STUART F. DELERY
Acting Assistant Attorney General
JOHN R. GRIFFITHS
Assistant Branch Director
JAMES D. TODD, JR.
Senior Counsel
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
20 Massachusetts Avenue, N.W.
Washington, DC 20001
(202) 514-3378
james.todd@usdoj.gov
Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HOPLAND BAND OF POMO INDIANS, *et al.*, Plaintiffs, v. KEN SALAZAR, Secretary of the Interior, *et al.*, Defendants.	Case No. 3:12CV556-CRB Hon. Charles R. Breyer Courtroom: 6 Hearing: September 7, 2012, at 10:00 a.m. NOTICE OF MOTION, COMBINED MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Civ. L.R. 7-2, please take notice that on September 7, 2012, at 10:00 a.m., or as soon thereafter as this matter may be heard, defendants will cross move for summary judgment pursuant to Federal Rule of Civil Procedure 56(a).

As the following combined memorandum of points and authorities in opposition to plaintiffs' motion for summary judgment and in support of defendants' motion for summary judgment demonstrates, as well as the certified administrative record filed herewith, this Court should issue an order denying plaintiffs' motion, granting defendants' cross motion, and entering judgment for defendants. A proposed order is submitted herewith.

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I. STATEMENT OF ISSUES

A. Whether plaintiffs Redding Rancheria and Rincon Band of Mission Indians have standing to maintain this action;

B. Whether defendants correctly denied plaintiffs' requests for new funding for law enforcement contracts pursuant to 25 U.S.C. § 450f(a)(2)(D) because the amount of funds they requested exceeded the amount of funds defendants allocated to the tribes for law enforcement; and whether defendants correctly denied plaintiff Hopland Band of Pomo Indians' request for an unfunded law enforcement program pursuant to 25 U.S.C. § 450f(a)(2)(E) because Hopland's proposal went beyond the scope of services that the tribe may lawfully provide;

C. Whether defendants' allocation of resources for law enforcement programs from their unrestricted lump-sum appropriation for the operation of Indian programs is subject to review under the Administrative Procedure Act, 5 U.S.C. §§ 553, 701 or is subject to the requirements of 25 U.S.C. § 450k;

D. Whether defendants' allocation of resources for law enforcement programs violates the Fifth Amendment;

E. Whether plaintiffs have stated a claim under the Indian Trust doctrine; and

F. Whether plaintiffs are entitled to monetary damages under 25 U.S.C. § 450m-1(a).

II. SUMMARY OF ARGUMENT

This is a challenge, brought under § 450m-1 of the Indian Self-Determination and Education Assistance Act of 1975 ("ISDA"), Pub. L. No. 93-638 ("638"), 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450 *et seq.*), to the decision of the Office of Justice Services ("OJS") in the Bureau of Indian Affairs ("Bureau") to decline proposals by plaintiffs Hopland Band of Pomo Indians, Robinson Rancheria of Pomo Indians of California, and Coyote Valley Band of Pomo Indians to enter into self-determination contracts for law enforcement services. Plaintiffs also challenge OJS's alleged policy of not allocating funds for law enforcement services to tribes located in the six states (including California) that have the benefit of state criminal law jurisdiction over crimes committed by Indians on Indian lands pursuant to Public Law No. 83-280, ch. 505, § 2, 67 Stat. 588 ("P.L. 280") (codified as amended at 18 U.S.C. § 1162). Plaintiffs claim

that OJS's declinations and alleged policy violate the ISDA, the Administrative Procedure Act, 5 U.S.C. §§ 553, 701 *et seq.*, the Fifth Amendment, the Indian Trust doctrine, and seek monetary damages. None of their claims have merit.

First, this Court should dismiss plaintiffs Redding Rancheria and Rincon Band of Luiseno Mission Indians of the Rincon Reservation of California for lack of standing under Article III of the U.S. Constitution because they fail to allege a personal stake in the outcome of this case. These plaintiffs do not claim to have suffered a concrete injury caused by government action. In fact, they never even submitted contract proposals for law enforcement services. *See Madsen v. Boise State University*, 976 F.2d 1219, 1220 (9th Cir. 1992) ("plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit") (citations omitted). Their claims instead constitute nothing more than "generalized grievances more appropriately addressed in the representative branches." *Nedow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (quotation marks and citations omitted). Nor can these plaintiffs "ride the [other plaintiffs tribes'] coattails and aver no facts that suggest direct, distinct and tangible injury to themselves." *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996).

Second, this Court should reject plaintiffs' ISDA claims because OJS correctly declined plaintiffs' requests for funding pursuant to 25 U.S.C. § 450f(a)(2)(D) as the amounts plaintiffs sought exceeded the amount of funds OJS has allocated for law enforcement programs on the tribes' lands. OJS also correctly declined Hopland's proposal for an unfunded contract pursuant to 25 U.S.C. § 450f(a)(2)(E) because that proposal sought to perform law enforcement tasks beyond what OJS's law enforcement officials are empowered to perform. Because OJS may decline any proposals for one or more of the five bases set out in the statute, *Hopland Band of Pomo Indians v. Norton* ("*Hopland v. Norton*"), 324 F. Supp. 2d 1067, 1075 (N.D. Cal. 2004), that is the end of this Court's inquiry, and the ISDA provides no vehicle to challenge the agency's allocation of funds for law enforcement resources.

