LESTER J. MARSTON
California State Bar No. 081030
RAPPORT AND MARSTON
405 West Perkins Street
P.O. Box 488
Ukiah, CA 95482
Telephone: 707-462-6846
Facsimile: 707-462-4235
e-mail: marston1@pacbell.net

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HOPLAND BAND OF POMO INDIANS; ROBINSON RANCHERIA OF POMO INDIANS OF CALIFORNIA; COYOTE VALLEY BAND OF POMO INDIANS; REDDING RANCHERIA; and RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, CALIFORNIA,

Plaintiffs,

vs.

KENNETH SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior, LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs for the United States Department of the Interior, and DARREN CRUZAN, in his official capacity as the Deputy Bureau Director, Bureau of Indian Affairs, Office of Justice Services,

Defendants.

Case No. CV 12-00556 CRB

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DATE: July 20, 2012
TIME: 10:00 a.m.
CTRM.: 6, 17TH Floor

Hon. Charles R. Breyer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

OTHER AUTHORITIES

RULES

TO THE DEFENDANTS, KENNETH SALAZAR AND LARRY ECHO HAWK, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 29, 2012, at 10:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Charles R. Breyer, Judge of the United States District Court for the Northern District of California, 17th Floor, Courtroom 6, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs, the Hopland Band of Pomo Indians ("Hopland Band"); the Robinson Rancheria of Pomo Indians of California ("Robinson Rancheria"); the Coyote Valley Band of Pomo Indians ("Coyote Valley Band"); the Redding Rancheria ("Redding Rancheria"); and the Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California ("Rincon Band") ("hereinafter referred to collectively as the "Tribes"), will move the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("F.R.C.P."), Local Rule 16.5 and Local Rule 56.

RELIEF SOUGHT BY THE PLAINTIFFS

The Tribes seek the following relief from the Court:

1. A declaration that the defendants' refusal to enter into self-determination contracts for law enforcement services ("638 contracts") pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. ("ISDEAA") and to fund those contracts is arbitrary, capricious, and contrary to law, in violation of the ISDEAA, the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA"), the Fifth Amendment to the United States Constitution ("5th Amendment"), and the defendants' trust obligations to the Tribes.

2. A declaration that the defendants are required by the ISDEAA to contract with the Tribes to provide law enforcement services on their reservations and to provide funding for those law enforcement services.

3. An order directing the defendants to enter into the 638 Contracts for law enforcement services with each of the Tribes as set forth in the Tribes' 638 Contracts.

4. An order directing the defendants to promulgate a funding formula for

the appropriation of 638 funds for law enforcement services in compliance with the requirements of the APA and to implement that formula for all qualified tribes that enter into 638 Contracts with the Secretary of the Interior ("Secretary").

5. An order directing the defendants to provide funding for those 638 Contracts pursuant to the Tribes' request for funding set forth in the 638 Contracts.

6. Award money damages to the Coyote Valley Band of Pomo Indians in the amount of $398,235; the Hopland Band of Pomo Indians in the amount of $270,347; and the Robinson Rancheria in the amount of $703,033 as requested in their proposed 638 Contracts.

7. Award the Tribes their costs and reasonable attorneys' fees.

ISSUES TO BE DECIDED

1. Are the defendants required to enter into contracts for law enforcement services with the Tribes pursuant to the ISDEAA?

2. Was the defendants' refusal to enter into contracts for law enforcement services with the Tribes pursuant to the ISDEAA a violation of the ISDEAA and the APA?

3. Are the defendants required to enter into and fund contracts for law enforcement services with the tribes of California pursuant to the ISDEAA, even though California is a Public Law 280 state?

4. Was the defendants' refusal to fund law enforcement services contracts with the tribes in California pursuant to the ISDEAA a violation of the ISDEAA?

5. Was the defendants' refusal to fund law enforcement services contracts with the tribes in California pursuant to the ISDEAA a violation of the Fifth Amendment to the United States Constitution?

6. Was the defendants' implementation of a written policy of refusing to fund 638 contracts for law enforcement services for the Tribes because California is a P.L. 280 state without promulgating regulations or otherwise complying with formal rulemaking a violation of the APA, 5 U.S.C. §553?

7. Was the defendants' failure to develop a funding formula for allocating available funding for contracts for law enforcement services constitute a violation of the APA?

8. Was the defendants' refusal to enter into the 638 Contracts for law enforcement services with the Tribes and to fund those contracts pursuant to the ISDEAA constitute a violation of the defendants' trust obligations to the Tribes?

STATEMENT OF FACTS

1. In 1953, Congress enacted 18 U.S.C. § 1162 ("P.L. 280"), which transferred limited criminal jurisdiction over certain offenses committed on Indian reservations to certain states, including California, Minnesota, Nebraska, Oregon, Wisconsin, Nevada, South Dakota, Washington, Florida, Idaho, Montana, North Dakota, Arizona, Iowa, and Utah ("P.L. 280 States").

2. On January 4, 1975, Congress enacted the ISDEAA. One of the primary purposes of the ISDEAA was to allow federally recognized Indian tribes to contract with the Department of the Interior ("DOI") to take over operation of those federal service programs that the DOI maintains and operates for the benefit of Indians and Indian tribes. 25 U.S.C. § 450a.

3. Under the ISDEAA, any federally recognized Indian tribe that seeks to contract a service performed by the federal government is required to submit an application to do so to the Secretary, pursuant to 25 U.S.C. § 450f(a)(1). These contracts are referred to as "638 Contracts." A proposed 638 Contract must include the standards under which the tribal government will operate the contracted program. 25 U.S.C. § 450f(a)(2).

4. Pursuant to the ISDEAA, the Secretary has ninety (90) days from receipt of a request from a tribe to enter into a 638 Contract to review and approve or disapprove the proposed contract. 25 U.S.C. § 450f(a)(2). The Secretary has a mandatory, non-discretionary duty to approve a request to enter into a 638 Contract unless:

> the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by, a controlling legal authority that–(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 project contract; (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract . . .; or (E) the program, function, service, or activity . . . that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under . . [25 U.S.C. §450f] . . . because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 450f(2).

5. The Bureau of Indian Affairs ("BIA") is an agency of the Department of the Interior ("DOI"). Within the BIA is the Office of Justice Services ("OJS"), which has responsibility for carrying out the law enforcement functions of the Secretary on Indian reservations and implementing the provisions of the Indian Law Enforcement Reform Act ("ILERA"), 25 U.S.C. § 2801 et seq.

6. Under the ILERA, the Secretary is authorized to enter into deputation agreements with Indian tribes to enforce federal law and, with the consent of the tribe, the laws of the tribes on their Indian reservations. 25 U.S.C. §§ 2802-2804.

7. Beginning as early as 1977, and continuing to the present, the BIA has contracted with Indian tribes pursuant to the ILERA and issued Special Law Enforcement Commissions ("SLECs") to the law enforcement officers of a number Indian tribes within the State of California, including, but not limited to, the Hopland Band and the Robinson Rancheria. The SLECs allow law enforcement officers of those Indian tribes to enforce certain federal and tribal laws, including, but not limited to, Title 18 of the United States Code §§1154, 1155, 1156, 1157, 1158, 1159, 1161, 1163, 1164, and 1165, as well as tribal hunting and fishing ordinances, pursuant to the Lacey Act, 16 U.S.C. § 3372. Once the tribal law enforcement officers have been commissioned, the OJS relies on them to serve as specially commissioned federal law enforcement officers, with the authority to enforce all applicable federal laws within the Indian reservations or Indian country that they police. 25 U.S.C. § 2804(a)-(f); Declaration of

John D. Irwin in Support of Plaintiffs' Motion for Summary Judgment ("Irwin Declaration"), p. 2, ¶ 3.

8. Each year, Congress appropriates funds for the BIA to provide law enforcement services to Indian tribes within Indian country throughout the United States. The BIA allocates the funds Congress appropriates for law enforcement services to various Indian tribes throughout the United States, including a number of tribes in P.L. 280 States, and some tribes with reservation land located in the State of California. Declaration of Shawn Padi in Support of Plaintiffs' Motion for Summary Judgment ("Padi Declaration"), p. 4, ¶ 13, and Exhibit H to the Complaint, pp. 26-30.

9. The DOI provides funding for law enforcement services to some tribes in P.L. 280 States through 638 Contracts that the DOI has entered into with those tribes. *Id.*

10. Pursuant to Executive Order 13175, the Secretary and the BIA are required to consult with any Indian tribe that would be affected by a policy proposed by the Secretary or the BIA, prior to adopting and implementing that policy.

11. In 2010, Congress enacted the Tribal Law and Order Act, P.L. 111-211, 124 Stat. 2258 ("TLOA"). Among the stated purposes of the TLOA are: (1) to increase coordination and communication among federal, state, tribal, and local law enforcement agencies, and (2) to empower tribal governments to provide public safety in tribal communities. *Id.*

12. The Secretary has never promulgated regulations pursuant to 25 U.S.C. § 450k that restrict the allocation of funding for law enforcement services to non-P.L. 280 States. The OJS has adopted an unwritten policy ("Policy") not to provide any money appropriated by Congress for law enforcement services by 638 Contract or otherwise to tribes in the State of California, on the grounds that California is a P.L. 280 State. Padi Declaration, p. 4, ¶ 13, and Exhibit H to the Complaint. To the extent that the Secretary has adopted the Policy, the Policy was not implemented through the formal rule making process required under 5 U.S.C. § 553 of the APA.

