No. 11-57222

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS COYOTES BAND OF CAHUILLA AND CUPENO INDIANS,
Plaintiff-Appellee,

v.

KEN SALAZAR, Secretary of the Interior, Et Al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLANTS

STUART F. DELERY
Acting Assistant Attorney General

LAURA E. DUFFY
United States Attorney

BARBARA C. BIDDLE
(202) 514-2541
JOHN S. KOPPEL
(202) 514-2495
Attorneys, Appellate Staff
Civil Division, Room 7264
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitution:

Statutes:

Regulations:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-57222

LOS COYOTES BAND OF CAHUILLA AND CUPENO INDIANS,
Plaintiff-Appellee,

v.

KEN SALAZAR, Secretary of the Interior, Et Al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361 and 1362, as well as 25 U.S.C. § 450m-1, the jurisdictional provision of the Indian Self-Determination and Education Assistance Act ("ISDA" or "the Act"), 25 U.S.C. § 450 *et seq*. *See* Complaint, Docket Entry ("DE") 1, Excerpts of Record ("ER") 101-128. On October 28, 2011, the district court issued an order granting and denying each side's summary judgment motion in part, granting plaintiff injunctive relief, and finally disposing of the action. DE 43, ER 1-14.

Defendants filed a timely notice of appeal on December 22, 2011. DE 45, ER 15. This Court has appellate jurisdiction over the district court's ruling pursuant to 28 U.S.C. §§ 1291 and 1292(a).

STATEMENT OF THE ISSUE

Whether the declination of plaintiff's proposed ISDA self-determination contract to provide law enforcement services violated the ISDA, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553, 706(2)(A), and/or the equal protection component of the due process clause of the Fifth Amendment.

STATEMENT OF THE CASE

Plaintiff brought this action to challenge the declination of its proposed ISDA self-determination contract to provide law enforcement services, contending that the declination violated the ISDA, the notice-and-comment rulemaking provisions of the APA and the APA's substantive prohibition against arbitrary and capricious action, and the equal protection component of the due process clause of the Fifth Amendment. The parties filed cross-motions for summary judgment; by Order of October 28, 2011, the district court granted each side's motion in part and denied each in part, and awarded plaintiff injunctive relief.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The Bureau of Indian Affairs ("BIA") – a component of the Department of the Interior ("Interior" or "the Department") – provides a broad range of services, both directly and through funding agreements with tribes and tribal organizations, to 1.9 million American Indian and Alaska Natives who are members of one of 566 federally-recognized tribes.[1] *See* Declaration of George T. Skibine ("Skibine Decl.") ¶ 2, DE 33-2, ER 19-20. Among other services, the BIA may provide or contract with tribes to provide education, social services, and repair and maintenance of roads and bridges, as well as law enforcement, detention services, and administration of tribal courts. *See, e.g.*, 25 U.S.C. § 13 ("Snyder Act"); *see also* ISDA, Pub. L. No. 93-638, 88 Stat. 2203 (*codified as amended at* 25 U.S.C. § 450 *et seq.*); Skibine Decl. ¶ 9, ER 21-22. No federal statute, however, requires the BIA to expend money on any particular service on tribal lands. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005). Instead, the BIA works with tribes through an informal process known as Tribal Priority Allocation

[1] This is the current figure for federally recognized Indian tribal entities (*see* www.bia.gov (last accessed on April 30, 2012)), although as stated in the Skibine Declaration, there were 565 such entities at the time the Declaration was filed.

("TPA"), in which tribes choose to allocate federal funds to specified BIA services. Skibine Decl. ¶¶ 8, 11, ER 21, 22-23.

Historically, funds for law enforcement programs were part of the TPA process, but funds currently appropriated for law enforcement are now listed as separate budget program elements. *Id.* at ¶ 12, ER 23. For fiscal year 2010, Congress appropriated $2,335,965,000 for the operation of Indian programs authorized by, among other statutes, the Snyder Act, the ISDA, and the Tribally Controlled Schools Act of 1988. *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904, 2916-2917 (Oct. 30, 2009); Skibine Decl. ¶ 2, ER 19-20. Although Congress in that year and in other years designated a certain amount of appropriated funds for "public safety and justice programs," it has not otherwise imposed any limitations or directives as to how those public safety and justice funds should be allocated. *See id.* at ¶ 3, ER 20-21.

1. The ISDA Scheme

A tribe's or tribal organization's authority to contract with the BIA to perform BIA services arises under the ISDA. Congress created the ISDA to effect "an orderly *transition* from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the

planning, conduct, and administration of *those* programs and services." 25 U.S.C. § 450a(b) (emphasis added); *see also* 25 U.S.C. § 450b(j) (requiring the BIA to enter into contracts with tribes "for the planning, conduct and administration of programs and services *which are otherwise provided* to Indian tribes and their members.") (emphasis added).

Upon the request of a tribe or tribal organization, the ISDA requires the BIA to enter into a self-determination contract (sometimes referred to as a "638 contract") with the tribe to administer any program, function, service or activity ("PFSA") that is currently provided by the BIA for the benefit of the tribe. 25 U.S.C. § 450f(a)(1). The Act provides that the funding transferred pursuant to a self-determination contract "shall not be less than the appropriate [agency] would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract [if the agency had continued to provide the service itself]." *Id.* at § 450j-1(a)(1). This PFSA funding amount is sometimes called the "secretarial amount."[2]

---

[2] In 1988, Congress amended the ISDA to require that, in addition to the secretarial amount, the Secretary must also provide an amount for the tribe's reasonable "contract support costs" – *i.e.*, expenses that a tribe must incur to operate a federal program but that the Secretary would not incur (*see* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292, *codified at* 25 U.S.C. § 450j-1(a)(2)), including certain

(continued...)

In essence, a self-determination contract "*transfer[s]* the funding and the [] related [PFSAs] (or portions thereof)" from the BIA to a tribal organization. *Id.* at § 450*l*(c), model agreement § (a)(2) (emphasis added). Once a tribe obtains a 638 contract, so long as it remains substantially the same and the PFSAs have not been completed, and the tribe continues to perform satisfactorily, the BIA must renew the contract indefinitely. 25 U.S.C. §§ 450j(c), 450j-1(b)(2); 25 C.F.R. § 900.32.

The ISDA, however, does not require the Secretary to award a 638 contract that would (excluding "contract support costs," *see supra* at 5 n.2) exceed the amount of funds that the BIA expends on the particular program or service for the tribe. *Id.* § 450f(a)(2)(D). Nor can the BIA be required to reduce funding for

[2](...continued)
direct costs of administering a program, such as costs of complying with special audit and reporting requirements, and certain indirect costs, such as an allocable share of general overhead expenses not already covered by the secretarial amount. *See* 25 U.S.C. § 450j-1(a)(3)(A).

PFSAs for one tribe in order to enter into a 638 contract with another tribe.[3] *Id.* § 450j-1(b).