Third, this Court should reject plaintiffs' claims arising under the APA and § 450k of the ISDA that challenge OJS's allocation of funds for law enforcement services among the 566 fed-

erally-recognized tribes. It is well settled that OJS's allocation of funds from its unrestricted lump-sum appropriation for law enforcement programs is committed to agency discretion. *Lincoln v. Vigil*, 508 U.S. 182 (1993). Neither that appropriation nor the underlying statutes authorizing the expenditure of these funds provide this Court with any relevant law to apply. *Webster v. Doe*, 486 U.S. 592, 600 (1988). As a "general statement of policy," OJS's allocation of funds is also exempt from the APA's notice and comment requirement. *Lincoln*, 508 U.S. at 197. In addition, neither OJS's declinations for the reasons set out by statute, nor its allocation of funds from its lump sum appropriation, violate § 450k's limitation on imposing non-regulatory or regulatory requirements on tribal contracts.

Fourth, this Court should reject plaintiffs' claims arising under the equal protection component of the Due Process clause of the Fifth Amendment. The government has broad discretion to allocate funds for law enforcement programs among the 566 federally-recognized tribes without violating equal protection, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), and, under the rational basis review, the government's classification must be upheld so long as there is *any conceivable basis* to support it. *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). In this case, the government clearly has a rational basis for directing more law enforcement resources to tribes located in states that do not have the benefit of state criminal law jurisdiction on tribal lands; indeed plaintiffs are not even similarly situated to these tribes. *Heller v. Doe*, 509 U.S. 312, 321 (1993). There are also many obvious "conceivably rational bases" for OJS's decision to provide funding to some tribes located in states that have criminal law jurisdiction on tribal lands, but not others. Such distinctions are easily justified based on, among other things, a belief 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 law enforcement assistance.

Fifth, this Court should reject plaintiffs' claims arising under the Indian Trust doctrine. Plaintiffs can point to no specific legal duty under any applicable federal statute to provide law enforcement services to their particular tribes. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 927-28 (9th Cir. 2008). Rather, the government does not bear a fiduciary responsibility to

any particular tribe unless it has "take[n] full control of a tribally-owned resource and manage[d] it to the exclusion of a tribe." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006) (quotation marks, citation, and emphasis omitted). Because the ISDA aims to foster self-determination, moreover, it would be inconsistent to hold that it makes the United States exclusively responsible for law enforcement. *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003).

Finally, this Court should reject plaintiffs' claims for monetary damages. The only remedy provided by the limited waiver of sovereign immunity under 25 U.S.C. § 450m-1 for the wrongful declination of a contract is injunctive relief. By contrast, the monetary damages remedy provided by this same waiver is limited to a breach of contract. Because waivers of sovereign immunity must be strictly construed in favor of the sovereign, *Lane v. Peña*, 518 U.S. 187, 192 (1996), and can "not [be] enlarge(d) . . . beyond what the language requires," *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (quotation marks and citation omitted), § 450m-1 cannot be read to allow monetary damages as a remedy for the allegedly wrongful declinations here.

Accordingly, this Court should deny plaintiffs' motion for summary judgment, grant defendants' cross motion for summary judgment, and enter judgment for defendants.

III. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The 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 2.3 million American Indian and Alaska Natives who are members of 566 federally-recognized tribes. *See* Declaration of Darren Cruzan ("Cruzan Decl.") [Attached hereto as Ex. A] ¶ 2. 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, 25 U.S.C. § 450 *et seq.* 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).

Congress appropriates money to BIA for the operation of Indian programs annually in a lump-sum appropriation. Congress bases its appropriation on the budget request that it receives from the President. Cruzan Decl. ¶ 3. The budget request for the operation of Indian programs is contained in the Department's budget justification, which takes about a year to develop. *Id.* During that time, BIA holds meetings with tribal leaders to consult with them on developing annual budget requests. *Id.* The result of this process is the Tribal Priority Allocation ("TPA"). *Id.* BIA programs that are part of TPA include, among others: aid to tribal government, child welfare, education, road maintenance, resource management, tribal courts, and fire protection. *Id.* TPA furthers Indian self-determination by giving the tribes the opportunity to establish their own priorities and to move funds among programs accordingly. *Id.* TPA is also a vehicle through which tribes can request new funds. *Id.*[1]

The Department's budget justification includes the tables showing the amount of TPA funds requested by each tribe. *Id.* The President's budget that is submitted to Congress includes these tribe-specific requests. *Id.*

After receiving its appropriation, BIA allocates available TPA and law enforcement funds among the federally-recognized tribes. *Id.* ¶ 6. For fiscal year 2012, Congress appropriated $2,371,532,000 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* Consolidated Appropriations Act, 2011, Pub. L. No. 112-74, 125 Stat. 786, 996. In a committee report, Congress indicated that $185,315,000 of that appropriation was for criminal investigations and police services, *see* H.R. Rep. No. 112-331, at 794 (2011) (Conf. Rep.), but provided no direction in the statute, nor gave any indication in the committee report, as to how the Bureau should allocate funds for criminal investigations and police services among the 566 federally-recognized tribes. *See* 125 Stat. at 996-97; H.R. Rep. No. 112-331, at 794.

[1] Historically, funds for law enforcement programs were part of the TPA process. Cruzan Decl. ¶ 4. Since 1999, however, funds for law enforcement have been listed as a separate program in the Department's budget justification. *Id.* Tribes can still reallocate unrestricted funds from other programs to law enforcement. For example, the Pokagon Band of Potawatomi Indians, located in Michigan and Indiana permanently reallocated, in consultation with BIA, $250,000 from its Consolidated Tribal Government Program to law enforcement. *Id.* But tribes can no longer reallocate law enforcement funds to other programs. *Id.*

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 id.* § 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 a "638 contract") with the tribe to administer any program, function, service or activity that is currently provided by the BIA for the benefit of the tribe. 25 U.S.C. § 450f(a)(1).[2] 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) (emphasis added). This amount is sometimes called the "secretarial amount."[3] In short, a self-determination contract "*transfer*[*s*] the funding [for the secretarial amount] and the [] related programs or activities (or portions thereof)" from the BIA to a tribal organization. *Id.* at § 450l(c), model agreement § (a)(2) (emphasis added).[4]

The ISDA does not require the BIA to award a 638 contract that would (excluding "con-

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[2] The ISDA requires a 638 contract to contain or incorporate by reference the provisions of the model agreement set out at 25 U.S.C. § 450*l*(c). *See* 25 U.S.C. § 450*l*(a)(1).