13. Pursuant to the authority granted to it under the Hopland Constitution, the Hopland Tribal Council enacted an ordinance establishing the Hopland Tribal Police Department ("Hopland Police Ordinance"). Padi Declaration, p. 2, ¶ 2, and Exhibit A to the Complaint.

14. On or about July 31, 2003, pursuant to the ISDEAA, the Hopland Band submitted to the BIA a 638 Contract to allow the Hopland Band to provide law enforcement services to the Hopland Indian Reservation. The proposed 638 Contract did not include a request for funding for the program from the United States. Padi Declaration, p. 2, ¶ 3.

15. In a letter dated October 28, 2003, the BIA denied the Hopland Band's request. Padi Declaration, p. 2, ¶ 4.

16. In January 2004, the Hopland Band filed suit against the Secretary and other federal officials in the United States District Court for the Northern District of California seeking a determination from the Court as to whether the OJS was required to issue SLECs to qualified tribal law enforcement officers under the ILERA and whether the DOI had a mandatory duty under the ISDEAA to enter into a 638 Contract with the Hopland Band for law enforcement services. Padi Declaration, p. 2, ¶ 5.

17. In July 2004, this Court concluded that law enforcement services are a contractible program under the ISDEAA and denied the Secretary's motion to dismiss the Hopland Band's lawsuit, *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067 (N.D. Cal. 2004) ("*Hopland v. Norton*"). Pursuant to a settlement agreement in the lawsuit, the DOI entered into a 638 Contract for law enforcement services in the form of a Deputation Agreement with the Hopland Band and subsequently granted Special Law Enforcement Commissions to qualified officers of the Hopland Police Department. Padi Declaration, pp. 2-3, ¶ 6, and Exhibit B to the Complaint.

18. Since the District Court's ruling in *Hopland v. Norton*, the Hopland Band has provided law enforcement services as a 638 Contract program on the Hopland Indian Reservation. Padi Declaration, p. 3, ¶ 7.

19. In February 2009, the Hopland Band submitted for approval an amendment to the its 638 Contract/Deputation Agreement that included a request for funding of $270,347.00. Padi Declaration, p. 3, ¶ 8, and Exhibit C to the Complaint.

20. In a letter dated May 20, 2009, the OJS denied the Hopland Band's request to amend the 638 Contract/Deputation Agreement . In the denial letter, the OJS stated that it allocated no funding for law enforcement programs for California tribes because California is a Public Law 280 state. Padi Declaration, p. 3, ¶ 9, and Exhibit D to the Complaint.

21. The OJS provides law enforcement funding to Indian tribes in some P. L. 280 states, including funding for the Washoe, Fort Mojave, and Colorado River tribes, which have portions of their reservations located in California. Padi Declaration, p. 4, ¶ 13, and Exhibit H to the Complaint.

22. In a response to DOI Field Solicitor William Quinn's e-mail request to then OJS District III Special Agent in Charge, Selanhongva McDonald, for information from the OJS on whether the OJS had developed a funding formula for the allocation of law enforcement funds, the Strategic Planning Officer for the OJS stated that there was no formula. Padi Declaration, p. 3, ¶ 10, and Exhibit F to the Complaint.

23. In a letter dated June 4, 2009, the Hopland Band responded to the OJS's refusal to agree to the amendment by requesting an informal conference between representatives of the Hopland Band and representatives of the OJS who had line-item authority to allow any agreement reached at the meeting to be implemented immediately. Padi Declaration, pp. 3-4, ¶ 11, and Exhibit G to the Complaint.

24. On July 16, 2009, Benjamin H. Nuvamsa, the Secretary of the Interior's Designated Representative, and representatives of the Hopland Band held an informal conference in Santa Rosa, California. Padi Declaration, p. 4, ¶ 12, and Exhibit H to the Complaint.

25. At the hearing, then OJS Director Patrick Ragsdale stated that the OJS does not allocate any funds to California tribes for law enforcement services because

California is a P.L. 280 State, but admitted that the OJS enters into 638 Contracts for law enforcement services with tribes in P.L. 280 States other than California. Padi Declaration, p. 4, ¶ 13, and Exhibit H to the Complaint, pp. 26-30.

26. On August 10, 2009, Nuvamsa issued a Recommended Decision upholding the decision of the BIA to decline to enter into a 638 Contract for law enforcement services with the Hopland Band. Padi Declaration, p. 4, ¶ 14, and Exhibit I to the Complaint.

27. In a letter dated December 14, 2010, the Hopland Band submitted an amendment to its 638 Contract/Deputation Agreement, pursuant to the ISDEAA. That proposed amendment did not include a request for funding pursuant to the ISDEAA. Padi Declaration, p. 4, ¶ 15, and Exhibit A thereto.

28. In a letter dated March 30, 2011, Selanhongva McDonald, Special Agent in Charge, District 3, OJS, denied approval of the amendments to the 638 Contract/Deputation Agreement on the ground that it did not contain a request for funding, which, he maintained, is an essential element of a 638 Contract. Padi Declaration, p. 4, ¶ 16, and Exhibit J to the Complaint.

29. Pursuant to the authority granted to it under the Robinson Rancheria Constitution, the Robinson Rancheria Citizens Business Council has enacted an ordinance establishing the Robinson Rancheria Tribal Police Department ("Robinson Police Ordinance"). Declaration of Tracey Avila in Support of Plaintiffs' Motion for Summary Judgment ("Avila Declaration"), p. 2, ¶ 2, and Exhibit K to the Complaint.

30. On May 11, 2009, the Robinson Rancheria entered into a Deputation Agreement with the OJS, pursuant to the ILERA, in which the OJS agreed to issue Special Law Enforcement Commissions to qualified tribal law enforcement officers. Avila Declaration, p. 2, ¶ 3, and Exhibit L to the Complaint.

31. On or about October 25, 2010, pursuant to the ISDEAA, the Robinson Rancheria submitted to the OJS a 638 Contract to provide law enforcement services to the Robinson Rancheria. The proposed 638 Contract included a request for funding of

$703,033 for the program from the Secretary. The Robinson Rancheria also submitted a revised Deputation Agreement as part of the 638 Contracting process. Avila Declaration, p. 2, ¶ 4, and Exhibit M to the Complaint.

32. In a letter dated December 28, 2010, the OJS denied the Robinson Rancheria's request. The letter stated that the OJS did not allocate any funding for law enforcement programs in California because it was a P.L. 280 State and, on that basis, it denied the request. Avila Declaration, p. 2, ¶ 5, and Exhibit N to the Complaint.

33. Pursuant to the authority granted to it under the Coyote Valley Band's Constitution, the Coyote Valley Tribal Council has enacted an Ordinance establishing the Coyote Valley Tribal Police Department ("Coyote Valley Police Ordinance"). Declaration of Patrick Naredo in Support of Plaintiffs' Motion for Summary Judgment ("Naredo Declaration"), p. 2, ¶ 2, and Exhibit O to the Complaint.

34. On or about January 26, 2011, pursuant to the ISDEAA, the Coyote Valley Band submitted to the BIA and the OJS a 638 Contract for law enforcement services. The proposed 638 Contract included a request for funding of $398,235 for the program from the Secretary. The Coyote Valley Band also submitted a proposed Deputation Agreement between the OJS and the Coyote Valley Band, pursuant to the ILERA in which the OJS would agree to issue Special Law Enforcement Commissions to qualified tribal law enforcement officers. Naredo Declaration, p. 2, ¶ 3, and Exhibit P to the Complaint.

35. In a letter dated March 14, 2011, the OJS denied the Coyote Valley Band's request for a 638 contract for law enforcement services on the grounds that the OJS did not allocate any funding for law enforcement programs in California because it was a P.L. 280 State. Naredo Declaration, p. 2, ¶ 4, and Exhibit Q to the Complaint.

36. On May 30, 2006, the Redding Rancheria Tribal Council established the Redding Rancheria Law Enforcement Department. Declaration of Jason Hart in Support of Plaintiffs' Motion for Summary Judgment ("Hart Declaration"), p. 2, ¶ 2, and Exhibit AA thereto.

37. On or about November 13, 2008, the Redding Rancheria and the United States entered into a self governance compact ("Self-Governance Compact"), pursuant to Title IV of the ISDEAA. The governmental programs and activities for which the Tribe assumed responsibility include law enforcement. Hart Declaration, p. 2, ¶ 3, and Exhibit BB thereto.

38. Since entering into the Self-Governance Compact, the Tribe has been unable to fund its Law Enforcement Department because it lacks funding for law enforcement activities. Hart Declaration, p. 2, ¶ 4.