The issue in this case is whether, under 25 U.S.C. § 450f(a)(2)(D), the Secretary may lawfully decline to enter into an ISDA contract where the Secretary is not currently providing the services in question to the tribe – *i.e.*, where there is no "secretarial amount" to transfer to the tribe.

2. Enforcement of Criminal Laws in Indian Country

Federally-recognized tribes, states, and the federal government each have certain authority when it comes to law enforcement on tribal lands, and in some respects that authority varies depending on the state in which the tribal lands are

[3] In addition, tribes that have met certain financial management requirements may apply to enter the self-governance program pursuant to the Tribal Self-Governance Act. *See* 25 U.S.C. §§ 458aa-458hh. A self-governance tribe negotiates and enters into a Title IV funding agreement with the Office of Self-Governance in the Department. The funding agreement authorizes the tribe to administer specified services for the benefit of the tribe. *Id.* § 458cc(b). A self-governance tribe has broad authority to allocate the funds awarded in a funding agreement among the federal services that the tribe administers. *Id.* § 458cc(b)(3). Funds that Congress earmarks for a specific activity and funds that are awarded pursuant to a formula to carry out a particular activity cannot be reallocated, however. 25 U.S.C. §§ 450cc(b)(5)-(6). Historically, some self-governance tribes located in California and other states subject to Public Law 280 (*see infra* at 8) have allocated funds to law enforcement services. *See* Declaration of Darren Cruzan ¶ 11, DE 33-3, ER 43.

located.[4] Of particular relevance here is the question of whether a state has the authority to enforce its criminal laws against Indians on tribal lands. All states have the power to enforce their criminal laws against non-Indians on tribal lands within state boundaries, *see, e.g., New York ex rel. Ray v. Martin,* 326 U.S. 496 (1946), but most of them cannot exercise jurisdiction over Indians on tribal lands. *See, e.g., United States v. Baker,* 894 F.2d 1144, 1146 (10th Cir. 1990). Congress, however, has given Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin primary jurisdiction to enforce their criminal laws against Indians on tribal lands. Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (1953) (*codified as amended at* 18 U.S.C. § 1162(a)) ("Public Law 280"); *see Bryan v. Itasca Cnty.,* 426 U.S. 373, 379 (1976).[5] These states are known as "P.L. 280 states." Additionally, certain states, including California, authorize state law enforcement officials to deputize tribal police to enforce state law. *See, e.g.,* Cal. Penal Code § 830.6(b).

---

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

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

As for the United States, the Office of Justice Services ("OJS"), a component of the BIA established by the Indian Law Enforcement Reform Act of 1990 ("ILERA"), has authority to enforce, or contract with tribes for the enforcement of, certain federal criminal laws on all tribal lands.[6] *See* 25 U.S.C. §§ 2801, 2802(b)(1); *see also* 18 U.S.C. § 1162(c). In addition, OJS has primary responsibility for enforcing, on tribal lands in non-P.L. 280 states (all except California, Oregon, Minnesota, Nebraska, and Wisconsin), the Indian Country Crimes Act, 18 U.S.C. § 1152,[7] and the Major Crimes Act, 18 U.S.C. § 1153.[8]

---

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

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

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

Tribes may also authorize OJS to enforce their respective tribal laws on their lands. 25 U.S.C. § 2803(2)(B).

OJS resources are stretched thin across the board. For example, even in a non-P.L. 280 state like Oklahoma, OJS is able to provide only five law enforcement officers for six tribes with a combined population of over 15,000 members; likewise in Nevada, another non-P.L. 280 state OJS provides three law enforcement officers who drive hundreds of miles between reservations to provide coverage to four tribes. Declaration of Darren Cruzan ("Cruzan Decl.") ¶ 14, ER 44. In light of the authority of California and other P.L. 280 states to enforce their respective criminal laws against Indians on tribal lands, and because of competing demands on OJS's limited resources, OJS has directed fewer resources for direct law enforcement services toward tribes in P.L. 280 states than toward tribes in non-P.L. 280 states. *Id.* at ¶ 5, ER 41. But OJS still provides consultation, training, certification, and supervision of tribal law enforcement officers operating under Special Law Enforcement Commissions ("SLECs") in California and other P.L. 280 states. *See, e.g.*, *id.* at ¶ 13, ER 43-44.

3. The ISDA Administrative and Judicial Review Process

a. A tribe or tribal organization that wants to enter a self-determination contract to take over PFSAs performed by the BIA can begin the contracting

process either by submitting a contract proposal to the BIA or by requesting technical assistance from the BIA to help the tribe develop a contract proposal. 25 U.S.C. § 450f(a)(2); 25 C.F.R. §§ 900.7-900.8. The proposal must be supported by a tribal resolution, 25 U.S.C. § 450f(a)(1); 25 C.F.R. § 900.8(d), and must describe the PFSAs that the tribal organization proposes to perform. 25 C.F.R. § 900.8(g). The proposal must identify the funds requested for the PFSA(s) to be performed, including the tribal organization's share of BIA funds related to the PFSA(s). *Id.* at § 900.8(h). The proposal must also identify the contract support costs, including one-time start-up costs or pre-award costs presented by major categories such as personnel, equipment, materials, *etc.* *Id.* at § 900.8(h)(2).

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

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

> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
>
> (B) adequate protection of trust resources is not assured;

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

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

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

Furthermore, 25 U.S.C. § 450k prohibits the agency from promulgating regulations or imposing "nonregulatory requirement[s]" with respect to ISDA

contracts, except for regulations relating to 16 specifically delineated topics. *See id.* at § 450k(a)(1).

c. A tribal organization has two options to begin an administrative appeal of a declination. Within 30 days of the declination, the tribal organization may either: (1) request an informal conference as "a way to resolve issues as quickly as possible, without the need for a formal hearing," 25 C.F.R. § 900.153; or (2) appeal the declination to the Interior Board of Indian Appeals ("IBIA"). 25 C.F.R. §§ 900.150, 900.152.

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

the BIA. *See id.* at §§ 900.166, 900.167; Administrative Record ("AR") 355, 357, ER 97, 99.

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

If written objections are filed, the IBIA may modify, adopt or reverse the ALJ's recommended decision. 25 C.F.R. § 900.167(a). The IBIA's decision constitutes the final decision of the Department. *Id.* at §§ 900.167(b)-(c), 900.169. After a final decision issues from the Department, or in lieu of any administrative appeal, a tribal organization may initiate an action in federal district court or in the Court of Federal Claims within 12 months of the final declination decision. 25 U.S.C. §§ 450f(b), 450m-1(a); 41 U.S.C. § 7104(b) (*formerly codified at* 41

U.S.C. 609(a)(1), (3)); 25 C.F.R. § 900.31. Among other things, the court may provide immediate injunctive relief to reverse a declination finding or to compel the BIA to award and fund an approved self-determination contract. 25 U.S.C. § 450m-1(a).