[3] To carry out this requirement, BIA implementing regulations require a tribal organization's proposal for a 638 contract to identify the funds requested for the program to be performed, including the tribal organization's share of BIA funds related to the program. *See* 25 C.F.R. § 900.8(h).

[4] As an alternative to the ISDA contracting process, 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). Apart from funds that Congress earmarks for a specific activity and funds that are awarded pursuant to a formula to carry out a particular activity, *id.* §§ 450cc(b)(5)-(6), 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).

tract support costs")[5] 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 programs and activities provided for one tribe in order to enter into a 638 contract with another tribe. *Id.* § 450j-1(b).

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 located. 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). In 1953, however, Congress gave six states, including California, primary jurisdiction to enforce their criminal laws against Indians on tribal lands, Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162(a)-(c)) ("P.L. 280"). These states are known as "mandatory P.L. 280 states." Over the years, Congress has also authorized a number of states to exercise concurrent criminal law jurisdiction, sometimes over Indians on certain tribal lands, sometimes over Indians on all tribal lands within a state. *See, e.g.*, 54 Stat. 249; 62 Stat. 1224; 67 Stat. at 589, § 7 (*repealed and replaced with* 25 U.S.C. § 1321(a), *see* 25 U.S.C. § 1323(b)). These states are generally known as "optional P.L. 280 states." Congress has also authorized states to retrocede jurisdiction over individual tribes back to the federal government, 25 U.S.C. § 1323(a), and has recently authorized tribes in mandatory P.L. 280 states, after consultation with and consent by the Attorney General, to request concurrent (federal

[5] 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* ISDA Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2292 (codified at 25 U.S.C. § 450j-1(a)(2)), including certain 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). Contract support costs are not at issue in this case.

and state jurisdiction) over their tribal lands. *See* 18 U.S.C. § 1162(d).[6] Additionally, certain states, including California, authorize state law enforcement officials to deputize tribal police to enforce state law. *See, e.g.*, Cal. Penal Code § 830.6(b).

As for the United States, the BIA's Office of Justice Services ("OJS"), established by the Indian Law Enforcement Reform Act of 1990 ("ILERA"), has authority to enforce, or enter into agreements with tribes for the enforcement of,[7] certain federal criminal laws on all tribal lands.[8] *See* 25 U.S.C. §§ 2801, 2802(b)(1). In addition, OJS has primary responsibility for enforcing, on tribal lands in non-mandatory P.L. 280 states (all except Alaska, California, Oregon, Minnesota, Nebraska, and Wisconsin, *see* 18 U.S.C. § 1162(c)), the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153.[9] Tribes may also authorize OJS to enforce their respective tribal laws on their lands. 25 U.S.C. § 2803(2)(B).

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[6] Under this regime, mandatory P.L. 280 states Alaska, California, Oregon, Minnesota, Nebraska, and Wisconsin exercise primary criminal jurisdiction over Indians on tribal lands, although certain tribes in Alaska, Minnesota, Nebraska, Oregon, and Wisconsin were either initially excluded or have been retroceded. Cruzan Decl. ¶ 8. Optional P.L. 280 states Florida, Kansas, and New York currently exercise concurrent criminal jurisdiction over all tribes in their states. *Id.* Optional P.L. 280 states Idaho and Washington currently exercise varying degrees of concurrent criminal jurisdiction over some tribes in their states. *Id.* The Attorney General has not granted any requests to restore concurrent jurisdiction to tribes in mandatory P.L. 280 states. *Id.*

[7] The agreements OJS enters into with the tribes concerning law enforcement take the form of 638 contracts for law enforcement under the ISDA, 25 U.S.C. § 450f(a), self-governance agreements under the ISDA that contain a line item for law enforcement, *id.* § 458cc, or unfunded deputation agreements entered into under the ILERA based on the model deputation agreement and model Special Law Enforcement Commission ("SLEC") for tribal officers published in the federal register. *See* 25 U.S.C. § 2804(e); 25 C.F.R. § 12.21; 76 Fed. Reg. 4369 (Jan. 25, 2011) (interim model deputation agreement, SLEC policy, rules, and procedures, and SLEC protocols). *See also* 69 Fed. Reg. 6321 (Feb. 10, 2001) (prior model deputation agreement and model SLEC).

[8] These include, among others: (1) embezzlement and theft from tribal organizations, 18 U.S.C. § 1163; (2) hunting, trapping, or fishing on Indian lands, *id.* § 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, *id.* § 2262; (6) trafficking in Native American human remains and cultural items, 18 U.S.C. § 1170; (7) controlled substances, 21 U.S.C. §§ 841(a), 844; and (8) bribery of a tribal official. 18 U.S.C. § 666(a)(2). Tribal officers holding SLECs, *see supra*, at 4 n.7, are authorized to enforce these same laws on their tribal lands.

[9] 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. The Major Crimes Act prohibits many major felonies, including homicide, rape, assault, felony child abuse, burglary and robbery committed by an Indian. *Id.* § 1153(a). The Act further provides that any offense referenced by the Major Crimes Act that is not defined or punished by Federal law shall be defined and punished in accordance with the laws of the state in which such offense was committed. *See id.* § 1153(b).