39. The Redding Rancheria's Tribal Council desires to amend its Self-Governance Compact to include funding for law enforcement services from the funds Congress appropriates each year and makes available to the OJS for law enforcement services, but has not submitted a proposed amendment to its Self-Governance Compact because the Redding Rancheria's Tribal Council has concluded that to do so would be futile, based on the adoption of the Policy by the OJS and the denial of approval of the 638 Contracts submitted by co-plaintiffs Hopland Band, Robinson Rancheria, and Coyote Valley Band. Hart Declaration, p. 2, ¶ 5.

40. The Rincon Band has established a tribal law enforcement agency. The Rincon Band's Tribal Council desires to enter into a 638 Contract for law enforcement services and a Deputation Agreement with the OJS as part of the 638 Contracting process. Declaration of Bo Mazzetti in Support of Plaintiffs' Motion for Summary Judgment ("Mazzetti Declaration"), p. 2, ¶ 2.

41. The Rincon Band's Tribal Council, however, has not submitted a proposed 638 Contract for law enforcement services or a proposed Deputation Agreement to the OJS, because the Rincon Band's Tribal Council has concluded that to do so would be futile, based on the adoption of the Policy by the OJS and the denial of approval of the 638 Contracts for law enforcement services submitted by co-plaintiffs Hopland Band, Robinson Rancheria, and Coyote Valley Band. Mazzetti Declaration, p. 2, ¶ 3.

ARGUMENT

The plaintiff tribes ("Tribes") want to ensure the safety of all persons who reside, work at, or visit their reservations. The law enforcement services provided to the Tribes by the law enforcement agencies of the State of California have been inadequate for decades. The Tribes, therefore, concluded that it was necessary to create their own law enforcement agencies that could enforce tribal, federal and state law on their respective reservations. The Tribes did not have the resources to properly fund those agencies. The Hopland Band, the Robinson Rancheria, and the Coyote Valley Band sought funding from the Office of Justice Services through 638 contracts delegating the Secretary's obligations to provide law enforcement services to the Tribes. The defendants refused to enter into those contracts.

The defendants stated the reason that they were refusing to enter into the proposed 638 contracts for law enforcement services was that California is subject to the provisions of P.L. 280. The defendants asserted that, because P.L. 280, specifically 18 U.S.C. §1162, granted California limited criminal jurisdiction over Indian country[1] located within those states, there is no need for the DOI to appropriate money for federal law enforcement services and programs in those states; law enforcement is the responsibility of state law enforcement agencies. The defendants' denial of the 638 Contracts is not based on a statute or regulation. It is merely a policy of the OJS, and an unwritten and unpublished policy, at that.

The defendants' decision to deny the 638 contracts and the policy it was based on are clearly arbitrary. The implementation of the policy has also been arbitrary. The defendants stated that the Tribes' 638 Contract funding requests were denied because California is a PL 280 state and the OJS does not provide 638 contract funding for law enforcement services to tribes in other PL 280 states, but the OJS provided 638 contract funding for law enforcement services to some tribes in PL 280 states,

[1] The term "Indian Country" is defined in Title 18 of the United States Code Section 1151 as, among other things, all land within the boundaries of any Indian reservation.

including at least three tribes with reservation land in California. The defendants' refusal to grant 638 contract funding to tribes located in PL 280 states, moreover, has not been established through the APA's mandatory rule-making procedures. 5 U.S.C. §553. It is, in fact, a "nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts," which is prohibited by the ISDEAA. 25 U.S.C. § 450k(a)(1). The defendants have also not established a funding formula for 638 contracts for law enforcement services, as required by federal court precedent and the newly enacted TLOA. 25 U.S.C. § 2802(c)(16)(D). The defendants have simply decided not to provide 638 funding to most tribes in California and other PL 280 states because they have not provided such funding in the past.

As this brief will demonstrate, in adopting and implementing this arbitrary policy, the defendants have violated the ISDEAA, the APA, the Tribes' right to equal protection arising from the due process clause of the Fifth Amendment, and the Federal government's fiduciary obligations to the Tribes.

I.

Summary Judgment Is Appropriate in this Case.

The Tribe moves for summary judgment pursuant to F.R.C.P. 56 which provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." To determine which facts are "material," a court must look to the substantive law upon which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, could affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). See *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006) ("*Miller*"); *GasPlus, L.L.C. v. United States Department of the Interior*, 510 F. Supp. 2d 18 (D.D.C 2007) ("*GasPlus*").

The Court must review the record as a whole and draw all reasonable inferences in favor of the nonmoving party. *Hernandez v. Spacelabs Med. Inc.,* 343 F.3d 1107,

1112 (9th Cir. 2000). Unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. *Id.*; *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008). "Thus, '[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *Miller*, 454 F.3d at 988 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

II.

Denial of the Requests for 638 Contracts Is a Violation of the ISDEAA and the APA.

A. The Denial of the Tribes Proposed 638 Contracts Violates the ISDEAA.

The initial legal issue that must be addressed is: did the Secretary violate the ISDEAA by refusing to enter into the 638 Contracts for law enforcement services submitted to him by the Tribes? In order to rule on that issue, two further issues must be addressed: (1) are law enforcement activities contractible under the ISDEAA; and (2) are the reasons given by the defendants for denial of the 638 Contracts legally permissible?

This Court, in *Hopland v. Norton*, *supra*, thoroughly addressed these issues. In that case, the Secretary refused to enter into a 638 contract for law enforcement services with the Hopland Band, asserting that she was not required to do so. This Court rejected the Secretary's arguments.

> The Indian Self-Determination and Education Assistance Act was passed in 1975 for the purpose of allowing federally-recognized Indian tribes to contract with the government to take over certain federal services and programs that the government maintains and operates for the benefit of Indians and Indian tribes.

Hopland v. Norton, 324 F. Supp. 2d at 1070.

In *Hopland v. Norton*, the Court found that the Secretary is required to enter into 638 Contracts for programs or services that are "contractible" under the ISDEAA: "Upon the request of any Indian tribe, . . . the Secretary of the Interior is *mandated* by the ISDEAA to enter into a 638 Contract for services or programs deemed contractible

under the ISDEAA, unless one of five statutory exceptions applies." *Id.*, 324 F. Supp. 2d at 1072. (Emphasis original.)[2]

The Court then concluded that law enforcement services are contractible programs under the ISDEAA:

> there are five categories of contractible services or programs called out by the statute, the second of which concerns the provision of a police force and related law enforcement functions on Indian lands. [25 U.S.C. §] *450f(a)(1)(B)*. Congress thus recognized that one of the ways to further Indian self-determination was to allow a tribe to contract for law enforcement services so the tribe could maintain a tribal police force on the reservation capable of effectively enforcing criminal laws.

Id., at 1071-1072.

The Court further concluded that law enforcement services performed pursuant to the ILERA are contractible law enforcement programs under the ISDEAA:

> [T]his order finds that those law enforcement services or programs established by the ILERA come within contracts for law enforcement services or programs under the ISDEAA. The clear intent of Congress in both enactments was to further the self determination of Indians tribes. This necessarily includes giving the tribes the power to adequately enforce federal law and investigate violations thereof.

Id., at 1074.

In *Hopland v. Norton*, the Court examined and rejected the grounds asserted by the Secretary for refusing to enter into the proposed contract. Among those grounds was the assertion that the federal government did not provide law enforcement services to the tribes of California, because it had ceded its authority to enforce federal law in

---

[2]The exceptions are set forth in 25 U.S.C. 450f(a)(2):
(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 . . . ; 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 paragraph (1) because the proposal includes activities that cannot be lawfully carried out by the contractor.

Indian country in California through the enactment of P.L. 280. "The government would now have this mean that it has *no* authority to enforce federal law on Indian lands in California. It appears the opposite is true, however." *Id.*, at 1076. (Emphasis original.) Citing to a 2009 training manual prepared by the OJS that stated that "the federal government retains substantial law enforcement authority in Indian country in P.L. 280 states," *Id.*, at 1076, the Court stated, "This excerpt completely rebuts 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." *Id.*, at 1077.

Thus, this Court has already resolved the question of whether law enforcement services, including the enforcement of federal law pursuant to ILERA, are contractible under the ISDEAA: they are contractible. *Id.* This Court has also ruled that the Tribes' requests for the 638 contracts can only be denied if the defendants' denial is based on one of the exceptions set forth in Section 450f(a)(2), and that the existence of state criminal jurisdiction pursuant to P.L. 280 is not a proper basis for such a denial.[3]

In the present case, the OJS's justification for denying the Hopland Band, the Robinson Rancheria, and the Coyote Valley Band's request for 638 contracts for law enforcement services is that the amount of funding proposed in the contracts is in excess of the applicable funding level for the contracts, citing Section 450f(a)(2)(D). That justification is based on the assertion that the OJS allocates no money for law enforcement programs to the tribes located in California, because California is a P.L.

