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11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA

13 LOS COYOTES BAND OF CAHUILLA
 & CUPENO INDIANS,

14 Plaintiff,

15 v.

16 KEN SALAZAR, *et al.*,
 17 Defendants.

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

Hon. Antony J. Battaglia

Room: 12

Date & Time: October 26, 2011, 1:30 p.m.

**DEFENDANTS’ REPLY TO RESPONSE
 TO MOTION FOR SUMMARY
 JUDGMENT**

18
 19 Defendants submit this reply to plaintiff’s response to defendants’ motion for summary
 20 judgment, and state as follows:

21 1. Plaintiff does not dispute that the amount of funds that the Bureau of Indian Affairs
 22 allocates to Los Coyotes Band of Cahuilla and Cupeno Indians for direct law enforcement
 23 services is zero dollars. *See* Pl.’s Opp’n & Reply, ECF No. 37, at 2. *Cf.* Administrative Record
 24 (“AR”) at 7-9 (plaintiff’s proposed contract requesting “additional” funds for the tribe). As a
 25 result, the Bureau correctly declined plaintiff’s proposed contract for direct law enforcement
 26 services on the tribe’s land under the Indian Self-Determination and Education Assistance Act of
 27 1975 (“ISDEAA”), Pub. L. No. 93-638 (“638”), 88 Stat. 2203 (*codified as amended at* 25 U.S.C.
 28

1 §§ 450 *et seq.*), because “the amount of funds proposed under the contract *is in excess* of the
2 [Bureau’s] applicable funding level for the contract.” *Id.* § 450f(a)(2)(D) (emphasis added).

3 Contrary to plaintiff’s claim, it is irrelevant for purposes of the ISDEAA that the Bureau
4 provides direct law enforcement services to other tribes. *See* Pl.’s Opp’n & Reply at 2 (citing
5 *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067 (N.D. Cal. 2004)). When the
6 Bureau provides direct law enforcement services for the benefit of a particular tribe, *that* tribe
7 has a right under the ISDEAA enter into a contract to take over the administration of those direct
8 law enforcement services. *Accord Hopland*, 324 F. Supp. 2d at 1075 (finding that direct law
9 enforcement services is a contractible program under the ISDEAA and holding that the Bureau
10 was required to negotiate a 638 contract for direct law enforcement services with that tribe
11 “unless a statutory exception justified not doing so.”). But the fact that tribes for which the
12 Bureau provides direct law enforcement services have a right to take over administration of those
13 law enforcement programs does not give plaintiff a right under the ISDEAA to require the
14 Bureau to come up with new funds for Los Coyotes. *See* 25 U.S.C. § 450f(a)(2)(D). Indeed, the
15 ISDEEA expressly precludes the award of a 638 contract that would require the Bureau to reduce
16 funding for programs and services provided to other tribes. *See id.* § 450j-1(b).

17 Nor does plaintiff’s reliance on legislative history that has no reference to specific
18 statutory language in the ISDEEA advance its claim. *See* Pl.’s Opp’n & Reply at 3 (citing S.
19 Rep. No. 274, 100th Cong., 1st Sess. 37 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2644).
20 “[A] committee report cannot serve as an independent statutory source having the force of
21 law. . . . Courts have no authority to enforce principles gleaned solely from legislative history
22 that has no statutory reference point.” *U.S. v. Frank*, 956 F.2d 872, 881-82 (9th Cir. 1991)
23 (quoting *Int’l Bhd. of Elec. Workers Local Union No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir.
24 1987)) (alterations and emphasis in original). *See also Roeder v. Islamic Republic of Iran*, 333
25 F.3d 228, 237 (D.C. Cir. 2003) (same). In any event, the Senate Report on which plaintiff relies
26 does not address the question of whether the ISDEEA gives a tribe the right to request new funds
27 for the administration of a program or service for the benefit of a tribe or its members. Rather,
28 the Report simply states that the ISDEEA requires the Bureau to transfer a program or service

1 operated for the benefit of a particular tribe, such as natural resources planning and management,
2 regardless of whether the Bureau is currently providing that program or service to the tribe
3 through the local Bureau office or by other means. *See* 1988 U.S.C.C.A.N. at 2644. Here, it is
4 undisputed that Los Coyotes receives no direct law enforcement services (or funding) from the
5 Bureau, locally or otherwise. As a result, there are no services (or funds) to transfer.