OJS allocates resources for law enforcement services based on a number of factors. In general, its policy is to provide direct coverage, provide funding for, or otherwise arrange for the provision of 2.8 federal law enforcement officers for every 1,000 members of resident populations. Cruzan Decl. ¶ 11. However, Congress has not appropriated funds sufficient for the agency to meet that goal. *Id.* Among the 566 federally-recognized tribes, OJS operates or oversees 187 law enforcement programs, 26 of which are OJS-operated, and 151 of which are operated by tribes pursuant to the ISDA, either under 638 contracts or self-governance agreements. *Id.*[10] OJS also operates 10 law enforcement programs that do not have defined service populations, which in some cases provide services for multiple tribes. *Id.*

In addition to funding these ongoing obligations, OJS has developed a methodology for allocating new funds appropriated by Congress in a particular year to tribes that are experiencing high crime rates or that demonstrate a high-priority need based on: (1) reported crime rates; (2) staffing-level shortages; (3) drugs/gang activity; (4) detention facility shortages; (5) recorded calls for service resulting in a reportable incident; and (6) operating expenses for new Department of Justice-funded detention facilities. *Id.* ¶ 11.

OJS's law enforcement resources are stretched thin across the board, and Congress has not appropriated funds sufficient for the agency to provide every tribe with the funding it seeks. *See id.* ¶ 14. Of the approximately 387 federally recognized tribes in non-P.L. 280 states (which includes Alaska native villages that are not subject to P.L. 280), comprising well over 75 percent of the reservation-based Indian population, OJS only provides, or contracts for the provisions of, law enforcement services to 147 tribes. *Id.* Even where OJS provides services, its officers are spread thin. Oklahoma, for example, is a non-P.L. 280 state where tribes do *not* have the benefit of state criminal law jurisdiction over crimes committed by Indians on tribal lands. *Id.* In southwest Oklahoma, OJS has the resources to allocate funding for eight full-time law enforcement officers to provide 24 hour, seven-days-a-week coverage to six tribes with a combined population of over 8,500. *Id.* In Nevada, another non-P.L. 280 state, OJS has the resources to allocate

[10] By statute, the obligation to fund tribes through 638 contracts or Title IV agreements is, so long as the contract remains substantially the same, ongoing. *See* 25 U.S.C. §§ 450j(c), 450j-1(b)(2); 25 C.F.R. § 900.32.

funds for six full-time law enforcement officers who provide law enforcement services to tribes located hundreds of miles apart. *See id.*

In light of the competing demands on OJS's limited resources, and because of the authority of California and other mandatory P.L. 280 states to enforce their respective criminal laws against Indians on tribal lands, OJS has historically allocated more of its resources for direct law enforcement services toward tribes in non-P.L. 280 states (where state law enforcement officials do not have authority to enforce criminal laws against Indians on tribal lands) than toward tribes in mandatory P.L. 280 states (where state law enforcement officials do have that authority). *Id.* ¶ 14. But OJS does not have a ban or other policy for denying funds or other assistance to tribes in mandatory P.L. 280 states but instead provides funding to many tribes in these states. *See id.* OJS has also entered into a number of deputation agreements with tribes located in California and other mandatory P.L. 280 states to assist OJS with the enforcement of federal law in Indian country and has provided consultation, training, certification, and supervision of tribal law enforcement officers operating under SLECs in those states. *Id.* ¶¶ 16-19. In addition, OJS has allocated funds for a full-time law enforcement position in Sacramento, California to provide administrative support to numerous tribes in California that have 638 contracts for law enforcement services or self-governance agreements with a line item for law enforcement, and to tribal police departments that have entered into deputation agreements and obtained SLECs for their tribal officers. *Id.* ¶ 20.

3. ISDA Administrative Process

A tribe or tribal organization that wants to enter a self-determination contract to take over a program or activity performed by the Bureau can begin the contracting process either by submitting a contract proposal to the Bureau or by requesting technical assistance from the Bureau to help the tribe develop a proposal. 25 U.S.C. § 450f(a)(2); 25 C.F.R. §§ 900.7-.8. Each self-determination contract must contain or incorporate by reference the provisions of the model agreement set out at 25 U.S.C. § 450*l*(c). *See* 25 U.S.C. § 450*l*(a)(1).

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 program or activity that the tribal organization proposes to per-

form. 25 C.F.R. § 900.8(g). The proposal must identify the funds requested for the program or activity to be performed, including the tribal organization's share of Bureau funds related to the program or activity. *Id.* § 900.8(h).[11] The Bureau must approve or decline a proposal within 90 days of receipt. 25 U.S.C. § 450f(a)(2); 25 C.F.R. § 900.16. On approval of a proposal, the Bureau awards the contract and the full amount of funds to which the contractor is entitled. 25 C.F.R. § 900.19.

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

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

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

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

A tribal organization has two options to begin an administrative appeal of a declination. Within 30 days of the declination, the tribal organization may either: (1) appeal the declination to

[11] 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. 25 C.F.R. § 900.8(h)(2).

the Interior Board of Indian Appeals, 25 C.F.R. §§ 900.150, 900.152; or (2) request an informal conference as "a way to resolve issues as quickly as possible, without the need for a formal hearing." 25 C.F.R. § 900.153.[12]

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

B. Factual Background

1. Plaintiff Hopland Band of Pomo Indians

Plaintiff Hopland Band of Pomo Indians is a federally-recognized tribe with a resident tribal population of approximately 300 located in Mendocino County, California. Administrative Record ("AR") 18. It currently receives $222,489 in federal funds from the BIA. Cruzan Decl. ¶ 6. Hopland has created a tribal law enforcement agency and in 2005 entered into a deputation agreement with OJS under the ILERA to enforce certain federal laws on tribal land. AR 1-9.[13] In February 2009, Hopland submitted a self-drafted document consisting of proposed revisions to its deputation agreement and what was purported to be a proposed 638 contract for law enforcement services that included a request for $270,347 in new funding. AR 10-31.

