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LOS COYOTES BAND OF CAHUILLA
& CUPENO INDIANS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LOS COYOTES BAND OF CAHUILLA & CUPENO INDIANS Plaintiff, vs. KEN SALAZAR, Secretary of the Interior; LARRY ECHO HAWK, Assistant Secretary of the Bureau of Indian Affairs; DARREN CRUZAN, Deputy Director of the Office of Justice Services; SELANHONGVA MCDONALD; Special Agent in Charge, District III. Defendants.	Case No.: 10 CV 1 448 AJB (NSL) PLAINITFF'S MOTION FOR SUMMARY JUDGMENT AND NOTION OF MOTION Hearing: August 26, 2011 at 11:00 a.m. Location: Courtroom 12 (2nd Flr.) Honorable Anthony J. Battaglia

To: Assistant U.S. Attorney James Todd, attorney for Defendants

Address: U.S. Justice Department, Civil Division, Federal Programs
20 Massachusetts Avenue, N.W.
Washington, DC 20001

NOTICE IS HEREBY GIVEN that Plaintiff, upon the complaint and the Administrative Record filed with the Court April 29, 2011, the undersigned will move the Court, at the U.S. Courthouse, 940 Front Street, San Diego, CA 92101 on August 26, 2011, at 11:00 for an order

granting Plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This Motion is made on the ground that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law.

This Motion is supported by Plaintiff's complaint, the Administrative Record, and accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment served with this Motion and Notice of Motion.

DATE: May 25, 2011

s/Dorothy Alther
CALIFORNIA INDIAN LEGAL SERVICES
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LOS COYOTES BAND OF CAHUILLA & CUPENO INDIANS Plaintiff, vs. KEN SALAZAR, Secretary of the Interior; LARRY ECHO HAWK, Assistant Secretary of the Bureau of Indian Affairs; DARREN CRUZAN, Deputy Director of the Office of Justice Services; SELANHONGVA MCDONALD, Special Agent in Charge, District III. Defendants.	Case No. 10 CV 1 448 AJB (NSL) POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Hearing: August 26, 2011 at 11:00 a.m. Location: Courtroom 12 (2nd Flr.) Honorable Anthony J. Battaglia

I. INTRODUCTION

1. On June 29, 2010 Defendant, Special Agent in Charge from the Bureau of Indian Affairs ("BIA"), Office of Justice Services ("OJS") denied Plaintiff's request for a law enforcement funding contract under the Indian Self-Determination and Educational Assistance Act ("ISDEAA"), 25 U.S.C. §450. These contracts are commonly known as "638 contracts." The denial is based on an internal, unwritten policy that the Defendants do not provide law enforcement funds to tribes located in a state subject to 18 U.S.C. §1162, (Public Law 83-280) or commonly referred to as "P.L. 280." California is subject to P.L. 280. The statutory basis given for the denial is §450(a)(2)(D) and §450j-1(a) of the ISDEAA, which provides that a

contract may be denied if the amount of funds requested exceeds the amount of funding the Department would have otherwise provided to operate the program itself. The denial explained that because Defendants provide zero law enforcement funding to tribes in California, that any amount of funding requested by the Plaintiff was in excess of the applicable funding level for the contract and thus properly denied under §450(a)(2)(D).

2. Plaintiff challenges the Defendants' decision and underlying policy supporting the decision as arbitrary, capricious and contrary the ISDEAA §§459k, the Administrative Procedures Act ("APA") 5 U.S.C. §553, the Fifth Amendment to the United States Constitution, and the federal trust responsibilities owed to the Plaintiff.

3. Plaintiff seeks summary judgment on all of its claims. Plaintiff's case presents no disputes to any material facts as the parties have stipulated to and submitted the Administrative Record in this case and the Plaintiff is entitled to judgment as a matter of law.

II. STANDARD FOR SUMMARY JUDGMENT AND REVIEW OF FINAL AGENCY ACTION

4. "Under the Administrative Procedures Act, [5 U.S.C. §706(2) (A)], a reviewing court shall 'hold unlawful and set aside agency action, findings, found to be ...arbitrary, capricious, abuse of discretion or otherwise not in accordance with the law." *Northwest Motorcycle Association vs. U.S. Department of Agriculture*, 18 F.3d 1468, 1472 (9th Cir. 1994) "In reviewing an agency's decision under 5 U.S.C. §706(2)(A), a court "must consider whether the decision is based on a consideration of the relevant factors and whether there has been clear error of judgment." *Northwest Motorcycle Association*, 18 F.3d at 1472 quoting *Citizens to Preserve Overton Park vs. Volpe*, 401 U.S. 402, 416 (1971) "After considering the relevant data, the court must 'articulate a satisfactory explanation of its actions including a 'rational connection between the facts found and the choices made." *Northwest Motorcycle Association*, 18 F. 3d at 1472 quoting *Motor Vehicle Manufacturers Association vs. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1989) "In order for an agency decision to be upheld under the arbitrary and capricious standard, the court must find that the evidence before the agency provided a

rational and ample basis for its decision." _Northwest Motorcycle Association_, 18 F.3d at 1472, citing _Washington State Farm Bureau vs. Marshall_, 625 F.2d 296, 305 (9th Cir. 1980)