---

[3]Despite the Court's ruling in *Hopland v. Norton*, the defendants continue to claim that they are not compelled to enter into 638 contracts for law enforcement services with tribes in California. Padi Declaration, pp. 3-5, ¶¶ 9-17. This should not surprise the Court, as representatives of the DOI have repeatedly flaunted the rulings of this Court relating to these issues. See the Court's January 21, 2005 Order Re Plaintiff's Motion for Summary Judgment. The current claims before the Court further reveal that the defendants have not complied with the terms of the Settlement Stipulation entered into in *Hopland v. Norton*. Despite the fact that the settlement stipulation was based on the Court's order to DOI officials to enter into a 638 Contract for law enforcement services (see *Id.*, p. 3), defendants are now interpreting the settlement stipulation as exclusively a deputation agreement pursuant to ILERA.

280 state:

> The amount of money that OJS spends in California for law enforcement services is zero. The principal reason for this is that, as you know, California is a P.L. 280 state, and so the costs of law enforcement on Indian reservations are borne by the State, not the BIA. Please understand that we are not saying that the BIA-OJS cannot enforce Federal laws on Indian reservations in California, as was apparently maintained in the *Hopland Band v. Norton* litigation. What we are saying is that the BIA-OJS does not spend any money for law enforcement on Indian reservations in the State, so law enforcement is not a program, function, service, or activity that, as a component of its budget, the OJS provides directly to Indian tribes in California.

May 20, 2009 letter from Selanhongva McDonald, Special Agent in Charge, BIA/OJS, District III, p.1. Padi Declaration, p. 3, ¶ 9, and Exhibit D thereto.

The denial letter reveals that the OJS is aware of the tenuousness of its stated basis for denying the 638 contracts. The OJS attempts to blunt the impact of the Court's decision in *Hopland v. Norton* by arguing that it is not the OJS's position that it does not have jurisdiction to enforce federal law in P.L. 280 states. Rather, OJS asserts, its decision is based on the fact that OJS does not allocate any money for law enforcement services for tribes in P.L. 280 states and, since the OJS does not allocate any funding for law enforcement services to Indians in California, any request for funding for law enforcement services exceeds the applicable funding level.

On its face, the OJS's differentiation between: (1) denying 638 contracts because jurisdiction to enforce some criminal laws in Indian Country in P.L. 280 states has been delegated to the states and (2) denying 638 contracts because OJS does not fund law enforcement activities in Indian Country in P.L. 280 states because jurisdiction to enforce some criminal laws in Indian Country in P.L. 280 states has been delegated to the states is a distinction without a difference. They are two sides of the same coin, since, in both cases, the OJS is making a policy decision not to enter into 638 contracts for law enforcement services with the Tribes because they are located in a P.L. 280 state. Even if it was a meaningful distinction, the OJS would have to demonstrate that the imposition of a policy that categorically denies funding for law enforcement services to Indian tribes in PL 280 states is a legally and constitutionally valid basis for

claiming that the amount of funding proposed under a 638 Contract is in excess of the applicable funding level.

Recently, the United States District Court for the Southern District of California addressed precisely this question. In *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, 2011 U.S. Dist. LEXIS 125213 (S.D. Cal. 2011) ("*Los Coyotes*"),[4] the Los Coyotes Band sued the Secretary, the Assistant Secretary – Indian Affairs ("Assistant Secretary"), and officials of the OJS, challenging the defendants' denial of the Los Coyotes Band's request for a 638 contract and the underlying policy supporting the refusal as arbitrary, capricious, and contrary to the ISDEAA, the APA, 5 U.S.C. § 553, the Tribe and its members' right to equal protection, and the federal trust responsibilities owed to the Tribe.

In *Los Coyotes*, as in this case, the Secretary's denial was based on the OJS's policy of not providing funding for law enforcement services to tribes in PL 280 states. The District Court for the Southern District of California concluded that the policy was arbitrary: "[T]he Court finds that Defendants may not decline Plaintiff's 638 contract for law enforcement funding solely on the basis of Plaintiff's location in a P.L. 280 state. Defendants' policy violates the ISDEAA, the APA, and Plaintiff's right to equal protection of the law." On that basis, the Court enjoined the defendants' denial of the 638 contract: "[T]o level the playing field and ensure that Plaintiff's request receives a fair evaluation, the Court enjoins Defendants from using California's P.L. 280 status as the sole reason for declining Plaintiff's contract proposal."

The *Hopland v. Norton* and *Los Coyotes* decisions directly addressed the fundamental issues raised in this case and concluded that the defendants' denial of the proposed 638 contracts was invalid. As the following sections of this brief will demonstrate, the *Hopland* and *Los Coyotes* decisions are fully consistent with the federal case law addressing the Secretary's obligations under the ISDEAA and the APA.

---

[4] *Los Coyotes* is presently on appeal before the United States Court of Appeals for the Ninth Circuit.

B. The Secretary Must Have a Rational Basis for How He Allocates Funds Appropriated by Congress for Law Enforcement That Is At Least Somewhat Fair.

The fundamental standard for analyzing whether an appropriations policy for programs designed to help Indians is permissible is set forth in the Supreme Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974). In *Ruiz*, the Supreme Court held that the Bureau of Indian Affairs was required to make general assistance under the Snyder Act available to Indians living near reservations as well as to those living on reservations. The court held that the BIA's policy of restricting such payments to Indians on reservations was a violation of the APA and the federal government's trust duties to Indians. In reaching that conclusion, the Supreme Court set out the basic standard for allocation policies for funds appropriated by Congress by federal agencies providing services and funding to Indians:

> Having found that the congressional appropriation was intended to cover welfare services at least to those Indians residing "on or near" the reservation, it does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. . . . Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. *But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.*

Id. 415 U.S. at 230-231. (Emphasis added. Citations omitted.)

Later Federal court decisions have interpreted *Ruiz* to require that the Secretary have a rational basis for the allocation of funds appropriated by Congress for Indians. In *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934 (N.D. Cal. 1979) ("*Califano*"), the Rincon Band sued the Secretary of Health, Education and Welfare, challenging the Indian Health Service's ("IHS") appropriations for health care for Indians in California. Despite the fact that California Indians made up 10% of the IHS's national service population, the IHS had appropriated less than 2% of its budget

for California's Indians, was planning to appropriate less that 0.5% of its budget for California Indians for future years, had assigned only 0.6 % of its professional IHS health care personnel to California, and, of the 51 hospitals, 99 health centers, and several hundred health stations operated by the IHA in the United States, California Indians were served by only one hospital and two health centers. The District Court found that the IHS had arbitrarily allocated funding "in such a way as to deprive California Indians of health care services comparable to those provided to Indians living in other parts of the country," and concluded that such an arbitrary allocation was impermissible:

> The IHS has never promulgated separate standards for eligibility for California Indians. However, it has, without a rational basis, denied the vast majority of California Indians health services comparable to those available to Indians in other parts of the country. The IHS's explanations and unsuccessful attempts to justify its history as a health care provider for California Indians are inadequate. The burden of providing a rational basis for the disproportionate funding of health care programs for Indians in California has not been met. Consequently, the Court finds that defendants' past and present allocation system for the distribution of IHS funds violates the California Indians' right to equal protection of the law as guaranteed by the *due process clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).* There is no rational basis to justify defendants' long history of minimal funding of California Indian health service programs.

Califano, 464 F. Supp. at 939. (Emphasis original.)

The District Court's decision was upheld on appeal in *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir.1980) ("*Harris*"). In its decision, the Court of Appeals for the Ninth Circuit again found that the United States is required to have a rational basis for its decision allocating among Indian tribes funds appropriated by Congress for Indian tribes:

> *Ruiz* requires that the IHS establish and consistently apply a reasonable standard for the allocation of its limited health services and facilities budget. While *Ruiz* does not explicitly state that the standard must be rational or result in an equitable distribution, it stresses that the purpose of establishing a clear standard is to prevent arbitrary denials of benefits. We can infer from this that the Court in *Ruiz* intended that the administering agency develop criteria for distribution that are rationally aimed at an equitable division of its funds.

Id., 618 F.2d at 572.[5] See also, *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987).

The Court of Appeals for the District of Columbia Circuit later specifically applied the *Ruiz* standard to the Secretary's allocation policies for 638 contracts. In *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir 1996), an Indian tribal school board and an Indian tribe challenged the Secretary's method of allocating 638 Contract Support Funds ("CSF") where Congress did not appropriate sufficient funds for all eligible tribes. The Secretary imposed a policy of granting the full CSF to tribes that filed their funding requests by a date set by the Secretary and only 50% of the funding request for the previous year for tribes that submitted their requests after that date. The court concluded that the ISDEAA did not commit the allocation of the insufficient funds to the Secretary's unbridled discretion, and found the Secretary's allocation policy to be arbitrary. Concluding that a *pro rata* allocation would have been appropriate and consistent with Congressional intent, the Court concluded:

> Thus it is clear that the Congress responsible for the ISDA did *not* intend, in the case of insufficient funding, for the numerous detailed provisions of the Act to be shunted aside by a Secretary exercising total discretion in allocation of the funds. Nor, as the legislative history shows, did the 1995 Congress which appropriated the insufficient funds intend for its shortfall to eviscerate the substantive provisions of the earlier Act.

Ramah, 87 F.3d at 1349.