OJS declined Hopland's proposal on May 20, 2009, pursuant to 25 U.S.C. § 450f(a)(2)(D), and notified the tribe of its appeal rights. AR 34-39. Pursuant to 25 C.F.R. § 900.153, Hopland pursued an informal conference, AR 40-41, which was conducted by a designated representative of the Secretary. AR 42, 43-89. The designated representative concluded

[12] An informal conference is conducted by a designated representative of the Secretary. 25 C.F.R. § 900.155(c). The designated representative provides a written report summarizing what happened at the conference and containing a recommended decision. *Id.* § 900.156(a).

[13] Plaintiffs mischaracterize this agreement as a "deputation agreement/638 contract." While the agreement is based on the model deputation agreement, it does not contain or incorporate by reference the statutorily-required terms of the ISDA's model contract set out at 25 U.S.C. § 450*l*. *See* AR 1-9.

that OJS correctly declined Hopland's proposal. AR 108-29.

On December 14, 2010, Hopland submitted a revised, self-drafted document consisting of proposed revisions to its deputation agreement and what was purported to be a 638 contract for law enforcement services that requested zero dollars in funding. AR 253-74. OJS offered to accept Hopland's proposed deputation agreement, subject to some significant revisions, but declined Hopland's proposal to enter into a contract under the ISDA pursuant to 25 U.S.C. § 450f(a)(2)(C) and (E). AR 276-81.

2. Plaintiff Robinson Rancheria

Plaintiff Robinson Rancheria is a federally-recognized tribe with a resident tribal population of approximately 150 located in Lake County, California. AR 300. It currently receives $209,109 in federal funding from the BIA. Cruzan Decl. ¶ 6. The tribe has created a tribal law enforcement agency and entered into a deputation agreement with OJS to enforce certain federal laws on tribal land. On October 25, 2010, Robinson Rancheria submitted a self-drafted document consisting of proposed revisions to its deputation agreement and what was purported to be a proposed 638 contract for law enforcement services that included a request for $703,033 in new funding. AR 282-306. On December 28, 2010, OJS declined Robinson Rancheria's proposal pursuant to 25 U.S.C. § 450f(a)(2)(D). AR 307-12.

3. Coyote Valley Band of Indians

Plaintiff Coyote Valley Band of Indians is a federally-recognized tribe with a resident tribal population of approximately 200 located in Redwood Valley, California. AR 316. It currently receives $214,750 in federal funding from the BIA. Cruzan Decl. ¶ 6. On January 26, 2011, Coyote Valley submitted a self-drafted document consisting of a deputation agreement based on proposed revisions submitted by Robinson Rancheria and what was purported to be a proposed 638 contract for law enforcement services that included a request for $398,235 in new funding. AR 313-33. On March 14, 2011, OJS declined Coyote Valley's proposal pursuant to 25 U.S.C. § 450f(a)(2)(D). AR 334-39. The tribe later created a tribal law enforcement agency.

4. Plaintiffs Redding Rancheria and Rincon Band of Mission Indians

Plaintiffs Redding Rancheria and Rincon Band of Mission Indians are federally-

recognized tribes located in California. BIA has provided $805,764 to Redding Rancheria and $216,623 to Rincon Band. Cruzan Decl. ¶ 6. Each has a tribal law enforcement agency. On November 13, 2008, Redding Rancheria entered into a self-governance compact pursuant to 25 U.S.C. § 458aa *et seq*., but alleges that it has been unable to fund its tribal law enforcement agency. Compl.¶¶ 48-49. Redding Rancheria alleges that it has not submitted a proposed amendment to its self-governance compact for new funding for law enforcement services but has concluded that "to do so would be futile." *Id.* ¶ 50. Rincon Band alleges that it desires to enter into a 638 contract for law enforcement services but has concluded that "to do so would be futile." *Id.* ¶¶ 51-52.

C. Plaintiffs' Complaint

Plaintiffs collectively bring nine causes of action against defendants, alleging violations of the: (i) ISDA, Compl. ¶¶ 54-59; (ii) Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, Compl. ¶¶ 61-64, 73-78; (iii) ISDA § 450(k), Compl. ¶¶ 66-71, 75-76; (iv) APA, 5 U.S.C. § 553, Compl. ¶¶ 80-85; (v) equal protection component of the Fifth Amendment, Compl. ¶¶ 87-91, 102-105; and (vi) Indian Trust doctrine, Compl. ¶¶ 93-100. Plaintiffs seek, among other things: (i) monetary damages, Compl. ¶¶ 107-113; (ii) a declaration that defendants violated the ISDA, the APA, the Fifth Amendment, and their trust obligations, Compl., Prayer for Relief ¶ 1; (iii) a declaration that defendants are obligated to provide law enforcement services on plaintiffs' reservations, *id.* ¶ 2; (iv) an order for specific performance on each proposed contract, *id.* ¶ 3; and (v) orders directing defendants to promulgate a funding formula for law enforcement services and to provide funding for each plaintiff's proposed 638 contract. *Id.* ¶¶ 4-5.

IV. STANDARD OF REVIEW

Plaintiffs are challenging whether OJS's decision to decline the tribes' proposed self-determination contracts for law enforcement services complied with the statutory requirements placed on defendants. *See* 25 U.S.C. § 450f(a)(2). This Court derives its jurisdiction to entertain plaintiffs' claims through 25 U.S.C. § 450m-1(a), a provision that does not specify a particular standard of judicial review. Plaintiffs contend that the APA provides the applicable standard of review. *See* Pls.' Mot. for Sum. J. ("Pl. MSJ") at 11-12 (claiming defendants' actions are "arbi-

trary."), 13-25 (same), ECF No. 21. Notwithstanding defendants' argument that this Court does not have jurisdiction over plaintiffs' APA claims, *see infra* at 23-32, if the Court does have jurisdiction, its review is governed by the APA standard of review and generally limited to the administrative record. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (basis for judicial review should be agency record already in existence rather than a court-created record); *Ctr. for Bio. Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (same); *NW Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (same).[14]