B. Facts of the Case

Plaintiff is a federally-recognized tribe located in Warner Springs, California consisting of 316 tribal members. *See* AR 11, 134, ER 56, 61. The BIA currently provides plaintiff with $190,787 in annual funding, which the tribe directs toward aid to tribal government and Indian child welfare programs. Cruzan Decl. ¶ 13, ER 43-44. The BIA does not currently provide plaintiff with any funding for law enforcement services, nor does the BIA provide such services to plaintiff.[9]

On March 19, 2009, plaintiff submitted to the BIA a proposed self-determination contract for law enforcement services on the tribe's land in the amount of $746,110 for personnel, equipment, and materials costs, approximately

[9] OJS has issued SLECs to two of plaintiff's tribal law enforcement officers. These officers have been funded by Community Oriented Policing Services ("COPS") grants from the U.S. Department of Justice. OJS is also aware that, pursuant to the tribe's discretion provided under the TPA, plaintiff has used approximately $30,000 of its aid to tribal government funds received from the BIA to pay the salary of its tribal police chief. *See id*.

half of which consisted of start-up costs. AR 7-10, ER 52-55. Contrary to the requirements of 25 C.F.R. § 900.8(h)(1), the proposed contract failed to identify the source of the funds for programs, functions, services, or activities funded by the Department. *See* AR 9, ER 54 (requesting "additional" or "supplemental" funding without any modification of their current funding).

The BIA denied plaintiff's proposed contract on June 29, 2009, because, pursuant to 25 U.S.C. § 450f(a)(2)(D), the tribe's contract would exceed the amount of funds that the BIA devotes to law enforcement services for the tribe. AR 11-13, ER 56-58. The BIA stated that neither plaintiff nor any other California tribe (with a few exceptions[10]) was currently receiving any OJS law enforcement funds, either through provision of direct services or through 638 contracts over a three- year period. *Id.* at 12, ER 57. As the BIA explained, because OJS was not providing any law enforcement services to plaintiff, there were no funds to transfer to plaintiff pursuant to a 638 contract. *Id.*

Plaintiff pursued an informal conference, at which time the BIA once again documented (this time over a six-year period) that funds were not provided for

[10] The BIA did acknowledge that three California tribes have lands in Arizona, which is not a P.L. 280 state, and therefore had received funds for law enforcement, and that OJS had previously provided one law enforcement consultant in Sacramento, California, but that position had been eliminated years before. *Id.* at 12, ER 57.

either direct law enforcement services or for 638 contracts in California. *See* AR 258, ER 67. After the informal conference, the designated representative issued a decision and recommendation encouraging OJS to seek further appropriations from Congress for law enforcement and enter into the 638 contract with plaintiff. *See id.* at 302-324A, ER 68-91. The BIA appealed that recommendation, but the IBIA held – without reaching the merits of the recommended decision – that under the BIA's current regulations, OJS does not have a right of appeal to the IBIA from a recommended decision. *Id.* at 350-356, ER 92-98. Thereafter, because OJS did not have funds allocated to direct law enforcement services for the benefit of the tribe, OJS ultimately rejected the designated representative's recommendation.[11]

In response, plaintiff timely filed the present action in district court. *See* Complaint, ER 105-132. Plaintiff maintained five causes of action against the BIA, claiming that the decision to decline to enter into the proposed 638 contract for law enforcement services violates: (1) Section 450k(a)(1) of the ISDA, 25 U.S.C. § 450k(a)(1), because OJS allegedly denied the contract for a

[11] OJS determined that the recommended decision – which called on the Assistant Secretary-Indian Affairs to seek additional funding from Congress and reassess BIA funding priorities – failed to establish a violation of law and was not binding on the Secretary of the Interior. *Id.* at 357, ER 99.

"nonregulatory" reason, Complaint ¶ 25, ER 113; (2) Section 553 of the APA, 5 U.S.C. § 553, because OJS allegedly failed to provide notice for the basis of its decision as a proposed rule in the Federal Register or accept comment on that proposed rule (Complaint ¶ 32, ER 114-115); (3) Section 706(2)(A) of the APA, 5 U.S.C. § 706(2)(A), because OJS's decision was allegedly arbitrary and contrary to law (Complaint ¶ 39, ER 116); (4) the equal protection component of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, because OJS allegedly has approved other 638 contracts for law enforcement services in P.L. 280 states, including California (Complaint ¶ 42, ER 116-117); and (5) the trust obligations of the United States because OJS allegedly has a trust obligation to keep the tribe safe and secure. (*id.* at ¶ 46, ER 117).

The parties filed cross-motions for summary judgment, and by Order of October 28, 2011 ("Order"), the district court granted each side's motion in part and denied each in part. The court determined that Los Coyotes was not actually challenging the "declination itself," Order 6, ER 6, and stressed that the court was not "requiring that Defendants issue the contract or otherwise dictating how Defendants should allocate their funds." *Id.* at 4, ER 4. "Instead, to level the playing field and ensure that Plaintiff's request receives a fair evaluation, the

Court enjoin[ed] Defendants from using California's P.L. 280 status as the sole reason for declining Plaintiff's contract proposal." *Id*.

The court held that OJS's declination violated: (1) 25 U.S.C. § 450k(a)(1), because OJS's "unwritten policy" not to allocate funds for law enforcement services to tribes in P.L. 280 states imposed a "nonregulatory requirement" on plaintiff that fell outside the sixteen "specific topics" delineated by § 450k about which the BIA may issue regulations governing ISDA contracts (Order 5-7, ER 5-7); (2) 5 U.S.C. § 553, because its funding allocation imposed a substantive requirement on the tribe without meeting the APA's notice and comment requirements (Order 7-8, ER 7-8); and (3) 5 U.S.C. § 706(2)(A) and the Fifth Amendment, because OJS failed to provide a reasonable explanation why it provides funds to some tribes located at least in part in P.L. 280 states, and does not provide funds to other tribes, such as plaintiff, in P.L. 280 states (Order 8-11, 12-14, ER 8-11, 12-14). The court rejected plaintiff's claim that OJS had violated its Indian trust obligations. *Id.* at 11-12, ER 11-12.

In closing, the court reiterated that it "enjoin[ed] Defendants from denying Plaintiff's 638 contract solely on the basis of California's status as a P.L. 280 state," and that it "f[ound] that Defendants' unwritten policy of denying law enforcement funding to tribes in P.L. 280 states violates the ISD[]A[], the

Administrative Procedures [*sic*] Act, and Plaintiff's right to equal protection of the law." *Id.* at 14, ER 14.

SUMMARY OF ARGUMENT

The district court's order granting summary judgment in favor of plaintiff does not withstand scrutiny. The challenged declination decision does not violate any provision of law, let alone all of the provisions cited by the court.

1. The agency's declination decision in this case was manifestly correct, irrespective of any BIA policy concerning law enforcement funding in P.L. 280 states. That is because the ISDA does not grant an Indian tribe the right to demand funding for federal programs or services that the federal government would not otherwise have provided to the tribe. The Act simply enables tribes to take over and administer in their own names the federal programs and services that, absent a self-determination contract, the relevant Secretary is providing directly. *See* 25 U.S.C. §§ 450f(a)(1), 450j-1(a)(1). Thus, a tribe that receives health services at a clinic operated by the Indian Health Service may request an ISDA contract to administer the clinic itself; a tribe that receives educational services from the Bureau of Indian Education may contract to run the school itself. But a tribe that, like plaintiff here, does not receive a particular service from the

federal government has no right under the ISDA to demand that the government provide that service merely so that the tribe can administer it.