The federal officials' actions and the justifications offered for their policies in *Califano* and *Ramah* were strikingly similar to those in the present case. In *Califano,* the Indian Health Service ("IHS") granted a disproportionally small percentage of its funding and other resources to the tribes of California. It did so based on alleged "resource allocation criteria," ("RAC") but "the evidence shows that RAC is, now at least, no more than a bureaucratic charade with respect to all IHS funds in general, and California Indians in particular." *Califano*, 464 F. Supp. at 937. The IHS had, in fact,

---

[5]In a "subsequent clarification" of the District Court's judgment, which was not included in the published decision, the Court declared that "(i)n accordance with this conclusion, defendants are obligated to adopt a program for providing health services to Indians in California which is comparable to those offered Indians elsewhere in the United States." *Rincon Band of Mission Indians v. Harris*, 618 F.2d at 570.

made funding decisions without any criteria. *Id.*, at 937-939.

In *Ramah*, the Secretary imposed an arbitrary funding policy that left some tribes with full funding and others with significantly reduced funding. The Secretary's excuse for the policy was that Congress had not appropriated sufficient money to provide funding to all of the eligible tribes. The Secretary made no attempt to seek an equitable or reasonable apportionment of funding.

In the present case, the internal communications of the OJS reveal that the OJS has not established *any* funding formula for law enforcement services for Indian tribes. In a June 2, 2009, e-mail to Special Agent in Charge Selanhongva McDonald, Jeannine Brooks, Strategic Planning Officer – Justice Services, stated:

> There is no formula. Original distributions for programs are just historical base funding amounts that were transferred from TPA [Tribal Priority Allocation] accounts and are now base dollars for the programs. The existing law enforcement programs are all under funded [sic] and redistribution of base funding is not possible.[6]

June 2, 2009, e-mail from Jeannine Brooks to Selanhongva McDonald, Exhibit F to the Complaint, and Padi Declaration, p. 3, ¶ 10 .

The e-mail goes on to state:

> The 280 issue is something completely different, though, since these are new programs that we are not funded for and they will not have crime reporting and staffing in place the criteria [used for existing programs] will not apply. One of the projects that we are going to have our interns work on this summer is to come up with the potential costs that would be associated with us having to take over jurisdiction on the 280 programs and funding is going to have to be requested from the Congress to cover this if they are going to revoke the Act because we do not have the necessary funding to cover a flood of new programs.

Id.

---

[6]This conclusion is in conflict with the Secretary's own regulations. 25 C.F.R. § 900.24 states:

> Can a contract proposal for an Indian tribe or tribal organization's share of administrative programs, functions, services, and activities be declined for any reason other than the five reasons specified in §900.22?
> No. The Secretary may only decline a proposal based upon one or more of the five reasons listed above. If a contract affects the preexisting level of services to any other tribe, the Secretary shall address that effect in the Secretary's annual report to Congress under section 106(c)(6) of the Act.

These emails reveal the OJS's appropriation policy is to fund law enforcement services for those tribes that have historically received funding and deny funding to all the other tribes. OJS adopted this policy in response to Congressional appropriations for law enforcement services that were insufficient to meet the needs of all tribes throughout the country. OJS is so overwhelmed by the prospect of having to deal with the development of a funding policy for law enforcement services that they transferred the issue to the highest level of policy making: the summer interns.

Apparently, even the summer interns were unable to solve the funding policy conundrum. More than two years after the June 2, 2009 email, OJS's policy continued to be to deny funding to tribes in California on the grounds that they are located in a P. L. 280 state. Padi Declaration, p. 3, ¶ 10, and Exhibit F to the Complaint .

Thus, the OJS simply adopted a policy of providing no law enforcement services and no funding for law enforcement services to tribes in P. L. 280 states, including California. That policy is based on nothing more than the OJS and its predecessor agency's allocation of funding and resources to particular tribes in the past. OJS has been and is unwilling to create a rational policy that would provide for a more equitable allocation of resources.

The actions of the defendants in the present case are clearly inconsistent with the standard set forth in the *Califano* and *Ramah* cases. The OJS has not based its policy of denying law enforcement funding to tribes in P. L. 280 states on any evidence that the tribes in P. L. 280 states receive adequate law enforcement from the states or any other analysis of the law enforcement needs of tribes in P. L. 280 states.[7] It has no rational basis for its funding decision.

The absence of any funding policy also violates the Court's holding in *Ruiz*, "No

---

[7] The calls for service at the Robinson Indian Reservation is but one example of the Tribes' growing need for law enforcement services. In 2011, there were a total of 810 calls for service on the Robinson Indian Rancheria: 512, or 63 %, of those calls were handled by Tribal Police holding special law enforcement commissions from the OJS and 298, or 37 %, were handled by the Lake County Sheriff's Department. Irwin Declaration, p. 3, ¶ 7.

matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds." *Ruiz*, 415 U.S. at 232. The statements of OJS officials demonstrate clearly that its determination of eligibility is neither rational nor consistent with congressional intent. It was entirely *ad hoc*: the OJS just decided that it would not enter into 638 contracts with Indian tribes in P.L. 280 states.

Faced with facts and claims that are essentially identical to those in the present case, the *Los Coyotes* Court applied the analysis set forth in *Ruiz*, *Califano*, *Harris*, and *Ramah* and concluded: "[T]he Court finds that Defendants may not decline Plaintiff's 638 contract for law enforcement funding solely on the basis of Plaintiff's location in a P. L. 280 state. Defendants' policy violates the ISDEAA, the APA, and Plaintiff's right to equal protection of the law." *Los Coyotes*, 2011 U.S. Dist. LEXIS 125213 at *7.

There is no rational basis to justify defendants' history of refusing to fund California Indian law enforcement programs. The OJS funding policy is not an equitable policy, nor a fair policy, nor a rational policy.[8] It is simply an expression of bureaucratic inertia and intransigence. The OJS has not met its burden of providing a rational basis for the its refusal to fund law enforcement programs for Indian tribes in California. The OJS funding policy is arbitrary and a violation of the ISDEAA, the APA, and the Tribes' right to equal protection.

III.

Defendants' Policy Is Also a Violation of the ISDEAA and the APA Because it Was Not Promulgated Through the APA's Rule-making Procedures.

Under the ISDEAA, the Secretary's authority to promulgate implementing regulations is limited to sixteen specific topics. Outside of those topics, the Secretary may not promulgate any regulation or impose

[8] The failure of the Secretary to develop an equitable funding formula for the allocation of funds appropriated by Congress for tribal law enforcement services is also a violation of the TLOA. The TLOA provides: ". . . the Secretary . . . shall be responsible for . . . the formula, priority list or other methodology used to determine the method of disbursement of funds for the public safety and justice programs administered by the Office of Justice Services." 25 U.S.C. § 2802(c)(16)(D).

> any nonregulatory requirement relating to self-determination contracts. *ISDEAA § 450k(a)*; *see also 25 C.F.R. § 900.5* ("[A]n Indian tribe or tribal organization is not required to abide by any unpublished requirements such as . . . policy directives of the Secretary, unless otherwise agreed to by the Indian tribe . . . , or otherwise required by law."). *Section 450k(a)(2)* requires that any implementing regulation be promulgated under the APA's rulemaking provisions, *5 U.S.C. §§ 552, 553*. Under *Section 450k(d)(1)*, when promulgating regulations, Defendants must confer with representatives of Indian tribes, tribal organizations, and individual Indians.

Los Coyotes, at *8-9.

25 U.S.C. 450(k)(a)(1) prohibits the Secretary from imposing non-regulatory requirements on tribes seeking 638 contracts. The Secretary may not "impose any nonregulatory requirement, relating to self-determination contracts or the approval, award, or declination of such contracts. . . ." The Secretary has the authority to promulgate regulations pursuant to the ISDEAA, but, in order to do so, the Secretary must comply with the requirements of the APA. "The regulations promulgated under this Act, . . . shall be promulgated--(I) in conformance with sections 552 and 553 of title 5, United States Code and subsections (c), (d), and (e) of this section." Section 450(k)(2)(A)(I). Sections 552 and 552 of title 5 set forth the requirements for formal rulemaking. Among those requirements are that proposed regulations be published in the Federal Register, that interested parties be permitted to submit comments, data, and arguments relating to the proposed regulations and that final regulations be published in the Federal Register.

There is no basis for concluding that the Secretary has promulgated any regulations imposing a ban on appropriating funding for law enforcement services to tribes in P.L. 280 states or that the applicable rulemaking requirements of the APA have been met. No regulation implementing the policy is included in Title 25 of the Code of Federal Regulations. No Federal Register Notice has been published announcing the promulgation of any such final regulation. No Federal Register Notice has ever been published setting forth a proposed regulation implementing the policy and no comments from interested parties have ever been solicited.

More important, even if the Secretary had intended to promulgate such regulations he could not do so. Regulations promulgated pursuant to the ISDEAA may only relate to sixteen topics.[9] Those topics do not include funding formulas for 638 contracts.