5. The purpose for summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. _Northwest Motorcycle Association_, 18 F.3d at 1472 citing _Zweig v. Hearst Corp._, 521 F.2d 1129 (9th Cir. 1975). The well establish standard for granting summary judgment is where the court finds that there is no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. _Northwest Motorcycle Association,_ 18 F.3d at 1472 In cases involving review of an agency decision the court does not need to engage in fact finding, "Rather the court's review is limited to the administrative record to which the Plaintiffs and the Defendants have stipulated to." _Northwest Motorcycle Association_, 18 F.3d at 1472 When the parties stipulate to the administrative record, the case is appropriate for summary judgment. _Northwest Motorcycle Association_, 18 F. 3d at 1472

III. STATEMENT OF UNDISPUTED FACTS

6. The following facts are undisputed and supported in the Administrative Record ("AR") filed with the Court on April 29, 2011.

7. On February 27, 2009 the Plaintiff submitted a written request to the OJS seeking a 638 contract for tribal law enforcement services as authorized under the ISDEAA. (AR Document 1)

8. This was not the first tribal request for law enforcement services to the BIA. Seventy years ago on March 31, 1934 the Plaintiff requested law enforcement services in response to growing crime on the reservation and was denied by the BIA due to lack of funding. (Exhibits A and C attached to AR Document 5)

9. The Plaintiff has been federally recognized since 1889. Its reservation includes 25,000 acres consisting of mostly rugged terrain located in the far northeast corner of San Diego County. Tribal membership is 316. Through a block grant from the Department of Housing and Urban Development, the Plaintiff administers and maintains 17 homes for its members. Other tribal members and non-members live in private homes on the reservation. The reservation is

1 surrounded by unoccupied federal lands under the jurisdiction of the United States Forest
2 Service. (AR Documents 5 and 6 at p. 6)

3 10. There is crime on the reservation not being addressed by local law enforcement.
4 (Exhibit I at pp. 5-9 attached to AR Document 5, AR Documents 5 and 6 at pp. 9, 11-18, 21-22,
5 28-33)

6 11. To combat crime on its reservation, the Plaintiff in 2007 hired a Chief of Police.
7 (Exhibit E attached to AR Documents 5 and 6 at p.9) The Chief of Police position was funded
8 through a federal Community Oriented Policing Services ("COPS") grant from the Bureau of
9 Justice Assistance. The grant ended in 2009, which is when the Plaintiff sought a 638 contract
10 from OJS. (AR Documents 5 and 6 at pp. 11 and 15)

11 12. The Plaintiff's Chief of Police is a retired state law enforcement officer. The
12 Chief is certified under the California Peace Officer Standards and Training ("POST".)
13 Additionally, he holds a Special Law Enforcement Commission ("SLEC") issued to him by OJS
14 since August 14, 2007. (Exhibit F attached to AR Documents 5) Under his SLEC he is a given
15 the same status as a federal Deputy Special Officer and the same authority as a BIA law
16 enforcement officer and authorizes him to enforce federal laws. (Exhibit F attached to AR
17 Document 5 and AR Document 6 at pp. 21-24)

18 13. On July 29, 2010 OJS denied the Plaintiff's request for a 638 contract for law
19 enforcement services under the ISDEAA, 25 U.S.C. §450f(a)(2)(D). (AR Document 2)

20 14. Pursuant to 25 C.F.R. §900.51, the Plaintiff requested an informal conference
21 with OJS in an attempt to find a compromise. The informal conference was conducted by a
22 "designated representative of the Secretary" appointed by OJS as provided for under 25 C.F.R.
23 §900.155(c) (AR Document 4) Both parties were allowed to submit written statements and
24 documents in support of their position. (AR Document 5 with Exhibits A – K) OJS
25 representatives and its legal counsel as well as the Tribal Chairwoman, Tribal Chief of Police
26 and tribal legal counsel all participated in the informal conference held on September 15, 2009.
27 (AR Document 6 at p. 2)

28

15. During the course of the informal conference, OJS representatives affirmed that the OJS policy not to fund tribes in P.L. 280 states is an unwritten policy. (AR Document 6 at p. 36-37 and AR Document 7) Further, OJS does not have a funding formula for the distribution of OJS law enforcement funds. (Exhibits J attached to AR Document 5, AR Document 6 at pp. 35-36 and AR Document 7) It is also undisputed that some tribes in California and tribes in other P.L. 280 states do receive federal law enforcement funding. (Exhibit H and I at pp. 5-6 attached to AR Documents 5, AR Documents 5 and 6 at pp. 38-41, AR Documents 19-22) Finally, OJS acknowledged that there was a need for law enforcement on the Plaintiff's reservation and that while the Plaintiff retained criminal jurisdiction over its lands, it was OJS's position that the state is responsible for law enforcement in California, not the federal government. (Exhibit I at pp. 5-6 attached to AR Document 5, AR Documents 4, 5 and 6 at pp. 46-50)

16. The OJS designated representative issued a recommended decision finding (AR Document 9):

(a) OJS's underlying rational for making zero law enforcement funding available to tribes in P.L. 280 states was not valid given the facts that: (a) P.L. 280 did not divest tribes of their criminal jurisdiction; (b) P.L. 280 did not divest the federal government of its law enforcement responsibility to Plaintiff; and (c) there is a very real and apparent need for law enforcement on the Plaintiff's reservation and that this need is not being met by local law enforcement;

(b) OJS's unwritten policy denying funding to tribes in P.L. 280 states has been arbitrarily implemented and has deprived the Plaintiff equal protection and due process of law; and

(c) OJS unwritten policy violates the mandates of the APA in that such a policy must be promulgated and receive tribal consultation.

