s/ *Bradley H. Cohen*
JAMES D. TODD, JR.
Senior Counsel
BRADLEY H. COHEN
Trial Attorney
U.S. DEPARTMENT OF JUSTICE
Civil Division

ATTORNEYS FOR DEFENDANTS