It is undisputed that plaintiff was not receiving law enforcement services from the BIA at the time of its ISDA contract proposal, nor did the BIA plan to provide such services to plaintiff in the future. There was, therefore, nothing for the tribe to administer in its own name under the ISDA. Under these circumstances, the BIA properly declined plaintiff's contract proposal under 25 U.S.C. § 450f(a)(2)(D), which authorizes declination of a proposed ISDA contract when "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j–1(a) of this title." The "amount of funds proposed" by plaintiff for law enforcement services was $746,110. And the "applicable funding level for the contract" – *i.e.*, the amount of funding that the BIA "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract," 25 U.S.C. § 450j-1(a)(1) – was zero dollars. The agency's declination decision should therefore have been upheld.

2. The issues on which the district court focused – the existence and contours of an alleged BIA policy against funding tribal law enforcement programs in P.L. 280 states – are largely irrelevant. California's status as a P.L.

280 jurisdiction has no bearing on plaintiff's entitlement to an ISDA contract for law enforcement services. If, for example, the BIA *had* been providing federally funded law enforcement services to the tribe at the time of its contract request, the tribe would probably have been entitled under the ISDA to assume the management of those services, without regard to any agency policy concerning P.L. 280.[12] But because the agency was *not* providing such services and had no plans to do so, there was nothing for the tribe to contract under the ISDA – again, irrespective of California's status under P.L. 280. The BIA's sensible preference for spending federal law enforcement dollars in regions where state law enforcement resources are not available may well explain why plaintiff was not receiving federal law enforcement services from the OJS at the time the tribe submitted its contract proposal. But whatever the reason, the fact remains that the tribe was not receiving such services and had no independent legal right to demand them. The district court erred in failing to focus on the actual question before the court – the propriety of the declination.

---

[12] We say "probably" because it is conceivable that some other reason for declination might have applied. For example, it is possible that the OJS would only have provided a single law enforcement officer for multiple tribes in the region in which plaintiff is located, in which case it might not have been feasible for the tribe to administer under the ISDA only the portion of that officer's services that related to the plaintiff's territory.

3. In any event, the district court's reasoning was flawed on its own terms. In particular, the court erred in believing that it could declare invalid the agency's internal justification for determining how best to allocate among competing claimants the funds provided by Congress under a lump-sum appropriation. Such matters are committed to agency discretion by law. *See Lincoln v. Vigil*, 508 U.S. 182 (1993). Neither plaintiff nor the district court identified any freestanding legal obligation on the BIA to fund tribal law enforcement programs in P.L. 280 states at all, let alone to treat tribes in such jurisdictions as equally deserving of federal funding in achieving the agency's mission.

As the Supreme Court explained in *Lincoln*, "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. *Lincoln* also refutes the court's holding that the declination runs afoul of the APA in any respect. The district court's conclusion that the BIA's funding decisions as to tribes in different P.L. 280 jurisdictions violate the Fifth Amendment's equal protection guarantee is equally untenable: those decisions are subject to highly deferential "rational basis" review, and neither plaintiff nor the district court even attempted to "negative every conceivable basis which might support" such different funding outcomes, such as

differences in prevailing crime levels or available state law enforcement resources. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Finally, the district court's reliance upon the BIA's purported "unwritten policy" of declining to provide law enforcement services in P.L. 280 states, to justify the award of injunctive relief, is misplaced and infects the court's entire analysis. BIA has no such policy (nor could the court have properly found the existence of such a policy on cross-motions for summary judgment), and the court's ruling is erroneous as a matter of law. For all of these reasons, the district court's summary judgment ruling should be reversed.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *See, e.g., Nolan v. Heald Coll.*, 551 F.3d 1148, 1153 (9th Cir. 2009).

ARGUMENT

BIA'S DECLINATION OF PLAINTIFF'S PROPOSED ISDA CONTRACT, ON THE GROUND THAT THE AGENCY WAS NOT PROVIDING THE LAW ENFORCEMENT SERVICES THAT PLAINTIFF PROPOSED TO TAKE OVER, IS VALID UNDER ISDA, THE APA, AND THE FIFTH AMENDMENT.

Because the BIA does not currently provide law enforcement services to Los Coyotes, the agency correctly declined plaintiff's proposed ISDA contract to

undertake such services. The declination withstands scrutiny under the ISDA, the rulemaking and substantive review provisions of the APA, and the equal protection component of the Fifth Amendment's due process clause. The district court's flawed decision to the contrary should be reversed.

First and foremost, the court lost sight of the crucial fact that the BIA does not currently administer a law enforcement program for plaintiff. Thus, the amount of funds available under the ISDA is zero dollars, and the BIA is not obligated to enter into an ISDA contract with plaintiff to finance plaintiff's undertaking of such services. This point is dispositive here.

Furthermore, the district court's decision is internally inconsistent. The court held that the BIA has an unlawful "unwritten policy" of not providing law enforcement funding to tribes in P.L. 280 states, Order 6, ER 6, and found that (although the government disputed the existence of this purported policy) "there is no genuine dispute as to this fact because the administrative record supports" the existence of such a policy. *Id.* at 6 n.2, ER 6 n.2. The court based this finding upon a few snippets of the administrative record (*see id.*);[13] it further held,

[13] The first three items (AR 164, 253, 305, ER 62, 66, 71) are passing remarks, while the fourth (*id.* at 359, ER 101) is an abandoned rulemaking from 1987. None of these items, singly or in combination, establishes the existence of the alleged policy.

however, that several tribes in California and other P.L. 280 states *do* in fact receive law enforcement funding under ISDA. *Id.* at 8-9, ER 8-9.

The court cannot have it both ways. While the court viewed this state of affairs as an "arbitrary application of the policy" (*id.* at 9, ER 9), what it really establishes is that there is no such "unwritten policy." *See* Cruzan Decl. ¶¶ 7-11, ER 42-43. The court's basic premise therefore is mistaken, and this crucial error infects its entire ruling.

A. The Declination Of Plaintiff's Proposed ISDA Contract For Law Enforcement Services Does Not Run Afoul Of ISDA.

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

1. The ISDA contemplates the transfer of direct services being provided by the BIA for the benefit of a tribe to the administration of those very same services by the tribe itself with the corresponding funding transferring as well. *See* 25

U.S.C. § 450f(a)(1)(B). If the BIA is not providing such direct services to a tribe, then there are simply no responsibilities, and no funds, to transfer. This is made clear by the language of the statute itself. The ISDA requires that the BIA only contract "for the planning, conduct and administration of programs and services *which are otherwise provided* to Indian tribes and their members." 25 U.S.C. § 450b(j) (emphasis added). The ISDA effects "an orderly *transition* from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of *those* programs and services." 25 U.S.C. § 450a(b) (emphasis added). In short, a self-determination contract "*transfer[s]* the funding and the . . . related [PFSAs] (or portions thereof)" from the BIA to a tribal organization. *Id.* § 450*l*(c), model agreement § (a)(2) (emphasis added). A self-determination contract does *not* require the BIA to create and fund new federal programs for a tribe out of whole cloth.