17. BIA attempted to promulgate a regulation in 1987 that would have formalized its current policy of not funding tribes in P.L. 280 states. (AR Document 17) A Conference Report from the BIA's 1988 Appropriation bill expressly repudiated the proposed regulation and

directed the BIA to continue to provide funding for law enforcement programs on the basis of demonstrated need and that no tribe shall be denied funding for a law and order program solely on the basis of P.L. 280. (AR Document18)

18. On November 16, 2009, Defendants filed a "Notice of Appeal" with the Office of Hearing and Appeals, Interior Board of Indian Appeals ("IBIA") requesting a decision on whether OJS has a right to appeal its own designated representative's decision under 25 C.F.R. §900.157 and if there is no right to appeal whether the designated representative's decision is binding on the department. (AR Document 11)

19. After briefing by the parties, the IBIA issued an "Order Dismissing Appeal" on January 15, 2010 finding that OJS did not have a right of appeal under §900.157 and that it would not address the issue of whether the designated representative's decision was binding on OJS. (AR Documents 13, 14, and 15)

20. In a letter dated January 21, 2010, OJS informed the Plaintiff that because it had no right to appeal, the decision of its designated representative "logical necessity under the law such recommended decision is not binding on the Secretary." (AR Document 16)

21. The Plaintiff filed its complaint for injunctive and declaratory relief with the Court on July 13, 2010.

IV. LEGAL ARGUMENT

A. Defendants' policy violates §450k of the ISDEAA

Passed in 1975, the ISDEAA allows an Indian tribe to contract with the Department of the Interior to take over operations of those federal service programs the Department maintains and operates for the benefit of Indians and Indian tribes. Law enforcement is one of these services. 25 U.S. C. §450f(a)(1)(B) citing to the Snyder Act at 25 U.S.C. §13. The Secretary's authority to promulgated regulations to implement the ISDEAA is limited to sixteen (16) carefully delineated topics not relevant here.[1] [25 U.S.C. §450k(a)(1)] Indeed, Congress made

1 Regulations (1) relating to the Federal Torts Claim Act; (2) the Contract Dispute Act; (3) the declination and waiver procedures; (4) appeal procedures; (5) re-assumption procedures; (6) discretionary grant procedures for grants awarded under 450h of this title; (7) property donation procedures arising under section 450j(f); (8) internal procedures relating to the implementation of this section; (9) retrocession and tribal organization relinquishment procedures; (10) contract proposal contents; (11) conflict of interest; (12) construction; (13) programmatic reports

clear, with the exception of the sixteen areas listed under §450k(a)(1), the Secretary "may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts …" Defendants limited authority is further reinforced under Defendants' regulation 25 C.F.R. § 900.5 which provides:

> "Except as specifically provided in the Act [ISDEAA] … an Indian tribe or tribal organization is not required to abide by any unpublished requirements such as program guidelines, manuals or policy directives of the Secretary, unless otherwise agreed to by the Indian tribe or tribal organization and the Secretary, or otherwise required by law."

ISDEAA §450k(a)(2) requires that any regulation implementing the Act shall be promulgated under the rulemaking provisions of the APA, 5 U.S.C. §§552 and 553. Section 450k(d)(1) also requires Defendants, when promulgating regulations, to "confer with and allow for active participation by, representatives of Indian tribes, tribal organizations and individual Indians. The promulgation is also subject to the "Negotiated Rulemaking Act" of 1990.

Defendants current policy is not a regulation because it has not been promulgated under the provisions of the APA as required under §450k(a)(2). More importantly OJS's policy cannot be promulgated because it is does not fall within one of the sixteen (16) areas delineated under the ISDEAA that defines the Defendants' regulatory authority. As such OJS's policy must be deemed a nonregulatory requirement as it directly relates to self-determination contracts and the approval, award and declination of such contracts and as such it is in violation of §450k(1)(a).

Defining a nonregulatory requirement was at issue in *Ramah Navajo School Brd. v. Babbitt*, 87 F.3d 1338 (C.D.D.C. 1996) Plaintiffs challenged the allocation plan for contract support funds ("CSF") which are awarded under a 638 contract for tribal administrative costs associated with federal Indian programs being contracted for. Additionally, plaintiffs challenged BIA's policy that a tribe who did not timely file for CSF would be penalized and only receives 50% of its funding request, while tribes who filed timely received full CSF funding.

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and data requirements; (14) procurement standards; (15) property management standards; and (16) financial management standards.

The BIA argued that when Congress makes limited funds available to a 638 program, it is within the discretion of the BIA to establish funding policies and requirements. The court disagreed and held that the ISDEAA does not commit allocation of insufficient funds to BIA discretion and the BIA's allocation policy constituted a nonregulatory requirement prohibited under §450k(a)(1) of the ISDEA. The court found that beyond the sixteen (16) delineated areas contained under §450k(a)(1), the Secretary had no delegated authority to impose or implement any regulations, rules or policies effecting the approval or disapproval of a 638 contract. In *Ramah* the court found that the 50% penalty was not merely a "general statement of policy" but was an inflexible policy and constituted a nonregulatory requirement prohibited under the ISDEAA.