6 2. Lacking any cognizable claim under the ISDEAA, plaintiff instead challenges the
7 Bureau's allocation of funds from its lump-sum appropriation for public safety and justice. In
8 essence, plaintiff challenges the agency's policy decision to provide direct law enforcement
9 services to some tribes, but not to others. But as defendants demonstrated in their opening brief,
10 *see* Defs.' Opp'n & Cross Mot., ECF No. 33-1, at 12-16, these types of policy judgment are
11 committed to agency direction by law and are therefore unreviewable under the APA. In
12 response, plaintiff incorrectly claims that *Ramah Navajo School Bd., Inc. v. Babbitt*, 87 F.3d
13 1338 (D.C. Cir. 1996), rather than *Lincoln v. Vigil*, 508 U.S. 182 (1993) and *Serrato v. Clark*,
14 486 F.3d 560 (9th Cir. 2007), controls the determination of whether this Court can review
15 defendants' allocation of funds from its lump-sum appropriations for public safety and justice
16 among tribes. But *Ramah* concerned the reviewability of the Bureau's allocation of funds over
17 which Congress gave the agency no discretion, not the reviewability of the Bureau's allocation
18 of funds from an unrestricted lump-sum appropriation. Specifically, *Ramah* addressed how the
19 Bureau must reconcile a provision of the ISDEAA that requires the Secretary to add to a 638
20 contract "additional" contract support costs ("CSC") funds to cover the "full administrative
21 costs" that a tribe incurs while operating 638 programs with an appropriations cap on those same
22 CSC funds. *See Ramah*, 87 F.3d at 1341-42 (discussing 25 U.S.C. § 450j-1(a)(2) and Pub. L. No.
23 103-332, Tit. I, 108 Stat. 2499, 2511 (Sept. 30, 1994)). The Bureau had chosen to reconcile these
24 provisions by imposing a 50-percent reduction in CSC on certain tribal contractors that failed to
25 meet a new agency-imposed annual deadline, and claimed that its decision was committed to
26 agency discretion. *See id.* at 1342, 1343. The court held that, because § 450j-1(a)(2) evidenced
27 congressional intent to limit, if not entirely eliminate, the agency's discretion in the allocation of
28 CSC, the Bureau's actions were subject to judicial review. *Id.* at 1347. Here, by contrast, plaintiff

1 is challenging the Bureau's decisions about how to allocate lump-sum appropriations for public
2 safety and justice among various tribes—precisely the type of judgments that committed to
3 agency discretion.¹ *Lincoln*, 508 U.S. at 192.

4 3. Plaintiff's claim that *Lincoln* does not dispose of its notice and comment claim
5 likewise fails. Not only does the APA's notice and comment provision clearly exempt "general
6 statements of policy," 5 U.S.C. § 553(b)(A), but the Supreme Court expressly held that this term
7 includes agency statements about how it will allocate unrestricted funds from a lump-sum
8 appropriation. *Lincoln*, 508 U.S. at 197. Nor is there merit to the plaintiff's contention, *see* Pl.'s
9 Opp'n & Reply at 9, that the Supreme Court required the Bureau to comply with the APA's
10 notice and comment requirement in *Morton v. Ruiz*, 415 U.S. 199 (1974). Rather, as the Court
11 clearly explained in *Lincoln*, "[t]hose [APA notice and comment] provisions were not at issue in
12 *Ruiz*." *Lincoln*, 508 U.S. at 199. But even if *Ruiz* did apply, plaintiff cannot show that defendants
13 failed to follow their procedures under the ISDEEA.

14 4. Plaintiff's claim that the Bureau's reliance on one of the five permissible reasons
15 specified under the ISDEEA for declining a proposed contract, 25 U.S.C. § 450f(a)(2), imposes
16 a non-regulatory requirement on plaintiff in violation of 25 U.S.C. § 450k is meritless. Plaintiff
17 cannot demonstrate why *Ramah* controls resolution of their non-regulatory-requirement claim.
18 The *Ramah* court held that, because Congress had not provided the Bureau with discretion to
19 determine the manner in which it would allocate CSC among the tribes with 638 contracts, it was
20 a violation of § 450k for the Bureau to impose a 50 percent reduction in CSC on tribes which did
21 not submit their request by June 30 of each year. *Ramah*, 87 F.3d at 1349-50. As noted above,
22 plaintiff can point to no such congressional restriction on the Bureau's discretion to allocate
23 funds from its unrestricted lump-sum appropriation for public safety and justice. *See* Pub. L. No.

24
25 ¹ To be clear, defendants agree that their declination decision about plaintiff's proposed
26 638 contract decision is reviewable pursuant to 25 U.S.C. § 450m-1. As discussed above, that
27 decision was proper because plaintiff's proposed contract exceeded the amount of funds the
28 Bureau devotes (zero dollars) to providing direct law enforcement services on the tribe's lands.
However, this Court's ability to review the validity of defendants' declination decision under
§ 450m-1 does not also grant the Court the authority to review plaintiff's real complaint that the
Bureau has made no funds for public safety and justice available to transfer to the tribe.