The OJS's adoption of a policy of denying 638 contracts to Indian tribes in P.L. 280 states is a nonregulatory requirement that is prohibited by the ISDEAA. The defendants, therefore, have violated the ISDEAA:

> The Court therefore agrees with the Plaintiff that Defendants' unwritten policy violates *Section 450k of the ISDEAA*. [2] As in *Ramah*, if viewed as a regulation, it would violate *Section 450k(a)(2)* because it was never subjected to the APA's notice and comments procedure. Since it has not been promulgated (and cannot be because it is outside of the sixteen delineated areas), it must be deemed a nonregulatory requirement, in violation of *Section 450k(a)(1)*.

Los Coyotes, at *11.

The defendants have also violated the APA: "[T]he Court finds that Defendants' unwritten policy cannot constitute a 'general statement of policy,' due to Defendants' limited discretionary powers under the ISDEAA. Defendants have consequently violated the APA by failing to follow the notice and comment procedures." *Id.*, at *15-16.

IV.

Defendants Application of its Policy Is Also Arbitrary.

Not only is the policy of categorically excluding tribes in P.L. 280 states from

---

[9]The permissible topics under 25 U.S.C. §450k(a)(1) are:
chapter 171 of title 28 [*28 USCS §§ 2671* et seq.], United States Code, commonly known as the "Federal Tort Claims Act", the Contract Disputes Act of 1978 (*41 U.S.C. 601* et seq.) [*41 USCS §§ 7101* et seq.], declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103 [*25 USCS § 450h*], property donation procedures arising under section 105(f) [*25 USCS § 450j(f)*], internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

receiving 638 contract funding for law enforcement services an arbitrary policy, the defendants' application of that policy is also arbitrary, in violation of the ISDEAA, the APA and the Tribes' right to equal protection.

The OJS attached to its denial of the Hopland Band's, Robinson Rancheria's, and Coyote Valley Band's request for 638 Contracts a spread sheet entitled "Office of Justice Services – Appropriated Funds as of April 3, 2009." The spreadsheet reveals that, in 2009, the OJS appropriated 638 contract funds to at least three tribes in California (Quechan, Fort Mojave, and Colorado River) and a number of tribes in at least three other P.L. 280 states (Minnesota, Wisconsin, and Florida). Exhibit D to Complaint. Padi Declaration, p. 3, ¶ 9; p. 4, ¶ 12, and Exhibit H to the Complaint.

The implications of the information contained in the OJS spreadsheet was analyzed in detail in the *Los Coyotes* decision.

> OJS attached to its declination a list of tribes that have received 638 contracts for law enforcement. The list contained three California tribes that straddle the border with Nevada and Arizona (which are not P.L. 280 states). At the informal hearing, OJS acknowledged that the funding provided to these tribes was in no way restricted to the portion of the reservations outside of California.[10] Therefore, at least three tribes with portions of their reservations in California receive law enforcement

---

[10]The OJS's willingness to tiptoe right up to the edge of active misrepresentation is also evident from its correspondence with the Tribes. In the cover letter provided to the Hopland Band, McDonald stated:

> For your convenience, please see the enclosed spreadsheet titled "Office of Justice Services – Appropriated Funds as of April 3, 2009." There, under District 3 (page 2), you will find a breakdown of all funds spent toward providing either direct law enforcement service to or 638 contract funds for tribes within District 3's administrative jurisdiction. While that jurisdiction includes the State of California, you will note that not a single California tribe is listed as receiving any law enforcement funds–through provision of direct services or through 638 contracts. While it is true that Quechan, Fort Mojave, and Colorado River tribes have land in California, all three have land in Arizona as well, which is not a P.L. 280 state, and *so the Arizona portions of those tribes [sic] receive law enforcement services and/or funds from District 3 of OJS*.

May 20, 2009 letter from Selanhongva McDonald, Special Agent in Charge, BIA/OJS, District III, p.1. Padi Declaration, p. 3, ¶ 9, ane Exhibit D to the Complaint.

Clearly, the intended implication is that the funding is not being used in the California portions of the tribes reservations.

> funding through a 638 contract. Further, the list contained several tribes in other P.L. 280 states (Minnesota, Wisconsin, and Florida) that were rewarded 638 contracts for law enforcement. . . . Defendants have provided no reasonable explanation for why some tribes in P.L. 280 states receive law enforcement funding, while others do not. The Court therefore finds that the Defendants have violated the APA by their arbitrary application of the policy.

Los Coyotes, 2011 U.S. Dist. LEXIS 125213 at 17-18.

Later, after noting that "certain tribes in California and other P.L. 280 states have received 638 contracts for law enforcement funding," the *Los Coyotes* Court concluded:

> There is no longer the distinction of state jurisdiction, and Defendants have not provided evidence of any rational basis for providing law enforcement funds to some tribes in P.L. 280 states, but not others. The Court therefore concludes that through their differing treatment of tribes within P.L. 280 states, Defendants have violated Plaintiff's right to equal protection of the law.

Los Coyotes at *21-22.

Further evidence of the OJS's arbitrary implementation of its policy can be found in the defendants' denial of the second 638 contract for law enforcement services submitted by the Hopland Band. After denying the first contract submitted by Hopland, **because it included a funding request**, the OJS denied the second proposed contract **because it did not include a funding request**. The OJS asserted that it could not approve the request because a funding request is a required element of a 638 contract.

> The transfer of funding is integral to Public Law 93-638. All programs and services that the Secretary provides must be supported by resources. Those resources *are* what the Secretary can transfer to a tribe that assumes a program or service. Absent identifiable resources to be passed on to a tribe, there is no program or service for the tribe to assume.

Exhibit J to Complaint, p. 4-5, Padi Declaration, p. 4, ¶ 16.

This statement removes any vestiges of legitimacy, should any remain, of the OJS's appropriations "policy." Apparently, the OJS is so driven to avoid entering into 638 contracts that it willing to use any excuse as a basis for denial, including completely self-contradictory excuse making. The OJS appropriations policy and its

application are both manifestly arbitrary.

The defendants' denial of Hopland's, Robinson's, and Coyote Valley's 638 contracts also violates 25 C.F.R. § 900.25, which states:

> What if only a portion of a proposal raises one of the five declination criteria?
> The Secretary must approve any severable portion of a proposal that does not support a declination finding described in §900.20, subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

25 C.F.R. §900.26 specifically addresses the circumstances of this case:

> What happens if the Secretary declines a part of a proposal on the ground that the proposal proposes in part to plan, conduct, or administer a program, function, service or activity that is beyond the scope of programs covered under section 102(a) of the Act, or proposes a level of funding that is in excess of the applicable level determined under section 106(a) of the Act?
> In those situations the Secretary is required, as appropriate, to approve the portion of the program, function, service, or activity that is authorized under section 102(a) of the Act, or approve a level of funding that is authorized under section 106(a) of the Act. As noted in §900.25, the approval is subject to any alteration in the scope of the proposal that the Secretary and the Indian tribe or tribal organization approve.

These provisions require that, even if the Secretary could have denied the funding element of the proposed 638 contract, the Secretary was compelled to enter into the contract to at least allow the Tribes to take over the responsibility for enforcing federal law. The funding provisions could have been denied separately and that decision could have been challenged by the Tribes independent of the other provisions of the proposed 638 contracts. Instead, the Secretary denied the proposed contracts no matter what the funding amount, in violation of his obligations under the regulations.

25 C.F.R. §900.30, furthermore, requires that the Secretary provide technical assistance where he denies a proposed contract:

> When the Secretary declines all or a portion of a proposal, is the Secretary required to provide an Indian tribe or tribal organization with technical assistance?
> Yes. The Secretary shall provide additional technical assistance to overcome the stated objections, in accordance with section 102(b) of the Act, and shall provide any necessary requested technical assistance to develop any modifications to overcome the Secretary's stated objections.

The Secretary offered no technical assistance after denying the Tribes' proposed 638 contracts. Once again, the Secretary failed to meet his obligations under his own regulations.

V.

The Defendants Failed to Fulfill Their Fiduciary Obligations to the Tribes.

It is undisputed that the United States maintains a trust relationship with all federally recognized Indian tribes. *Seminole Nation v. United States,* 316 U.S. 286 296-297 (1942). "This principal has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). See, *e.g., United States v. Mason,* 412 U.S. 391, 398 (1973); *Minnesota v. United States,* 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe,* 304 U.S. 111, 117-118 (1938); *United States v. Candelaria,* 271 U.S. 432, 442 (1926); *McKay v. Kalyton,* 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock,* 185 U.S. 373, 396 (1902); *United States v. Kagama,* 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia,* 5 Pet. 1, 17 (1831). The existence of a fiduciary responsibility toward Indians exists independent of the express provisions of a treaty, agreement, executive order or statute. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 991 (Ct. Cl. 1980).

In the exercise of their trust responsibility towards the Tribes, the Secretary and his representatives' conduct must be exercised with "great care," *United States v. Mason*, 412 U.S. 391, 398 (1973), in accordance with "moral obligations of the highest responsibility and trust," and must be measured "by the most exacting fiduciary standards." *Smith v. United States*, 515 F. Supp. 56, 58 (N.D. Cal. 1978).

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States, 316 U.S. at 296-297.