ISDA further provides that the funding transferred pursuant to a self-determination contract "shall not be less than the applicable amount determined pursuant to section 106(a) of the [ISDA, *codified at* 25 U.S.C. § 450j-1]." 25 U.S.C. § 450*l*(c), model agreement § (b)(4). Stated another way, the amount "shall not be less than the appropriate [agency] would have otherwise provided for the

operation of the programs or portions thereof for the period covered by the contract [if the agency had continued to provide the service itself]." *Id.* at § 450j-1(a)(1). If no such funding exists, a contract proposal may be declined. *Id.* at §§ 450f(a)(2)(D), (4)(B). In such a case, there is no contractible program.

In this case, the Secretary correctly declined plaintiff's proposed 638 contract. Plaintiff's contract proposal did not offer to take over or transfer direct law enforcement services and related funding provided by the BIA for the benefit of the tribe. AR 7-9, ER 52-54. Indeed, it could not make such a request, because there was no such funding. Rather, the only funding plaintiff identified – a one-time COPS grant it had received from the U.S. Department of Justice in 2004, *see id.* at 8, ER 53 – was irrelevant to OJS's determination. Plaintiff also emphasized that its law enforcement officer funded by the Department of Justice had obtained training and a SLEC commission from the BIA under the ILERA. *Id.* at 9, ER 54. Neither of these details regarding the tribe's current law enforcement services establishes that the BIA operated direct law enforcement programs or services on behalf of the tribe which the tribe would be entitled to take over pursuant to the ISDA. Contrary to BIA regulations, the proposal did not identify any BIA funds provided for the benefit of the tribe, but instead proposed that the BIA allocate

what plaintiff itself described as "***additional***" funds to the tribe. *Id.* (emphasis in original).

Thus, the BIA correctly denied plaintiff's proposed 638 contract pursuant to 25 U.S.C. § 450f(a)(2)(D), because "the amount of funds proposed under the contract is in excess of the [BIA's] applicable funding level for the contract." *Id*. Moreover, because plaintiff has not contested the denial of its proposed contract on this, or any other of the enumerated bases in the ISDA, the tribe's challenge necessarily must fail and this case should be at an end.

In short, the BIA fully complied with the ISDA in declining plaintiff's contract proposal, and the district court erred as a matter of law in holding otherwise. The court wholly failed to address the arguments presented by the government demonstrating that the BIA properly declined plaintiff's proposed contract under the plain language of 25 U.S.C. § 450f(a)(2)(D). This failure alone constitutes reversible error in an action brought under the ISDA.

2. The court mistakenly ruled that BIA declined to enter into the tribe's proposed self-determination contract for a "nonregulatory" reason in violation of 25 U.S.C. § 450k. *See* Order 6, ER 6. Declining a contract proposal because the "amount of funds proposed under the contract is in excess of the applicable funding level for the contract," however, is one of the five permissible reasons

specified under the ISDA. 25 U.S.C. § 450f(a)(2)(D). By contrast, with limited exceptions not applicable here, 25 U.S.C. § 450k merely prohibits the BIA from promulgating regulations and imposing "nonregulatory requirement[s]" relating to the approval, award, or declination of self-determination contracts. *Id*.

25 U.S.C. § 450k is a red herring in this case. The essence of the district court's holding is that the BIA's explanation for why it generally has not provided law enforcement services to tribes in California was somehow equivalent to a "nonregulatory requirement" imposed upon plaintiff. However, it cannot reasonably be maintained that BIA's reason for declining to enter into its proposed self-determination contract – in keeping with one of five permissible statutory grounds – imposed a nonregulatory requirement on the tribe.

In support of its decision, the district court invoked *Ramah Navajo School Bd., Inc. v. Babbitt,* 87 F.3d 1338 (D.C. Cir. 1996). *See* Order 5-6, ER 5-6. But *Ramah* is readily distinguishable.

In *Ramah*, the D.C. Circuit addressed a challenge to a notice by the BIA published in the Federal Register announcing that, because Congress had not provided sufficient appropriations for the BIA to give all tribes with 638 contracts the full amount of contract support costs ("CSC") to which they were entitled under the ISDA, tribes that did not submit their indirect cost rates by June 30 of

each year would receive only fifty percent of their CSC. *Ramah,* 87 F.3d at 1342. The *Ramah* Court held that, because Congress had not provided the BIA with discretion to determine the manner in which it would allocate CSC, the BIA's notice violated the prohibition in 25 U.S.C. § 450k against promulgating regulations or imposing nonregulatory requirements (except for regulations regulating to 16 specified topics). *Ramah*, 87 F.3d at 1349-1350. As the basis for concluding that there was a statutory violation, the D.C. Circuit concluded that the Secretary had effectively imposed a requirement upon the tribes to meet the new June 30 deadline or accept a 50% reduction in their CSC entitlement. *Id.* at 1350. The *Ramah* Court likened this decision to implementing a "50% penalty" on certain tribes, exceeding the authority of the Secretary under the statute. *Id.*

This case, unlike *Ramah*, does not involve an extant 638 contract, and it has nothing to do with the ISDA provisions governing contract support costs. The dispute here is about whether the BIA properly declined plaintiff's contract proposal because the "secretarial amount" (*i.e.*, the funding plaintiff sought in its proposed contract to provide law enforcement services) exceeded the value (zero dollars) of the law enforcement services that the BIA currently provides to plaintiff. *See* AR 11-13, ER 56-58 (declining plaintiff's contract proposal under 25 U.S.C. § 450f(a)(2)(D), which authorizes a declination when the "amount of

funds proposed under the contract" (*id.*) exceeds the amount the BIA "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract," 25 U.S.C. § 450j-1(a)(1)). The distinction is a crucial one, because whereas tribes, once they have an ISDA contract, have a statutory entitlement to CSC (subject to congressional appropriations), *see* 25 U.S.C. §§ 450j-1(a)(2), 450j-1(g), they have no entitlement to a contract in the first place if the BIA is not currently providing the service at issue.

In relying upon *Ramah*, the district court essentially ruled that by proposing an ISDA contract to "take over" a service that the BIA does not currently provide, a tribe can obtain judicial review of the BIA's decisions on the allocation of its annual unrestricted lump-sum appropriation among the 566 federally recognized tribal entities, and among numerous activities such as education, social services, repair and maintenance of roads and bridges, law enforcement, detention services, and administration of tribal courts. This is contrary to controlling Supreme Court precedent, which teaches that such decisions are committed to agency discretion. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

Accordingly, *Ramah* does not advance plaintiff's "nonregulatory requirement" claim in the instant case. In contrast to *Ramah*, here the BIA has not imposed an unlawful "nonregulatory requirement" in violation of 25 U.S.C.