The court explained that if the 50% penalty policy constituted a "regulation" it violated the ISDEAA because it was never subjected to the notice and comments procedures under the APA, which is required under §450k(a)(2). On the other hand, if the policy is not a regulation, then it constituted a nonregulatory requirement, and violates the ISDEA's absolute ban on the imposition of such polices.

Applying this same reasoning to OJS's policy of denying law enforcement funding to tribes located in P.L. 280 states, the policy directly impacts the approval, award and declination of a self-determination contract. It cannot be considered a regulation because it has never been promulgated pursuant to the APA as mandated under the ISDEAA and it is not listed within the sixteen (16) areas OJS is permitted to regulate. As such, OJS's policy can only be categorized as a nonregulatory requirement, which is strictly prohibited under §450k(a)(1) of the ISDEAA. OJS's policy is invalid and in violation of the ISDEAA.

B. <u>Defendants' Policy is Arbitrary, Capricious and Contrary to Law</u>

1. Defendants' Policy Violates the Rulemaking Provisions of the APA.

Under the APA federal agencies must promulgate agency rules by providing notice of the rule in the Federal Register. [5 U.S.C. §553(b)] Section 553 also provides that the federal agency must allow for public comment and participation in the rulemaking process before the rule becomes adopted, this process is commonly referred to as the "notice and comment

rulemaking procedures." _Mt. Diablo Hospital Dist. et al. v. Bowen, Sec. of Health and Human Services, et al._, 860 F.2d 951 (9th Cir. 1988) The rulemaking procedures apply to "substantive rules" which the courts have determined implements a statute or rule. Such rules grant rights, impose obligations, or produce other significant effects on interested parties. _National Treasury Employees Union vs. Reagan_, 685 F. Supp. 1346 (E.D. Louisiana 1988), _Chamber of Commerce vs. OHSA_, 636 F.2d 464 (D.C. Cir. 1980), _Batterton v. Marshall_, 648 F.2d 694 (D.C.Cir. 1980)

A policy that automatic denies tribes law enforcement funding solely on the geographical location of tribe can only be seen as a substantive rule that significantly affects tribes in P.L. 280 states. A rule or policy that is subject to the APA but has not or cannot be properly promulgated under the APA is invalid. _Morton v. Ruiz_, 415 U.S. 199 (1974) In *Ruiz* the Supreme Court was asked to review the BIA's manual provisions that set out the eligibility criteria for general assistance to Indian people. The manual limited such assistance to only those Indians who lived on an Indian reservation. Plaintiffs were denied assistance even though they lived near their reservation and maintained close social and economic ties with the reservation. The Court found the BIA's manual violated the APA and was contrary to the Snyder Act, 25 U.S.C. §13. Although the BIA, in denying the general assistance, may have been in conformity with its policy manual, the Court looked at the procedures and process used in adopting the policy and also the rational justification of the policy. The Court made clear that while the BIA may have the authority to establish eligibility rules, the rule must be rational, consistent with the authorizing legislation and adopted pursuant to procedures that conforms to the law (i.e. APA.) Specifically,

> "No matter how rational or consistent with congressional intent a particular decision might be, the determination cannot be made on an ad hoc basis by the dispenser of the funds. The Administrative Procedures Act was adopted to provide, inter alia, the administrative policies affecting individual rights and obligations pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished as hoc determinations (*citation omitted.)*" Id. at 232

///

2. Defendants' Previous Attempt to Comply with APA Undercuts Their Current Position

In the current case the BIA in fact attempted to comply with the APA in 1987 when it published its policy of denying law enforcement funding requests from tribes located in P.L. 280 states in the Federal Register on March 26, 1987 at 52 FR 9669-01. The BIA sought to amend 25 C.F.R. § 11.307 by adding:

> "Bureau of Indian Affairs law enforcement funds shall not be expended to provide enforcement services in those areas of Indian Country where, pursuant to Federal law, states have jurisdiction over offences committed by Indians."

The rational given for the proposed regulation was that the BIA generally does not provide law enforcement funding to tribes in P.L. 280 states because it involves a duplication of services and would possibly encourage some states to avoid discharging their law enforcement responsibility. At the time the BIA announced that it was spending $1 million dollars on ten (10) tribes in P.L. 280 states. The BIA found the regulation necessary "In order to ensure a consistent Bureau of Indian Affairs' *policy* on funding requests." [Emphasis added]

In a December 21, 1987 House Conference Report "Making Further Continuing Appropriations For The Fiscal Year Ending September 30, 1988" the managers of the Appropriation Bill responded to the BIA proposed regulation amendment and stated the following:

> "The managers disagree with the proposal of the Bureau of Indian Affairs to deny funding for law enforcement services in areas where, pursuant to Federal law, States have jurisdiction over offenses committed by or against Indians. Funds appropriated for the Bureau's law enforcement programs include funds for the continued operation of such programs in States which P.L. 83-280 or similar Federal laws are applicable. The managers direct that the Bureau shall continue to provide funding for law enforcement programs on the basis of demonstrated need and no tribe shall be denied funding for a law and order program solely on the basis of P.L. 83-280 or similar Federal law authorizing the extension of State criminal jurisdiction over Indians within Indian Country."