1 111-88, 123 Stat. 2904, 2916-2917 (Oct. 30, 2009). Moreover, Congress expressly granted the
2 Bureau the authority in the ISDEAA to decline a proposed contract that is “in excess of the
3 applicable funding level for the contract.” 25 U.S.C. § 450f(a)(2)(D).

4 5. Plaintiff attempts to make out an equal protection violation by minimizing the
5 significant differences: (i) in the effect of state criminal law jurisdiction over Native Americans
6 between tribes located states governed by Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (1953)
7 (*codified as amended at* 18 U.S.C. § 1162(a)) (“P.L. 280”) and non-P.L. 280 states; (ii) between
8 tribes operating with self-governance agreements entered into pursuant to 25 U.S.C. §§ 458aa-
9 458hh and those tribes operating without them; and (iii) between tribes without 638 contracts for
10 direct law enforcement services and tribes that obtained 638 contracts for various historical
11 reasons. But these difference matter because: (i) tribes located in P.L. 280 states have the benefit
12 of state criminal jurisdiction on tribal lands for crimes committed by Native Americans, 18
13 U.S.C. § 1162(a), while the federal government does not have general criminal jurisdiction over
14 tribes in these states, *id.* § 1162(c) (making the Indian Country Crimes Act and the Major Crimes
15 Act inapplicable to P.L. 280 states), and tribes in non-P.L. 280 states do not have the benefit of
16 state law criminal jurisdiction over crimes committed by Native Americans; (ii) tribes operating
17 with self-governance agreements are free to allocate the funds provided by the Bureau among
18 any number of permissible functions (provided that the funds are not otherwise earmarked for a
19 specific purpose); and (iii) 25 U.S.C. §§ 450j(c), 450j-1(b)(2) requires the Bureau to indefinitely
20 renew a 638 contract for direct law enforcement services with any tribe that obtained one,
21 regardless of the reason. Thus, plaintiff cannot make out an equal protection claim on these
22 bases. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that equal protection only applies
23 to “persons who are in all relevant respects alike”); *Thornton v. City of St. Helens*, 425 F.3d
24 1158, 1167-68 (9th Cir. 2005) (“[D]ifferent treatment of unlike individuals does not support an
25 equal protection claim.”).² Moreover, “even if [the] assumptions underlying [the Bureau’s]

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27 ² As defendants demonstrated in their opening brief, these distinctions are the reason that
28 *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),

1 rationales [could be shown to] be erroneous, . . . the very fact that they are ‘arguable’ is
 2 sufficient, on rational-basis review, to ‘immunize’ the [government’s] choice from constitutional
 3 challenge.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 320 (1993) (quoting *Vance v. Bradley*,
 4 440 U.S. 93, 112 (1979)). *See also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“it does
 5 not offend the Constitution simply because [a challenged] classification ‘is not made with
 6 mathematical nicety or because in practice it results in some inequality.’”) (quoting *Lindsley v.*
 7 *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *Aleman v. Glickman*, 217 F.3d 1191, 1201
 8 (9th Cir. 2000).

9 6. Finally, plaintiff’s trust claim fails to reconcile how the trust obligations of the United
 10 States that allegedly make it exclusively responsible for providing direct law enforcement
 11 services to the tribe accord with the ISDEAA’s aims of fostering tribal self-determination. As
 12 defendants demonstrated in their opening brief, *see* Defs.’ Opp’n & Cross Mot. at 25-26, it
 13 would be inconsistent with the purposes of the ISDEAA to hold that it imposes such trust
 14 obligations. *See United States v. Navajo Nation*, 537 U.S. 488, 508 (2003); *McNabb*, 829 F.2d at
 15 792. Nor, contrary to plaintiff’s claims, *see* Pl.’s Opp’n & Reply at 14-15, do the general trust
 16 obligations of the United States place additional requirements on defendants beyond those set out
 17 in the ISDEAA.

18 This Court should deny plaintiff’s motion for summary judgment and grant defendants’
 19 cross motion.

20 Dated: September 20, 2011

21 Respectfully Submitted,

22 s/ James D. Todd, Jr.
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 27 U.S. DEPARTMENT OF JUSTICE

28 would not apply even if it were good law, which it is not. *See* Defs.’ Opp’n & MSJ, ECF No. 33-
 1, at 20-21.

CERTIFICATE OF SERVICE

I, James D. Todd, Jr., hereby certify that a copy of the foregoing motion was this date served upon all counsel of record by electronically filing the foregoing with the Clerk of the U.S. District Court for the Southern District of California, using its ECF system, which automatically provides electronic notification to the following:

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