§ 450k; rather, the district court has improperly intruded into the province of the agency.

B. The Declination Of Plaintiff's Proposed ISDA Contract Does Not Violate The APA.

The district court also agreed with plaintiff that the BIA's declination of plaintiff's ISDA contract proposal for law enforcement services violates both the notice-and-comment rulemaking requirement of the APA and the APA's substantive prohibition on arbitrary and capricious agency action. These rulings are equally erroneous, for essentially the same reason that the court's holding concerning 25 U.S.C. § 450k is mistaken.

1. The Declination Does Not Violate the Notice-and-Comment Rulemaking Requirements of the APA, Which Are Inapplicable in this Context.

Lincoln v. Vigil, supra, also controls resolution of plaintiff's APA notice-and-comment rulemaking claim. In *Lincoln*, the Supreme Court reviewed a challenge to a decision of the Indian Health Service (" IHS") to discontinue a pilot program called the Indian Children's Program; operated pursuant to the Snyder Act, the program had served physically and mentally handicapped Indian children in the Southwest region of the United States. The Court held that the discontinuance of this program was a general statement of policy, not subject to

notice and comment, because it was a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." 508 U.S. at 197 (citation and internal quotation marks omitted); *see* 5 U.S.C. § 553(b)(A) (exempting from APA rulemaking requirements, *inter alia*, "general statements of policy"). The Court further held: "Whatever else may be considered a 'general statemen[t] of policy,' the term surely includes an announcement like the one before us, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation." *Lincoln*, 508 U.S. at 197.

By the same token, in *Serrato v. Clark*, 486 F.3d 560 (9th Cir. 2007), the Court applied this holding of *Lincoln* to a Bureau of Prisons ("BOP") decision to terminate a boot camp program without publishing the decision for notice and comment. *Serrato,* 486 F.3d at 569. The Court found that the case similarly involved "'a discretionary allocation of unrestricted funds from a lump-sum appropriation,'" not a rule subject to the APA's notice and comment procedures. *Id.* (quoting *Lincoln*, 508 U.S. at 197). As this Court held, "[b]ecause *Lincoln* controls, BOP's decision is a general statement of policy; notice and comment simply was not required." *Id.* at 569-570.

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

Once again, the district court relied upon *Ramah* for its contrary holding, concluding that BIA's "unwritten policy cannot constitute a 'general statement of policy,' due to the B[IA]'s limited discretionary powers under the" ISDA. *See* Order 8, ER 8. Not only was the court completely wrong about the BIA's "limited discretionary powers" in the context of this case, but that "unwritten policy" does not even exist (unlike the challenged policy in *Ramah*, whose existence was not contested), and therefore has no bearing whatsoever on the agency's broad discretion regarding allocation of unrestricted funds.[14] Most importantly, plaintiff may not use the device of a proposed ISDA contract to obtain judicial review of

[14] It is also of no moment that the BIA initially undertook rulemaking in this area, only to abandon it, *see id.* at 8 n.3, ER 8 n.3. Agencies are free to voluntarily undertake notice-and-comment rulemaking, so the abandoned rulemaking does not necessarily "indicate[] that Defendants had previously determined the policy was subject to the APA rulemaking process." *Id.*

the Secretary's discretionary funding decisions. *Ramah* therefore provides no support for this aspect of the court's ruling, either.

2. The Declination Does not Violate the APA's Prohibition Against Arbitrary and Capricious Agency Action.

Moreover, contrary to plaintiff's claim and the district court's ruling, the BIA's decision not to provide funding for law enforcement services to the tribe is not arbitrary and capricious agency action forbidden by 5 U.S.C. § 706(2)(A). Indeed, such funding decisions are not even susceptible to judicial review under the APA, because they are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In any event, under 25 U.S.C. § 450f(a)(2)(D), the agency did not act unreasonably in declining plaintiff's proposed contract for law enforcement services, given the fact that the BIA is not currently expending any funds on law enforcement services for plaintiff, and the agency's resources are extremely limited.

a. The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. However, "'review is not to be had' . . . where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'"

Lincoln, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). The most common and relevant example of an administrative decision that is committed to agency discretion and thus precluded from judicial review is an agency decision about how to allocate funds from a lump-sum appropriation. *Id.* at 192.

In *Lincoln*, a unanimous Supreme Court held that the IHS's decision to discontinue the Indian Children's Program was a decision about how to allocate funds from a lump-sum appropriation for other permissible statutory objectives and was therefore committed to agency discretion and precluded from judicial review. *Id.* at 193-194. The Court held that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. The Court explained:

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

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

Following *Lincoln*, federal courts (among them this Court) have consistently recognized that an agency's decision as to how to allocate scarce funding resources is "committed to agency discretion by law" and therefore unreviewable under the APA so long as the allocated funding is otherwise spent on permissible statutory objectives. *See, e.g.*, *Serrato,* 486 F.3d at 568-569 (prioritizing funds for BOP programs within statutory appropriations mandate was not reviewable); *Collins v. United States*, 564 F.3d 833, 839 (7th Cir. 2009) ("The prioritization of demands for government money is quintessentially a discretionary function."); *St. Tammany Parish v. FEMA*, 556 F.3d 307, 325 (5th Cir. 2009) ("Eligibility determinations, the distribution of limited funds, and other decisions regarding the funding of eligible projects are inherently discretionary and the exact types of policy decisions that are best left to the agencies without court interference."); *Bd. of Cnty. Comm'rs v. Isaac*, 18 F.3d 1492, 1498 (10th Cir. 1994) (FAA decision to withdraw tentative funding based on a statutory authorization requiring

expenditure to be "reasonably necessary for use in air commerce" was not reviewable).

For example, in *Serrato* this Court held that, because the BOP's decision to discontinue its boot camp met permissible statutory objectives, the decision was unreviewable. *Id.* at 568. The Court noted that Congress provided authority for BOP to operate a boot camp under 18 U.S.C. § 4046, but in using the word "may," did not mandate that the program operate continuously. 486 F.3d at 569.

Similarly, in *Quechan Tribe of Ft. Yuma Indian Reservation v. United States,* No. 10-02261, 2011 WL 1211574 (D. Ariz. Mar. 31, 2011), *appeal docketed,* No. 11-16334 (9th Cir.), the district court confronted a claim brought by a tribe alleging that IHS had a non-discretionary duty to provide health care on its reservation. *Id.* at *4. The court found that the plaintiff was really challenging the defendants' lack of funding at Fort Yuma. *Id.* at *5. Because Congress has not expressly appropriated funds to Fort Yuma but rather had allocated funds from a lump-sum appropriation to various permissible activities, the court held that IHS's decision was not judicially reviewable. *Id.*

In this case, the appropriation provision at the heart of plaintiff's challenge, *see* Pub. L. No. 111-88, 123 Stat. 2904, 2916-2917 (Oct. 30, 2009), is subject to the very same analysis. Although Congress has, in supporting the operation of

Indian programs, authorized funds for "public safety and justice programs" and "annual funding agreements entered into with the B[IA]," it has not mandated the use of appropriated law enforcement funds for any particular tribe. *See* 123 Stat. at 2916; *see also* Skibine Decl. ¶¶ 2-3, ER 19-21. And although Congress has occasion to review TPA funding made available to tribes by the Secretary of the Interior, *id.* at ¶ 10, ER 22, there is no appropriation by Congress that mandates that particular funds be allocated for the benefit of a particular tribe.