The BIA's proposed regulation was never finalized. What this failed attempt at complying with the APA demonstrates is the Defendants determined the policy was subject the

APA rulemaking process. Because Defendants' lack the authority promulgate their policy under the APA as seen under §450k of the ISDEAA and because Congress has directed Defendants to continue to fund tribes in, Defendants' denial of Plaintiff's 638 contract should be reversed and the requested awarded.

3. OJS's Policy is Arbitrarily Applied

Attached to OJS's declination was a list of tribes that have received 638 contracts for law enforcement, the purpose of which was to illustrate that no law enforcement funds were expended in California from 2003 to 2005. Exception was made for three (3) California tribes that straddle the Nevada and Arizona (Arizona and Nevada are not P.L. 280 states.) Both the designated representative at the informal hearing and Plaintiff questioned OJS on whether these three (3) tribes' had 638 contacts that restricted the tribes' funding to the portion of their reservations that were in Nevada and Arizona. OJS acknowledged that the contracts had no restrictions. (AR Document 6 at pp. 38-39) So technically there are at least three (3) tribes with a portion of their reservations in California that do receive law enforcement funding through a 638 contract.

From the list, Plaintiff also pointed to several tribes in other P.L. 280 (Minnesota, Wisconsin and Florida) that were awarded 638 contracts for law enforcement. OJS could not explain why these tribes had received law enforcement funding as they were from a different OJS district. One offered explanation from OJS was that perhaps these tribes administrated a Title IV Self-Governance contract under the ISDEAA. Under a Title IV contract the tribe takes *all* programs administered by the BIA instead of a select few as is done under a Title I contract. For example the Hoopa Tribe, Yurok Tribe and Manzanita Band of Mission Indians, all located in California, receive law enforcement funding under a Self-Governance Title IV contract. Why some tribes in California and tribes in other P.L. 280 states receive law enforcement funding but Plaintiff cannot makes no rational sense and clearly demonstrates the arbitrary application of Defendants' policy.

Further, Defendants have supplemented the administrative record with several copies of 638 tribal law enforcement contracts from tribes located in California and other P.L. 280 states.

While most of submitted contracts are Title IV Self-Governance contracts, four (4) of the contracts for law enforcement are Title I 638 contracts. The Red Cliff Band of Lake Superior Chippewa Indians, the Stockbridge-Munsee Community and the LacDu Flambeau are in Wisconsin a P.L. 280 state and the Lower Sioux Indian Community is in Minnesota also a P.L. 280 state. By Defendants own submission of these 638 contracts, they have demonstrated that their policy is not consistently applied and thus arbitrary and discriminatory against Plaintiff.

Finally, UCLA Law Professor Carole Goldberg, a leading expert on P.L. 280, has written extensively on P.L. 280 and has been cited as legal authority by the Supreme Court and the Ninth Circuit Court of Appeals. She and UCLA Professor Duane Champagne authored a 2002 report titled "A Second Generation of Dishonor: Federal Inequities and California Tribes." The report clearly documents that tribes in P.L. 280 states other than California are receiving BIA funds for tribal law enforcement and cites to Wisconsin and Oregon, both P.L. 280 states, where BIA allocates funds for law enforcement and judicial services. (Exhibit J pp. 5-6 attached to AR Document 5)

C. Defendants' Policy Violates Plaintiff's Tribal Members' Constitutional Right to Equal Protection

As discussed above the Defendants are arbitrarily applying its funding policy by denying funding to Plaintiff while at the same time funding tribes in Wisconsin, Oregon, Minnesota and Florida. A funding policy that disproportionately denies California tribes law enforcement funding is a violation of equal protection clause of the Constitution. *Rincon Band of Mission Indians v. Califano,* 464 F. Supp. 934 (N.D. CA. 1979) affirmed by the Ninth Circuit in *Rincon Band of Mission Indians vs. Harris*, 618 F.2d 569 (1980) In *Rincon* the court looked at the Indian Health Services' ("IHS") funding policy to determine if the policy disproportionately denied California Indians health care funding in violation of the Constitution. While IHS's funding decision under challenge may have been made in conformity with its funding policy the court looked to the rational basis of the policy.

Under IHS's funding policy health care funds were allocated under four (4) categories: (1) program continuity; (2) mandatory costs such as civil service pay increase and inflationary cost index increases; (3) congressionally mandated programs; and (4) program expansion. When making allocations under the program expansion category, IHS relied on a Resource Allocation Criteria ("RAC") which was a decision-making index where by information on health care needs were collected and feed through the RAC and supposedly allowed IHS to compare the health needs of Indians throughout the United States and funding allocations would be made accordingly.

Health care funding in California was done through a congressional mandate and continuing serves for new programs. California received none of the program expansion funds because health care data for California was not collected in the RAC index. Under this funding policy California, since 1956 to 1980, received no more than 1.93% of the IHS funding and it was determined that .35% of IHS's total funds for health facilities would be allocated to California over the next seven years.