In carrying out its trust obligations to Indian people, the United States must exercise the same duty of care as that of a private trustee or fiduciary in managing a private trust. "It is well established that [the] conduct of the Government as a trustee is measured by the same standards applicable to a private trustee." *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238, 1245 (N.D. Cal.1973). Thus, in determining whether the United States breached its trust duty to a tribe, a court is required to enforce the standards applicable to a private trustee. *Moose v. United States*, 674 F.2d 1277 (9th Cir. 1981); *Coast Indian Community v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1977). "A breach of trust is a violation by the trustee of any duty which he owes to the beneficiary." American Law Institute, RESTATEMENT OF THE LAW, 2d, Trusts 201 (1959); *First National Bank of Colorado Springs v. McGuire*, 184 F.2d 620, 625 (7th Cir. 1950).

A failure on the part of the Federal Government to fulfill its trust obligations to Indian tribes can provide a basis for the awarding of both equitable relief, *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 589 (10th Cir. 1992), *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1st Cir. 1975), and money damages against the United States, *Mitchell II*.

In order to successfully litigate a claim that a federal official has breached his trust obligations, an Indian tribe must establish that the court has jurisdiction, that the United States has waived its sovereign immunity with regard to the claim, and the existence of a claim upon which relief can be granted.

Federal courts have subject matter jurisdiction over breach of trust claims pursuant to 28 U.S.C. §1331, which grants jurisdiction over claims based on the Constitution, statutes and treaties of the United States and 28 U.S.C. §1362, which specifically authorizes suits by Indian tribes based on a federal question. Normally, money damages claims against the United States have to be brought in the Court of Federal Claims. However, 25 U.S.C. § 450m-1(a) grants federal district courts

jurisdiction to hear claims for money damages against the United States brought under the ISDEAA.[11]

The United States has waived its sovereign immunity relating to claims for equitable relief through the APA. As discussed above, the APA waives the sovereign immunity of the United States where a federal official has taken action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §§ 702, 706(2)(A). The APA's waiver applies to claims for breach of the federal government's fiduciary obligations to Indians. See, e.g., *Cheyenne-Arapaho Tribes, supra*; *Joint Tribal Council of the Passamaquoddy Tribe, supra*.

The United States has waived its sovereign immunity relating to claims for money damages through the Tucker Act, 28 U.S.C. § 1491. The Tucker Act gives the Court of Federal Claims jurisdiction to award damages upon proof of "any claim against the United States founded either upon the Constitution, or any Act of Congress," 28 U.S.C. § 1491(a)(1). The Tucker Act's companion statute, the Indian Tucker Act, 28 U.S.C. § 1505, confers the same waiver for claims for money damages filed by Indian tribes. As stated above, the ISDEAA itself grants federal district courts jurisdiction to hear claims for money damages against the United States brought pursuant to the ISDEAA.

The waiver provided for in those statutes standing alone, however, is not enough to allow a claim for equitable relief or for money damages to succeed. *United States v. Mitchell*, 445 U.S. 535, 538-540 (1980) ("*Mitchell I*"); *Mitchell II*, at 216. A litigant must also identify a statute creating a substantive right enforceable against the United States through equitable relief or money damages.

In the Ninth Circuit, in order for a claim for equitable relief based on a breach of

---

[11]"The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act."

trust claim to be successful, a tribe must be able to identify specific statutory or treaty obligations or pervasive regulation on the part of the federal government. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809-813 (9th Cir. 2006); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) "[although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."]; *Shoshone-Bannock Tribes v. Reno,* 312 U.S. App. D.C. 406, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("[A]n Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty.")

The requirements for a successful claim for money damages based on a breach of trust claim were set forth in *Mitchell II*: "a court must inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell II*, 463 U.S. at 218. Accord, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). In *Mitchell II*, the Court found that source of substantive law in statutes and regulations relating to the regulation of tribal timber resources, and the fact that the government "assumed such elaborate control over forests and property belonging to Indians." *Id. at 225*. A statute does not have to expressly provide for money damages; the availability of damages can be inferred. *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *Mitchell II*, at 217, n. 16. "It is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. at 472. A statute also does not need to include another waiver of sovereign immunity: "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." *Mitchell II*, at 218-219. The

federal government is liable for money damages where the breach of trust proximately caused the damages, "The test should always be that of proximate causation by a proven breach of trust." *Duncan v. United States*, 667 F.2d 36, 49 (Ct. Cl.1981).

Mitchell I and *II* provide the analytical structure for determining when a fiduciary duty qualifying under the Indian Tucker Act exists and when it does not. "*Mitchell I* and *Mitchell II* are the pathmarking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.'" *United States v. Navajo Nation*, 537 U.S. 488 (2003). In *Mitchell I*, the Supreme Court found that the General Allotment Act, 25 U.S.C. §331, et seq., did not provide a basis for granting money damages. The Supreme Court ruled that the trust created by the General Allotment Act was "limited," *Mitchell I*, at 542. Although the United States "held the land . . . in trust for the sole use and benefit of the Indian," 25 U.S.C. § 348, the statute gave the United States no functional obligations to manage timber, which was the basis for the plaintiffs' claims. The statute established that "the Indian allottee, and not a representative of the United States, is responsible for using the land," that "the allottee would occupy the land," and that "the allottee, and not the United States, was to manage the land." *Mitchell I*, at 542-543. The Supreme Court concluded that Congress did not intend to "impose any duty" on the Government to manage resources. *Id.*, at 542. The trust language, considered without reference to any statute beyond the General Allotment Act, was intended "to prevent alienation of the land" and to guarantee that the Indian allottees were "immune from state taxation," *Id.*, at 544.

Mitchell II was based on claims that went beyond the General Allotment Act. The Supreme Court found that, in contrast with the "bare" trust created by the General Allotment Act, *Mitchell II*, at 224, the statutes and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by those statutes and regulations were enforceable through money damages. Through those statutes and regulations, the

Department of the Interior possessed "comprehensive control over the harvesting of Indian timber" and "exercised literally daily supervision over [its] harvesting and management," *Mitchell II,* at 209, 222 , giving it a "pervasive" role in the sale of timber from Indian lands under regulations addressing "virtually every aspect of forest management," *Mitchell II,* at 219, 220. The statutes and regulations gave the United States "full responsibility to manage Indian resources and land for the benefit of the Indians," and they "defined . . . contours of the United States' fiduciary responsibilities" beyond the "bare" or minimal level, and thus could "fairly be interpreted as mandating compensation" through money damages if the Government faltered in its responsibility. *Id.*, at 224-226.

The *Mitchell I* and *II* analysis has provided the foundation for successful damages claims brought by Indian tribes against the United States in a variety of contexts. In *White Mountain Apache Tribe,* the Supreme Court concluded that a statute holding the Fort Apache Military Reservation in trust for the White Mountain Apache Tribe, subject to the right of the Secretary to use any part of the land and improvements, gave rise to claims for money damages by the tribe. The claim in *White Mountain Apache Tribe* arose because the United States failed to maintain the buildings that it used on the reservation. The Supreme Court found that the statute established a fiduciary relationship, despite the fact that the Act did not, unlike the statutes cited in *Mitchell II*, expressly require the Government to manage and conserve tribal lands, resources, and property. The Court concluded that, by giving the United States authority to make use of the property, the statute imposed obligations, which, when unfulfilled, gave rise to a cause of action for damages: "This is so because elementary trust law . . . confirms the common sense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.'" *White Mountain Apache Tribe*, 537 U.S. at 475.

In *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), the Court of Claims

awarded damages to members of the Robinson Rancheria based on claims that the Secretary violated his fiduciary duties as trustee for the Tribe when the Secretary terminated the Tribe's status as a tribe and terminated all federal benefits, pursuant to the Rancheria Act, 72 Stat. 619 (1958), before fulfilling all of the federal government's obligations to the Tribe set forth in the statute. The Department of the Interior had failed to undertake and complete construction projects and improvements on the Robinson Rancheria required by the Rancheria Act, including the creation of a functioning water and sewer system. The court concluded that the federal government had a trust relationship with the Tribe, despite the fact that the legislation creating the Robinson Rancheria did not specifically so state. "[W]here the Federal Government takes over control or supervision of Indian property, the fiduciary relationship normally exists (unless Congress has provided otherwise) even though nothing is said expressly in the statute about a trust or fiduciary connection." *Id.*, 667 F.2d at 40. The court found that the Federal Government's failure to perform its obligations was a violation of the statute and the Secretary's trust obligations, which subjected the Federal Government to a suit for damages: "We see no adequate reason why a . . . suit cannot be brought here when . . . the Secretary breached the trust by illegally terminating that trust–contrary to the Act–causing comparable detriment to the Indians." *Id.*, at 44. The court found that losses due to mismanagement of trust funds and to mismanagement of tangible trust properties are compensable. "These are all injuries *proximately caused by the breaches of trust* shown here . . . and, accordingly, are included within the range of proper recovery." *Id.*, at 47-48. See *Manchester Band, supra*, 363 F. Supp. at 1245; *Coast Indian Community, supra*, 550 F.2d at 653.

When the requirements for granting equitable relief and money damages against the officials of the United Stated for breaches of their fiduciary obligations are applied to this case, it is evident that the Tribes are entitled to both equitable relief and money damages.