Given the Snyder Act's general authorization of expenditures for "the benefit, care, and assistance of Indians throughout the United States," 25 U.S.C. § 13, plaintiff does not (and cannot) allege that defendants are otherwise using money appropriated under the Act for impermissible purposes. *See* AR 243, ER 63. Rather, plaintiff attacks the Secretary's allocation of funds solely on the basis of what plaintiff asserts should be a higher budgetary priority for Congress and the BIA, *see, e.g.*, *id.* at 244-245, ER 64-65 (arguing for greater federal funding for tribal law enforcement in California given plaintiff's dissatisfaction with state and local law enforcement efforts in southern California).

This argument ignores many other considerations that defendants have in prioritizing limited funds nationally, including setting a ratio of 2.6 officers for every 1000 inhabitants, assessing costs per officer, costs of dispatch,

administrative support, and office space. *See id.* at 120-121, ER 59-60. It also ignores OJS's obligations to allocate law enforcement funds to tribes in non-P.L. 280 states with populations many times the size of Los Coyotes, for whom state and local law enforcement options are altogether unavailable. *See* Cruzan Decl. ¶ 14, ER 44 (describing OJS's provision of five law enforcement officers for six tribes with a combined population of over 15,000 members in Oklahoma). Ultimately, the BIA's allocation of funds among the various tribes for law enforcement purposes involves a discretionary decision in keeping with a permissible statutory objective. *See Int'l Union, United Autoworkers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."); *Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) ("The federal courts . . . were not established to operate the administrative agencies of government.").

In addition, there is no statutory mandate that the government provide a certain minimal level of law enforcement to any particular tribe. Rather, the primary limitation placed upon the Secretary of the Interior is that blocks of funding must be made available for particular sets of programs operated for tribes

across the nation.[15] *See* Skibine Decl.¶ 3, ER 20-21 (describing the eight general categories of Indian programs' funding). When appropriations are enacted with such few statutory limitations, the APA is not the proper mechanism for challenging a lack of agency-instituted programmatic changes; as the Supreme Court has explained, "[t]he principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness*

[15] The fact that the BIA issued a proposed regulation in 1987 regarding the allocation of law enforcement funds in Public Law 280 states, which was then addressed in a 1987 House Conference Report, *see* AR 358-362, ER 100-104, has no relevance. As plaintiff admitted in district court, the proposal was never finalized (*see* Pl. Mot. for Summary Judgment, DE 21, at 10), and thus never became legally binding upon the agency. *See, e.g.*, *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1207 (D.C. Cir. 1996) (although agency published proposed regulation for public comment, the proposal did not impose substantive obligations on agency and agency's decision to withdraw notice did not make it a "regulation" subject to APA review). Likewise, plaintiff's reliance upon language in the committee report addressing this proposal is also unavailing. *See Lincoln v. Vigil,* 508 U.S. 182, 192-193 (1993) ("[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.") (citation and internal quotations omitted); *see also Am. Hosp. Ass'n v. N.L.R.B.,* 499 U.S. 606, 616 (1991) (holding that statements in committee reports were not binding on the agency and do not "ha[ve] the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating").

Alliance, 542 U.S. 55, 66 (2004). Accordingly, under 5 U.S.C. § 701(a)(2), plaintiff's claim falls outside the scope of judicial review under the APA.

Once again, however, the district court incorrectly held that *Ramah*, rather than *Lincoln* and *Serrato*, controls the determination of whether a court may review the government's allocation of funds from its lump-sum appropriations for public safety and justice among tribes. Order 12-14, ER 12-14. But *Ramah* concerned the reviewability of the BIA's allocation of funds over which Congress gave the agency no discretion – not the reviewability of the BIA's allocation of funds from an unrestricted lump-sum appropriation.

Specifically, *Ramah* addressed how the BIA must reconcile a provision of the ISDA that requires the Secretary to add to a 638 contract "additional" CSC funds to cover the "full administrative costs" that a tribe incurs while operating 638 programs with an appropriations cap on those same CSC funds. *See Ramah,* 87 F.3d at 1341-42 (discussing 25 U.S.C. § 450j-1(a)(2) and Pub. L. No. 103-332, Tit. I, 108 Stat. 2499, 2511 (Sept. 30, 1994)). The BIA had chosen to reconcile these provisions by imposing a 50-percent reduction in CSC on certain tribal contractors that failed to meet a new agency-imposed annual deadline, and claimed that its decision was committed to agency discretion. *See id.* at 1342, 1343. The D.C. Circuit held that, because § 450j-1(a)(2) evidenced congressional

intent to limit, if not entirely eliminate, the agency's discretion in the allocation of CSC, the BIA's actions were subject to judicial review. *Id.* at 1347. Here, by contrast, plaintiff is challenging the BIA's decisions about how to allocate lump-sum appropriations for public safety and justice among various tribes – precisely the type of judgments that are committed to agency discretion.

The district court found *Ramah* to be "directly on point" because, unlike *Lincoln* and *Serrato*, *Ramah* "deals specifically" with the ISDA and "makes clear" that the BIA's discretion is limited under the ISDA. Order 14, ER 14. The court further stressed that "this case is not about the allocation of funds, but rather the *eligibility* to be considered for a 638 contract in the first place." *Id*. But the court lost sight of the fact that the relevant funding decisions in this case are not under the ISDA itself, but under other statutes such as the ILERA and the Snyder Act, and it is only after those funding decisions have been made that the question of ISDA "eligibility" arises. The district court's decision thus put the cart before the horse, and overlooked the fact that plaintiff is bringing a direct challenge to BIA's funding decisions wholly outside of the ISDA. Under 5 U.S.C. § 701(a)(2), and the controlling authority of *Lincoln* and *Serrato*, that challenge is impermissible.

b. In any event, assuming *arguendo* that the merits of plaintiff's APA challenge under 5 U.S.C. § 706(2)(A) are properly before the Court in any respect,

the BIA's declination determination under 25 U.S.C. § 450f(a)(2)(D) plainly is not arbitrary or capricious, in light of the fact that the agency is not currently expending any funds on law enforcement services to plaintiff, and the BIA's funds are extremely limited. The BIA's decision is consistent with the plain language of the ISDA, as there is no dispute that "the amount of funds proposed under the contract *is in excess of the applicable funding level for the contract, ...*" *Id.* (emphasis added). Nor can it be faulted for choosing not to allocate its scarce law enforcement resources to plaintiff (even if such a judgment were reviewable, which it is not, *see* subsection a, *supra*, at 36-44), which is receiving law enforcement services from the State of California. There is nothing irrational about such prioritizing. And as long as the agency has acted reasonably, its action must be upheld. *See, e.g., Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1150 (9th Cir. 2010) ("Because the agencies fully considered [the articulated] concerns, examined the relevant evidence, and made a reasonable conclusion, their actions were not arbitrary or capricious."); *Sacora v. Thomas*, 628 F.3d 1059, 1068 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 152 (2011) (reiterating that arbitrary and capricious standard of review is "'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision'" (citation omitted)).