In finding the IHS funding policy unconstitutional, the court found no rational basis for underfunding to California. The court was not persuaded by HIS's argument that Congress had ratified the policy by continually appropriating funding each year to IHS knowing of its funding policy. Further, the court found the necessary information which would make the RAC a rational method to distribute funding was lacking and was nothing more than a "bureaucratic charade." Finally, the court found that under its policy, 85% of the IHS budget was allocated under category 1 program continuity. This automatic re-funding of existing programs without regard to whether the program is in fact meeting the health care needs of the population was not rational and did not provide for equitable funding. *Rincon* 618 F.2d at 573

California tribes and their members are once again being denied funding that other tribes in the United States receive. Professor Carole Goldberg and Professor Duane Champagne conducted an exhaustive study on P.L. 280 and filed a report in 2007 entitled "Final Report on Law Enforcement and Criminal Justice Under P.L. 280." Chapter 11 of the report discusses the

Defendants' funding allocation of law enforcement to tribes in P.L. 280 states and non-P.L. 280 states. Among their findings were that in 1995 tribes in California were receiving less than 1% of the $80,440,000 Defendants' allocated for law enforcement. Focusing on 1998 funding allocation, the report finds:

> "The BIA funding data for the fiscal year 1998, displayed in Table 1 below, show that the affected tribes in mandatory P.L. 280 states (not including excluded and retroceded tribes) received a disproportionately small amount of BIA funding. While they constitute 9% of the total reservations' population, they receive only 3% of the funding. The lack of parity is even greater when one separates out the straddle tribes [Ft. Mojave, Colorado River Tribe, Washoe and Quechan] that encompass territory not affected by P.L. 280. The non-straddler P.L. 280 tribes [such as Plaintiff] in mandatory states constitute 8.2% of the reservation-based Indian population, but receive only 1.6% of the BIA law enforcement funding. The difference per capita is striking: $101.13 for the non-P.L. 280 tribes, as compared with the $40.95 for all mandatory P.L. 280 tribes, and $19.40 for the mandatory P.L. 280 tribes that are non-straddlers."

These funding percentages are as low as the percentages in *Rincon* where the court found the funding disparity unconstitutional. Similarly, Defendants' law enforcement funding levels in California violate the Plaintiff's tribal members' rights to equal protection under the Constitution.

1. Just Like Previously Rejected Justifications, Defendants' Current Justification for Denying Plaintiff's Request for Funding Should be Rejected.

In Professor Carole Goldberg's and Professor Duane Champagne's 2002 report "A Second Generation of Dishonor: Federal Inequities and California Tribes" cited above they set forth the various justifications Defendants' have historically given for its funding disparity in California. Defendants' first justification for denying law enforcement funding to tribes in P.L. 280 states was that the law had divested the tribes of their entire jurisdiction. This justification was overturned by the Eighth and Ninth Circuit Court of Appeals, an opinion from the Solicitor of the Department of Interior, two state Attorney General's opinions from P.L. 280 states other

1 than California, a state court opinion from Alaska and a 2000 opinion from the United States
2 Attorney General. (Exhibit J attached to AR Document 5)
3 A second justification was that Defendants distinguished between "historic" tribes and
4 "created" tribes. Only "historic" tribes possessed inherent civil and criminal jurisdiction and
5 could function concurrently with state jurisdiction in P.L. 280 states. "Created" tribes only
6 possessed those authorities expressly conferred by the Secretary of the Interior. "Created"
7 tribes were deemed to lack authority to establish judicial systems. Most of the tribes in
8 California were classified as "created" tribes. Congress finally, in May of 1994, amended the
9 Indian Reorganization Act to make all tribes on equal footing and repudiated the artificial
10 "historic" and "created" tribal distinction.
11 The current justification for denying Plaintiff's 638 contract is that law enforcement and
12 court services are available through the state thus making it unnecessary for the federal
13 government or the tribes to establish tribal police departments and tribal courts. In Defendant
14 Special Agent's declination letter to Plaintiff, he states that:
15 "The amount of money that the BIA's Office of Justice Services spends in California
16 is zero. The principal reason for this is that, as you know, California is a P.L. 280
state, and so the cost of law enforcement on Indian reservations is borne by the State,
17 not the BIA."
18
19 Professor Goldberg and Professor Champagne in their 2002 report cited above finds the
20 notion that there is no need for tribal law enforcement and tribal courts completely unfounded.
21 The "existence of state jurisdiction does not remove the need for tribal law enforcement, courts,
22 or alternative forms of dispute resolution, some of which are rooted in tribal traditions and
23 customs." (Exhibit I attached to AR Document 5)
24 Defendants are operating under two (2) misunderstanding about P.L. 280. First having
25 retained both civil and criminal jurisdiction and exclusive regulatory jurisdiction, tribes in a P.L.
26 280 state need tribal law enforcement and tribal courts in order to exercise their inherent
27 jurisdiction. For example, there is no state or federal jurisdiction over housing evictions on
28 Indian reservations. Plaintiff administers and maintains tribal housing for qualified tribal

members. If a member needs to be evicted, Plaintiff's only recourse is to file for eviction in tribal court and have its tribal police officer execute the eviction order.

Another example of the need for tribal law enforcement is in the area of tribal environmental laws. State and county environmental laws and regulations do not apply on the reservation. Many tribes have adopted environmental laws to protect their natural resources. Without law enforcement and a tribal forum, a tribe's environmental laws are unenforceable.