V. ARGUMENT

A. Plaintiffs Redding Rancheria and Rincon Band of Mission Indians Lack Standing

Plaintiffs Redding Rancheria and Rincon Band of Mission Indians lack standing under Article III of the U.S. Constitution to maintain their causes of action against defendants because they fail to allege a personal stake in the outcome. "[T]o invoke judicial power the claimant must have a personal stake in the outcome, or a particular, concrete injury, or a direct injury; in short, something more than generalized grievances." *United States v. Richardson*, 418 U.S. 166, 179-80 (1974) (quotation marks and citations omitted). Allegations of a "special interest" in the challenged policy are not sufficient to confer standing. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989) (teacher association's "special interest" in education does not confer standing to challenge education policy). These requirements apply to parties challenging the validity of administrative policies of general applicability. *See Sierra Club v. Morton*, 405 U.S. 727 (1972). As the party

[14] Although the rationale for the agency's decision must be derived from the administrative record, an agency may offer declarations or affidavits to provide background information or clarify subject matter in the record. *See Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 82 (2d Cir. 2006); *Empresa-Cubana Exportadora De Alimentos y Productos Varios v. Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009) (court may also consider agency affidavits or testimony consistent with the agency's contemporaneous rationale). Defendants have submitted such a declaration with this motion. *See* Cruzan Decl. This declaration is offered solely to provide background information and to "illuminate[] the original record." *Yale-New Haven Hosp.*, 470 F.3d at 82. It does not "advance new rationalizations for the agency's action." *Id.* Accordingly, it is properly considered for that limited purpose when deciding the parties' cross-motions for summary judgment. *See Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977) ("[T]he augmenting materials were merely explanatory of the original record. No new rationalization of the . . . regulations was offered by the EPA. Instead, the augmenting materials clarified a dispute that we felt was less than clear from the original record and were clearly admissible.").

To the extent plaintiffs' declarations offered in support of their summary judgment motion offer similar background and explanatory material, defendants do not object to their consideration. Any other use is not permissible under the APA.

invoking federal jurisdiction, plaintiffs bear the burden of establishing standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Plaintiffs Redding Rancheria and Rincon Band of Mission Indians cannot meet this burden.

Plaintiffs Redding Rancheria and Rincon Band fail to demonstrate any concrete injury caused by defendants. Each alleges that it has established a tribal law enforcement agency. Compl. ¶¶ 47, 51; Pls.' MSJ 10. Plaintiff Redding Rancheria further alleges that, although it has entered into a Self-Governance Compact pursuant to Title IV of the ISDA, which gives it the authority to allocate funds not otherwise earmarked for a particular purpose among any program or activity it administers, *see* 25 U.S.C. § 458cc(b)(3), it has been "unable to fund[] its law enforcement department." Compl. ¶¶ 48-49; Pls.' MSJ 10. Plaintiff Rincon Band, moreover, alleges that it "desires" to enter into a 638 contract for law enforcement services. Compl. ¶ 51; Pls.' MSJ 10. Neither plaintiff, however, demonstrates *any* government conduct that caused a concrete injury to the tribe. Compl. ¶¶ 47-52; Pls.' MSJ 10. Redding Rancheria fails to demonstrate, for example, that it proposed and defendants denied an amendment to the tribe's self-governance compact or any other request for an increase in funds. Compl. ¶¶ 47-50; Pls.' MSJ 10. Similarly, Rincon Band fails to demonstrate, for example, that it proposed and defendants denied a 638 contract for law enforcement services. Compl. ¶¶ 51-52; Pls.' MSJ 10. Instead, each plaintiff alleges only that it believes any such request would be "futile." Compl. ¶¶ 50, 52; Pls.' MSJ 10. These allegations fail to demonstrate a concrete injury sufficient to establish standing. *See Madsen v. Boise State University,* 976 F.2d 1219, 1220 (9th Cir. 1992) ("plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit") (citations omitted); *Hood River Cnty. v. United States by and through Dep't of Labor,* 532 F.2d 1236, 1238 (9th Cir. 1976) (allegation that a party seeks public funds "is not of itself sufficient to support standing."); *Lomax v. City of Antioch Police Officers,* No. 11CV2858-CRB, 2011 WL 4345057, at *2 (N.D. Cal. Sept. 14, 2011) ("in suits against government entities, such as here, 'the concrete injury requirement must remain.'") (quoting *Lujan,* 504 U.S. at 578).[15]

[15] Only when a challenged statute "flatly prohibit[s]" the conduct at issue does the standing requirement excuse "exercises in futility." *Taniguchi v. Schultz,* 303 F.3d 950, 957 (9th Cir. 2002) (quotation marks and citations omitted). *See also Desert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir. 1996) (same).

Absent demonstration of a concrete injury, each of the causes of action brought by Redding Rancheria and Rincon Band constitute nothing more than "'generalized grievances more appropriately addressed in the representative branches,' [and] which do not confer standing." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Nor can these plaintiffs "ride the [other plaintiff tribes'] coattails and aver no facts that suggest direct, distinct and tangible injury to themselves." *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996). Accordingly, this Court should dismiss plaintiffs Redding Rancheria and Rincon Band from this action for lack of subject matter jurisdiction.

B. Defendants Had a Valid Basis Under the ISDA for Declining Plaintiffs' Proposals

1. Defendants Had a Valid Basis under the ISDA for Declining Plaintiffs' Requests for New Funding

OJS had a valid statutory basis for declining the proposals. Because plaintiffs' proposals for new funding exceeded the secretarial amount, *i.e.*, the amount of funds that OJS had allocated to each of the tribes for law enforcement, OJS correctly declined them pursuant to 25 U.S.C. § 450f(a)(2)(D).