Moreover, although the district court held that the BIA acted arbitrarily and capriciously with respect to plaintiff because the agency provides 638 funding to certain tribes in P.L. 280 states, the Cruzan Declaration explains at length why some tribes in P.L. 280 states have received 638 contracts for law enforcement services. *See* Cruzan Decl. ¶¶ 7-11, ER 42-43. Briefly, several tribes in California with federally-funded tribal law enforcement officers are self-governance tribes (*see supra* at 7 n.3) that have elected to direct a portion of their annual funding agreements to law enforcement services. Cruzan Decl. ¶ 11, ER 43. There are also two California tribes that have self-governance funding agreements because, in the mid-1990s, the BIA began providing direct law enforcement/natural resources (fisheries) enforcement services for both tribes to assist them in averting violent criminal acts relating to a dispute over fishing rights. *Id.* at ¶ 10, ER 42-43. Some other tribes have obtained such contracts for historical reasons having to do with their TPA funding. *Id.* at ¶ 9, ER 42. Finally, still other tribes in P. L. 280 states have received such contracts because their territory extends into a non-P.L. 280 state. *Id.* at ¶ 8, ER 42.

Plaintiff, by contrast, does not fall into any of these categories. *See id.* at ¶ 12, ER 43. Accordingly, the BIA reasonably declined plaintiff's proposed ISDA

contract for law enforcement services. The district court's contrary holding is erroneous.

C. The Declination Of Plaintiff's Proposed ISDA Contract Does Not Violate The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment.

The district court further erred in holding that the disparate treatment of certain tribes within P.L. 280 states lacks a rational basis and thus violates the equal protection component of the Fifth Amendment's due process clause. Order 10-11, ER 10-11. This ruling is at odds with controlling equal protection principles.

First, it is axiomatic that equal protection analysis only comes into play with respect to "persons who are in all relevant respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992); *see also Thornton v. City of St. Helens,* 425 F.3d 1158, 1167-68 (9th Cir. 2005) ("[D]ifferent treatment of unlike individuals does not support an equal protection claim."). Furthermore, the government unquestionably has broad discretion to allocate funds for programs such as law enforcement among the 566 federally-recognized tribes around the country without violating equal protection rights. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("[I]t does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it

results in some inequality.'" (quoting *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911))); *Aleman v. Glickman,* 217 F.3d 1191, 1201 (9th Cir. 2000) (recognizing that "courts are compelled under rational-basis review to accept" a government's classification, "even when there is an imperfect fit between means and ends" (citation and internal quotation marks omitted)).

It is equally well settled that rational basis review is "highly deferential." *United States v. Hancock,* 231 F.3d 557, 566 (9th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001). As a result, "equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic'" of the policy choices of federal agencies. *Heller v. Doe,* 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993)); *Kahawaiolaa v. Norton,* 386 F.3d 1271, 1279, 1283 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005) (applying rational basis scrutiny to review of federal regulations).

Moreover, government programs conferring monetary benefits come with a "strong presumption of constitutionality," *Mathews v. De Castro,* 429 U.S. 181, 185 (1976), and the government's policy choices may not be "subject to courtroom fact-finding." *Beach Commc'ns,* 508 U.S. at 315; *Kahawaiolaa,* 386 F.3d at 1283. Instead, they must be sustained even if based on nothing more than "rational speculation unsupported by evidence or empirical data." *Beach Commc'ns,* 508

U.S. at 315. In other words, "[t]he absence of . . . facts explaining [a] distinction on the record has no significance in rational-basis analysis." *Id*. (quotation marks, alteration, and citation omitted). Additionally, the party attacking the program bears the burden "'to negative every conceivable basis which might support it.'" *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Finally, even if the government's "assumptions underlying [its] rationales may be erroneous, . . . the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [government's] choice from constitutional challenge." *Beach Commc'ns,* 508 U.S. at 320 (quoting *Vance v. Bradley,* 440 U.S. 93, 112 (1979)).

The district court correctly rejected plaintiff's challenge to the differential treatment of tribes in P.L. 280 states and those in non-P.L. 280 states, on the basis of the applicability of state criminal jurisdiction in the P.L. 280 states. Order 10, ER 10. It mistakenly held, however, that the disparate treatment of certain tribes within P.L. 280 states gave rise to an equal protection violation. *Id.* at 10-11, ER 10-11. The latter holding is untenable.

As we have already shown (*see supra* at 46), the Cruzan Declaration articulates in considerable detail why, for a variety of historical reasons, certain tribes in P.L. 280 states have received 638 contracts for law enforcement services.

See Cruzan Decl. ¶¶ 7-11, ER 42-43. Plaintiff is not similarly situated to these other tribes, *see id.* at ¶ 12 ER 43, and its requested 638 contract was properly denied based on the plain language of 25 U.S.C. § 450f(a)(2)(D). Thus, there is a rational basis for treating plaintiff differently, and the declination of plaintiff's proposed 638 contract does not violate equal protection principles.

Moreover, consistent with the rational bases set forth in the Cruzan Declaration, there is an obvious "conceivable basis" (*Lehnhausen, supra*) for the distinction between tribes in P.L. 280 states – BIA may well believe that some tribes have a greater crime problem (or a crime problem that is not being sufficiently addressed by state authorities, for whatever reason), than others – and hence a greater need for federal law enforcement assistance. At the very least this is "rational speculation" (*Beach Commc'ns,* 508 U.S. at 315), and neither the district court nor plaintiff is in a position to "negative" (*Lehnhausen, supra*) this rationale. That should suffice to carry the day here.

CONCLUSION

For the foregoing reasons, the district court's Order of October 28, 2011 should be reversed, insofar as it granted summary judgment to plaintiff.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

LAURA E. DUFFY
United States Attorney

BARBARA C. BIDDLE
Barbara.Biddle@usdoj.gov
(202) 514-2541
s/ JOHN S. KOPPEL
John.Koppel@usdoj.gov
(202) 514-2495
Attorneys, Appellate Staff
Civil Division, Room 7264
Department of Justice
950 Pennsylvania Av e., NW
Washington, D.C. 20530-0001

STATEMENT OF RELATED CASES

Appellants are aware of no related cases pending in this Court.

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing brief is proportionally spaced, has a typeface of 14 points and contains 11,455 words (which does not exceed the applicable 14,000 word limit).

s/John S. Koppel
John S. Koppel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 2, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/John S. Koppel
John S. Koppel