Final, Plaintiff, as have many tribes in California, has enacted a Law and Order Code to address primarily misdemeanor conduct on their reservations. (Exhibit D attached to AR Document 5.) The Code was adopted in response to the sheriff's lack of response to minor crimes being committed on the reservation. As Plaintiff discussed at the September 2010 Informal Conference, the Plaintiff's reservation is in a very remote area and the sheriff often fails to respond to a 911 call or it can take hours for them to arrive. With the Law and Order Code in place and the presence of the Plaintiff's Chief of Police, there has been a reduction in crime on its reservation and the community is safer.

As stated by Professor Goldberg and Professor Champagne :

> "With all these exclusions from state jurisdiction under Public Law 280, it is unrealistic to expect tribes to rely entirely on state government for their law enforcement and dispute resolution needs. Indeed, without tribal law enforcement and courts, there is a near vacuum of authority over certain problem areas, sometimes leading to violet or disruptive self-help measures."

Defendants' second misunderstanding is that although 18 U.S.C. §1152 and 1153 do not apply in California, federal criminal laws of general application do. For that reason, Plaintiff's Chief of Police holds a SLEC from the BIA/OJS allowing him to enforce federal laws on the reservation and under certain circumstances, as a federal officer, he can exercise California arrest authority. [California Penal Code §830.8(a)]

This point was driven home by the United States Attorney General in a 2000 opinion titled "Concurrent Tribal Authority under P.L. 280." After concluding that P.L. 280 did not divest tribes of their civil or criminal jurisdiction he found that there remained *substantial* federal criminal jurisdiction in P.L. 280 states. The opinion states that:

> "Aside from tribal authority, it is also clear the Federal Government retains substantial law enforcement authority in Indian Country in P.L. 280 states. Federal criminal laws of general application continue to apply in Indian country areas that are subject to P.L. 280. *(citation omitted)* That includes the offences---other than Sections 1152 and 1153—that are designed to protect Indian lands or Indian commerce that are set forth in Chapter 53 of Title 18. *(citation omitted)* Violations of federal criminal law are investigated by the Federal law enforcement agencies that generally have responsibility over them. That includes the BIA which generally has authority to enforce federal laws in Indian country. *(citation omitted)* The BIA also has the authority to commission tribal police officers as "special law enforcement officers" of the BIA to carry out those responsibilities and to ***contract out its functions under the Indian Self-Determination and Educational Assistance Act, 25 C.F.R § 450 et.seq, or the Self-Governance Program , 25 U.S.C. §458 et seq.*** (Emphasis added) (Exhibit J attached to AR Document 5)

This same passage was cited by the court in Hopland Band of Pomo Indians vs. Norton, 324 F. Supp. 2d 1067, 1076 (N.D. Cal. 2004) in support of the court's rejection of defendants' claim that there is no federal law enforcement responsibility to the Hopland Band because the tribe is located in a P.L. 280 state. In Hopland, the tribe submitted a 638 request for a deputation agreement in order to have it tribal officers issued SLECs. The tribe did not request 638 contract funding, only the deputation agreement. The defendants first contended that the deputation agreement was not a "contractual program" under the ISDEAA. The court rejected the defendants' argument pointing to the numerous tribal law enforcement agencies that contract for police services that includes a deputation agreement. Next, defendants' argued that because the tribe was in a P.L. 280 state the federal government had no law enforcement responsibility and in fact could not enforce federal criminal laws in the state. The court found that the excerpt from the Attorney General cited above "completely rebut's counsel's *ipse dixit* contention here that California's status as a Public Law 280 state entirely voids the government's jurisdiction to enforce federal law on California tribal lands." Hopland Band of Pomo Indians, 324 F. Supp. 2d at 1077 As in Hopland the Defendants' contention that they have no law enforcement responsibilities to Plaintiff is completely rebutted by the Attorney General of the United States.

1 In sum, there is no rational basis for denying Plaintiff a 638 contract for law
2 enforcement funding. All parties agree the Plaintiff has concurrent civil and criminal
3 jurisdiction with the state and exclusive regulatory jurisdiction on its reservation. It cannot be
4 denied that there are many legal gaps in the state's jurisdiction that can only be filled by the
5 Plaintiff. It has been acknowledged that there is a need for tribal law enforcement on Plaintiff's
6 reservation because state law enforcement is inadequate to meet the Plaintiff's law enforcement
7 needs. Perhaps, the greatest single factor showing the irrationality of Defendants' policy is that
8 they have and do fund law enforcement for tribes in California and other P.L. 280 states.
9 Defendants' policy has denied Plaintiff and its members' equal protection of the law.

10 **D. Defendants' Policy Violates The Trust Responsibilities Owed to Plaintiff**

11 It has long been recognized that there is a trust relationship between the federal
12 government and tribes. *U.S. vs. Mitchell*, *(Mitchell II)* 463 U.S. 206, 225 and 226 (1983) cases
13 cited, and *Seminole Nation vs. U.S.*, 361 U.S. 286 (1942) The trust relationship may be deemed
14 general or limited in nature and creating no special obligations on the part of the federal
15 government or it can be specifically defined through treaties, statutes and/or regulations to a
16 degree that the government may be monetarily liable for its breach. *U.S. vs. Mitchell*, *(Mitchell
17 I)*, 445 U.S. 535 (1980), *Mitchell II* 463 U.S. at 224, *Gila River Pima-Maricopa Indian
18 Community vs. U.S.*, 427 F. 2d 1194 (1970)