Clearly, the Court has jurisdiction over the Tribes' claims, because they are

based on the constitution, laws, and treaties of the United States. The United States has waived its sovereign immunity with regard to claims for equitable relief under the APA and money damages under the Tucker Act and the Little Tucker Act. The only question that remains is whether there is a statute or regulation that imposes specific duties on the Secretary towards the Indians, which if breached, can fairly be interpreted as mandating money damages for the defendants' breach of trust.

In the present case, the Court is not required to perform a intricate analysis to find a statute authorizing equitable relief or a statute that can be interpreted as mandating compensation through money damages. The Tribes' right to both equitable relief and money damages is set forth explicitly in the ISDEAA.

25 U.S.C. §450f imposes on the Secretary a mandatory obligation to approve a 638 contract unless he can identify one of the grounds for denial listed in 25 U.S.C. §450f(a)(2). This, the Secretary has failed to do. The Secretary's denial is based on the Secretary's imposition of an arbitrary, non-regulatory, unwritten and unannounced policy of refusing to enter into 638 contracts for law enforcement services with Indian tribes located in P. L. 280 states, which does not fall within any of the ISDEAA's listed bases for denial. That policy also constitutes a failure to fulfill defendants' obligation to review proposed 638 contracts in a good faith effort to enter into the contracts. 25 U.S.C. §450f. Defendants failure to meet their obligations to approve the 638 contracts constitutes a failure to meet their fiduciary obligations to the Tribes by failing to fulfill specific obligations mandated under the ISDEAA.

The ISDEAA also imposes an obligation on the Secretary to assist Indian tribes to resolve the objections that are the basis for the Secretary's refusal to approve a 638 Contract:

> Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall– . . .
> (2) *provide assistance to the tribal organization to overcome the stated objections*,

25 U.S.C. §450f(b).

The Secretary has unquestionably failed to fulfill his obligation to assist the Tribes to "overcome the stated objections." Those to whom he delegated authority to evaluate the proposed 638 Contracts have imposed a policy of categorically and arbitrarily denying all such contracts when submitted by tribes located in P. L. 280 states. Rather than doing their best to fulfill their legal and fiduciary duties to the Tribes, the defendants appear to be determined to *prevent* the Tribes from providing effective law enforcement services on their reservations through the 638 contracting process.

The fact that OJS did not make any attempt to find a way to make the proposed 638 contracts acceptable is unmistakable evidence that the intention of the Federal Defendants was to satisfy the bureaucratic imperatives of the OJS, the BIA and the DOI, not the needs of Indian tribes for effective law enforcement in Indian Country. See 25 C.F.R. § 900.30.

The defendants obligations under the ISDEAA are obligations arising from the federal government's trust relationship with and trust obligations to Indian tribes. The Secretary's obligation to approve and fund 638 contracts derives directly from the trust relationship between the Secretary and Indian tribes. The purpose of the ISDEAA is to promote tribal self-government and the development of tribal governmental authority and institutions by allowing tribes to take over programs that would otherwise be administered by the federal government. The requirement that the Secretary consult with tribes and attempt to resolve any problems with a proposed 638 contract also arises from the trust relationship. It is designed to promote and strengthen the government-to-government relationship between the federal government and Indian tribes. The Secretary's fiduciary responsibilities also arise from the ILERA and the TLOA, which were enacted to help ensure effective law enforcement in Indian Country.

More broadly, the Secretary, in his fiduciary capacity, was required to take the Indians' best interests into account when making any decision involving the Tribes' requests for 638 contracts for law enforcement services by considering what is in the

best interests of the Tribes. The Tribes need effective law enforcement on their reservations. The Secretary's failure to meet that mandatory obligation as a result of an arbitrary and discriminatory policy is undeniably a violation of his trust obligations to the Tribes.

Even if the Secretary's refusal to approve the 638 contracts was based on legitimate statutory ground, which it was not, he would not have fulfilled his fiduciary obligations to the Tribes. "When the Secretary is obligated, as in this case, to act as a fiduciary, 'then his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under more stringent standards demanded of a fiduciary.'" *Cheyenne-Arapaho Tribe*, at 590-591, citing *Jicarilla Apache Tribe v. Supron Energy*, 728 F.2d 1555, 1563 (10th Cir. 1984)

Moreover, a fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and **funds**)." *United States v. Mitchell,* 463 U.S. 206, 225 (1983).

Here, the Secretary has taken over management of funds appropriated by Congress for the benefit of tribes to provide law enforcement services on the Tribes' reservations. Rather than equitably apportioning the funds among all tribes in the United States, pursuant to a non-discriminatory funding formula adopted by the Secretary through formal rulemaking, the Secretary mismanaged the funds by arbitrarily denying the Tribes' their proportionate share. The actions of the Secretary in breaching the specific duties imposed upon the Secretary under the ISDEAA proximately caused the Tribes to not receive their proportionate share of the fund. This mismanagement of the fund clearly is a breach of the Secretary's fiduciary obligation that he owes to the Tribes. The defendants have not only failed in their responsibility to provide adequate law enforcement services to California tribes, but they have also arbitrarily allocated OJS funds that the Tribes have an absolute right to

contract for in such a way as to deprive the Tribes of law enforcement services comparable to that provided to Indians and tribes living in other parts of the country. That the Secretary cannot do consistent with his trust duties.

> There is a presumption that absent explicit language to the contrary, all funds held by the United States for Indian tribes are held in trust [citation omitted]. Therefore, courts correctly recognize a trust relationship even where it is not explicitly laid out by statute. Specifically, "where the Federal Government takes on or has control or supervision over tribal monies . . . , the fiduciary relationship normally exists with respect to such monies . . . even though nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection.

Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001).

The Secretary's policy of categorically refusing to enter into 638 contracts with the Tribes because they are located in a P. L. 280 state is arbitrary and a violation of the ISDEAA, the APA, and the Tribes' right to equal protection. That arbitrary policy clearly fails to meet "the most exacting fiduciary standards." The Secretary's fiduciary responsibility compels him to take the Tribes' best interests into account when making any decision on proposed 638 contracts. The Tribes need effective law enforcement on their reservations. That effective law enforcement is not being provided by the State of California. The Tribes seek the approval of the 638 contracts for law enforcement services as the best available means of establishing effective law enforcement services on their reservations. The Secretary's refusal to approve those contracts based on bureaucratic imperatives of the OJS is a stark, unapologetic violation of the defendants' fiduciary obligations to the Tribes. Under the express terms of the ISDEAA, the Court is authorized to grant both equitable relief and money damages. The Court, therefore, is authorized to order the Secretary to enter into the proposed 638 contracts for law enforcement services, provide funding for those contracts, and establish a valid funding formula for 638 contracts for law enforcement services. The Court is also to award damages in the amount of the funding requested in the originally proposed 638 contracts.

VI.

The Tribes Are Entitled to Money Damages under the ISDEAA.

There is no question that the ISDEAA authorizes this Court to grant the relief sought by the Tribes, including the award of money damages. 25 U.S.C. § 450m-1(a) states:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the **district courts may order appropriate relief including money damages**, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief **to reverse a declination finding under section 102(a)(2)** [*25 USCS § 450f(a)(2)*] or **to compel the Secretary to award and fund an approved self-determination contract**).

25 U.S.C. § 450m-1(a). (Emphasis added.)

The United States Court of Appeals for the 10th Circuit recently implemented this provision in *Southern Ute Tribe v. Sebelius*, 657 F.3d 1071 (10th Cir. 2011).

> The ISDA includes remedial provisions. Relevant here, it gives United States district courts jurisdiction to hear tribal claims against the Secretary for actions taken contrary to the ISDA. *25 U.S.C. § 450m-1(a)*. The district courts have authority to "order appropriate relief including money damages, injunctive relief against [the Secretary] . . . or mandamus . . . to compel the Secretary to award and fund an approved self-determination contract." *Id.*

Id., 657 F.3d at 1075.

The Tribes have requested that the Court issue an order compelling the defendant to enter into the 638 contracts submitted by the Tribe and to establish an equitable funding policy for 638 contracts for law enforcement services, including one for tribes in P.L. 280 states. The Tribes have also asked the Court to award them money damages in the amount of the requested 638 funds. The foregoing analysis reveals that the defendants had a mandatory duty to enter into the 638 contracts

proposed by the Tribes, because they did not meet any of the bases for denial set forth in Section 450f(a)(2). The Court is, therefore, authorized to issue an order to reverse the Secretary's declination finding under 25 USCS § 450f(a)(2) and to compel the Secretary to award and fund an approved 638 contract for each of the contracting Tribes.

Moreover, an award of money damages by the Court would not be affected by any alleged shortfall in funding for 638 contracts for law enforcement services. Any award would be paid out of the Judgment Fund, since this Court is sitting as the Court of Claims. 28 U.S.C. § 2517(a).

CONCLUSION

For all of the foregoing reasons, the Tribes respectfully request that their motion be granted.

DATED: May 25, 2012

Respectfully submitted,

RAPPORT AND MARSTON

/s/ Lester J. Marston

By: _____
Lester J. Marston
Attorneys for Plaintiffs