The ISDA concerns the transfer of direct services, currently 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, known as the secretarial amount, transferring as well. *See* 25 U.S.C. § 450f(a)(1)(B). The ISDA requires that the BIA contract "for the planning, conduct and administration of programs and services which are *otherwise* provided to Indian tribes and their members." *Id.* § 450b(j) (emphasis added). *See also id.* § 450a(b) (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.") (emphasis added). ISDA further 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).

Or, as stated in the ISDA's model agreement, the amount "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. § 450l(c), model agreement § (b)(4). This amount is known as the "secretarial amount." In short, a self-determination contract under the ISDA "*transfer*[*s*] the funding and the . . . related [programs and services] (or portions thereof)" from the BIA to a tribal organization. *Id.* § 450l(c), model agreement § (a)(2) (emphasis added).

But while the ISDA governs the transfer of existing programs and services to a contracting tribal organization, nothing in the ISDA requires the BIA to create and fund new federal programs for a tribe out of whole cloth. Indeed, if BIA is not currently operating a program, and thus not allocating any funding to carry it out, the ISDA expressly allows the BIA to decline the contract proposal. *See id.* at §§ 450f(a)(2)(D), (4)(B).

In this case, OJS correctly declined the tribes' proposals for additional funding for their law enforcement programs pursuant to 25 U.S.C. § 450f(a)(2)(D) because the amount sought by the tribes exceeded the amount of funds that OJS had allocated for direct law enforcement programs on the tribes' lands. In asking for new funds, the tribes were not seeking to take over the administration of existing law enforcement programs operated by OJS for the benefit of the tribes. *See* AR 19, 301, 317. Rather, the tribes were simply seeking new funding. However, the ISDA simply does not provide plaintiffs with a right to obtain additional funds. 25 U.S.C. § 450f(a)(2)(D), 4(B).

Contrary to plaintiffs' contention, *see* Pls.' MSJ 16, no part of OJS's declinations of plaintiffs' funding proposals violates the district court's decision in *Hopland v. Norton*, 324 F. Supp. 2d 1067. In *Hopland v. Norton*, Hopland sought to enter into a deputation agreement with OJS under the ILERA, 25 U.S.C. § 2801 *et seq.*, to obtain Special Law Enforcement Commissions for its tribal police to enforce federal law on the tribe's land. 324 F. Supp. 2d at 1069. OJS informed the tribe that it had placed a moratorium on the issuance of new deputation agreements. *See id.* Hopland then submitted what was purported to be a proposed zero-dollar 638 contract for law enforcement services. *Id.* OJS declined the tribe's proposal pursuant to 25 U.S.C. § 450f(a)(2)(A) on the grounds that the proposal was not among the "programs, functions, services or activities"

that are contractible under the ISDA, and the tribe brought suit in the Northern District of California. *See Hopland v. Norton*, 3:04-CV-102-WHA (N.D. Cal.), AR 141-55.

The court issued a decision holding that the law enforcement function performed by a tribe under the ILERA was a contractible program under the ISDA. *See Hopland v. Norton*, 324 F. Supp. 2d at 1074. It found that Hopland's proposal set forth the scope and criteria of the proposed program for law enforcement services, including the minimum standards the tribe's police officers would need to be commissioned as federal deputies, very much like the deputation contract contemplated under the ILERA. *Id.* at 1069. "In effect," the court found, "the tribe sought to obtain the deputation agreement authorized by the ILERA as a 'contractible' program under the [ISDA]." *Id.* at 1070. But the court did not reach the issue of whether, under the ISDA, OJS had to accept Hopland's proposal outright. *See id. passim.* Rather, the *Hopland v. Norton* court expressly found that OJS could decline the tribe's proposal for law enforcement services for any of the reasons set out in 25 U.S.C. § 450f(a)(2), *see* 324 F. Supp. 2d at 1075, 1077 (allowing OJS to determine whether statutory grounds for a denial exist), which is precisely what OJS did here.

Nor did the parties settle the *Hopland v. Norton* litigation by entering into a 638 contract that OJS must now renew under the ISDA. *See* 25 U.S.C. §§ 450j(c), 450j-1(b)(2); 25 C.F.R. § 900.32. Rather, a review of the settlement documents filed with the court makes clear that the parties settled after they entered into a deputation agreement under the ILERA, not a 638 contract under the ISDA. *See Hopland v. Norton*, ECF No. 72, AR 234-42. *See also* AR 1-9 (same). Although plaintiffs repeatedly mischaracterize this document as a 638 contract, *see* Pls.' MSJ 6, the deputation agreement does not purport to be a 638 contract or to have been issued pursuant to the ISDA and does not does not contain or incorporate by reference the statutorily-required terms of the ISDA's model agreement set out at 25 U.S.C. § 450*l*(c). Cruzan Decl. ¶ 21; c*ompare* 25 U.S.C. § 450*l*(a)(1) *with* AR 237-42. Accordingly, neither the court's decision in *Hopland v. Norton* nor the parties' settlement of that litigation provides any basis for finding that OJS must accept Hopland's proposed revisions to its deputation agreement as a 638 contract under the ISDA.