19 Determining whether the federal government owes a tribe specific trust obligations
20 requires looking to the legal authorities that are claimed to have created the specific trust
21 relationship. In the current case, the Snyder Act, 25 U.S.C. §13 provides that the BIA will
22 direct, supervise and expend funds appropriated under the Act for the benefit of the Indians.
23 One of the benefits specifically list is "police." Law enforcement is provided either directly by
24 the BIA/OJS or the tribe may contract for those funds under the ISDEAA as discussed above.
25 Under 25 U.S.C. §450a, Congress declared that one of the policies behind the ISDEAA is:

26 "(b) The Congress declares its commitment to the maintenance of the Federal
27 Government's unique and continuing relationship with and responsibility to,
individual Indian tribes and to the Indian people as a whole through the
28 establishment of a meaningful Indian self-determination policy which will permit an

orderly transition from 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…"

BIA regulations implementing the ISDEAA state:

"Nothing in these regulations shall be construed as: …(b) Terminating, waiving, modifying or reducing the trust responsibility of the United States to the Indian tribe(s) or individual Indians. The Secretary shall act in good faith in upholding this trust relationship." 25 C.F.R. §900.4(b)

Both the ISDEAA and its implementing regulations clearly recognizes the federal governments trust responsibility to ensure that tribes are given the opportunity to contract for the administration of federal programs and services in order to make them less depend on the federal government and enhance tribal self-determination. Defendants' have a trust responsibility to approve Plaintiff's 638 contract request.

Specific to the area of law enforcement, the authority and responsibility of Defendants to provide such services are mandated under the Indian Law Enforcement Reform Act ("ILERA"), 25 U.S.C. §2802 which provides that the "Secretary, acting through the Bureau, shall be responsible for providing, or for assisting in the provision of law enforcement services in Indian country as provided in this chapter." The Defendants' have a trust responsibility to assist Plaintiff with law enforcement on its reservation. This assistance should be through funding there 638 contract so that Plaintiff can financially cover the costs of providing law enforcement services on its reservation.

Congress' and the President's commitment to law enforcement in Indian Country was reaffirmed with passage of the Tribal Law and Order Act of 2010 ("TLOA"). Section 202 . FINDINGS; PURPOSES.

"(a) Findings-Congress finds that—

(1) The United States has a distinct legal, treaty and trust obligation to provide for the public safety of Indian country;

(2) Congress and the President have acknowledged that---
(A) tribal law enforcement officers are often the first responders to crime on Indian reservations;

(B) tribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country; ….

(3) ….

(4) the complicated jurisdictional schemes that exists in Indian county—
(A) has a significant negative impact on the ability to provide public safety in Indian county;
(B) has been increasingly exploited by criminals; and
(C) requires a high degree of commitment and cooperation among tribal, Federal, and State law enforcement officials; …"

(b) Purposes ---the purpose of this title are---

(1) to clarify the responsibilities of Federal, State, tribal and local governments with respect to crimes committed in Indian country;

(2) increase the coordination and communication among Federal, State, tribal and local law enforcement agencies;

(3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; …"

The TLOA brings a host of amendments to numerous federal statutes notably the ISDEAA, ILERA and P.L. 280. The amendment to P.L. 280 adds a new section that allows a tribe to request the Attorney General to consent to the federal government's re-assumption of 18 U.S.C. §1152 (General Crimes Act) and §1153 (Major Crimes Act) jurisdiction. If reassumed criminal jurisdiction on Indian reservations would be concurrent between the federal, state and tribal governments.

From these federal statutes and BIA regulations, Defendants' have defined its legal and trust obligation to provide law enforcement services and support to the Plaintiff in its efforts to make its community safe. Defendants have a mandatory, non-discretionary legal and trust obligation to orderly transition from Federal domination of Indian programs for and services to Plaintiff in order to allow effective and meaningful participation by Plaintiff in the planning, conduct, and administration of law enforcement services on its reservation. In light of the facts (1) that Plaintiff's Chief of Police is often the first responders to crimes on its reservations; (2)

the complicated jurisdictional scheme created by P.L. 280 has a significant negative impact on the ability to provide public safety on Plaintiff's reservation; and (3) Plaintiff's reservation has been increasingly exploited by criminals, Defendants have a trust obligation to empower the Plaintiff with the authority, resources, and information necessary to safely and effectively provide public safety on Plaintiff's reservation. Denying Plaintiff's 638 contract for law enforcement funding violates Defendants' responsibility for law enforcement on Plaintiff's reservation.

V. CONCLUSION

Defendants' policy of denying Plaintiff's 638 contract request for law enforcement funding solely on the basis that Plaintiff is located in California is invalid as a nonregulatory requirement prohibited under the ISDEAA. Because the Defendants 'policy significantly impacts Plaintiff's ability to operate its law enforcement department it must be promulgated under the APA as required by the ISDEAA. Defendants' attempted and failed to promulgate its policy under the APA. The policy is beyond the regulatory authority of Defendants and they cannot therefore comply with the APA making the policy is invalid. Finally, Defendants' policy is arbitrarily applied, violates Plaintiff's tribal members' right to equal protection and violates Defendants' trust responsibility to provide law enforcement services and support to the Plaintiff.

DATE: May 25, 2011

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