Contrary to plaintiffs' contention, *see* Pls.' MSJ 16, moreover, the fact that plaintiffs are located in California, a mandatory P.L. 280 state, where tribes have the benefit of state law en-

forcement for crimes committed by Indians on tribal land, should not play any role in this Court's analysis under the ISDA. Indeed, plaintiffs' claim does not even make sense: plaintiffs assert at one point in their brief that OJS has a "categorical policy" of denying funds for law enforcement to tribes in mandatory P.L. 280 states, *see* Pls.' MSJ 22, and then later claim that OJS's application of this alleged policy is "arbitrary," because OJS actually provides funding to tribes in mandatory P.L. 280 states. *See* Pls.' MSJ 26-27. Plaintiffs' dueling contentions demonstrate neither the existence of the policy nor its arbitrary application. What they demonstrate instead is that OJS does *not* have a policy prohibiting the allocation of funds to tribes in mandatory P.L. 280 states. *See* Cruzan Decl. ¶ 15. As a result, several tribes in mandatory P.L. 280 states have entered into 638 contracts for law enforcement services pursuant to 25 U.S.C. § 450f(a) or self-governance agreements that include a line item for law enforcement pursuant to 25 U.S.C. § 458cc. *See* Cruzan Decl. ¶¶ 16-19. The reason that those tribes have these funding agreements is that OJS had allocated law enforcement funds to those tribes which, pursuant the ISDA, were transferred to those tribes when they elected to take over those programs. [16]

[16] Some tribes in mandatory P.L. 280 states have used their authority under the Tribal Priority Allocation process to reallocate funds to a BIA law enforcement program and then taken over operation of that law enforcement program via a 638 contract. Cruzan Decl. ¶ 16. The Red Cliff Band of Lake Superior Chippewa Indians, Stockbridge-Munsee Community Tribe, and Lac Du Flambeau Tribe, all located in Wisconsin (a mandatory P.L. 280 state), and the Lower Sioux Indian Community, located in Minnesota (a mandatory P.L. 280 state), obtained 638 contracts for law enforcement this way. *Id.*

Other tribes in P.L. 280 states that have entered into self-governance agreements have used their authority to choose how to allocate existing pooled federal funds among various programs and activities to include a line item for a law enforcement program. *Id.* ¶ 17. The Leech Lake Band of Ojibwe Indians, located in Minnesota (a mandatory P.L. 280 state), the Oneida Tribe of Indians of Wisconsin (a mandatory P.L. 280 state), the Siletz Tribe located in Oregon (a mandatory P.L. 280 state) and Montana (a non-P.L. 280 state), and the Manzanita Tribe in California (a mandatory P.L. 280 state) are among self-governance tribes located (or partially located) in P.L. 280 states that have allocated a portion of their existing funds to law enforcement. *Id.*

Additionally, the Hoopa Valley Indian Tribe and Yurok Indian Tribe, located in California, obtained federal funds for law enforcement programs for unique historical reasons. *Id.* ¶ 18. In the mid-1990s, BIA began providing direct law enforcement services to assist them in addressing violent criminal acts relating to a dispute over fishing rights. Both tribes later elected to transfer operation of those law enforcement programs via 638 contracts. *See id.*

Finally, OJS allocates law enforcement funds to some tribes that have lands in both a non-P.L. 280 state and a P.L. 280 state. *Id.* ¶ 19. The Quenchan Tribe of Ft. Yuma has tribal lands in Arizona, which is not a P.L. 280 state, and California, which is. *Id.* Because state law enforcement officials in Arizona do not have jurisdiction over crimes committed by Indians on the tribe's land in Arizona, OJS had allocated funding to the tribe, which the tribe was able to take over via a 638 contract. *Id.* A similar situation exists for Ft. Mojave and Colorado River Tribes, both of which have tribal lands in Arizona and California. *Id.*

But OJS does not have enough funds to be able to allocate law enforcement funds to every federally-recognized tribe, *see id.* ¶ 11, and obviously, has not allocated law enforcement funds to plaintiffs. As a result, OJS declined plaintiffs' proposals because, contrary to the requirements of 25 U.S.C. § 450f(a)(2)(D), their funding requests exceeded the amount that OJS had allocated to them. Declining the proposals pursuant to § 450f(a)(2)(D) because the amount of funds the tribes sought exceeded the "secretarial amount" for each tribe is one of the bases set out in 25 U.S.C. § 450f(a)(2) under which OJS may decline a contract. *See Hopland v. Norton,* 324 F. Supp. 2d at 1077. Under the ISDA, that is the end of this Court's analysis. The ISDA is not a vehicle to challenge OJS's allocation of funds.

For this same reason, plaintiffs' reliance on *Los Coyotes Band of Cahuilla & Cupeño Indians v. Salazar,* 2011 WL 5118733 (S.D. Cal. 2011), *on appeal*, No. 11-57222 (9th Cir.), *see* Pls.' MSJ 17, does nothing to advance their case. In *Los Coyotes*, the district court expressly declined to reach the question of whether OJS's declination was consistent with § 450f(a)(2)(D). *See id.* at *3. The court nevertheless held that OJS cannot use plaintiff's location in a P.L. 280 state as the sole reason for declining plaintiffs' contract proposal. *See id.* But the reason that OJS declined Los Coyotes' proposal was the same reason OJS declined these plaintiffs' requests for additional funding here: because the amount proposed by the tribe exceeded the secretarial amount. *See* 25 U.S.C. § 450f(a)(2)(D). Because the *Los Coyotes* court declined to even address this issue under the ISDA, there was no basis to its finding that the tribe's request did not receive a "fair evaluation," 2011 WL 5118733, *3, and there is certainly no basis to make such a finding here.

2. Defendants Correctly Declined Hopland's "Zero Dollar" Proposal and Had No Duty to Approve a Severable Portion of Robinson Racheria's and Coyote Valley's Proposals

Even though Hopland's second proposal did not include a request for any funding, OJS had a valid basis for declining it pursuant to 25 U.S.C. § 450f(a)(2)(E). Nor did OJS have any duty to approve an allegedly severable portion of Robinson Rancheria's and Coyote Valley's proposals.

Hopland's second proposal to OJS was to take over as an unfunded program under the

ISDA a revised deputation agreement. *See* AR 262-71. As discussed above, the ISDA contemplates the transfer of direct services being provided by the Bureau for the benefit of a tribe to the administration of those very same services by the tribe itself. *See* 25 U.S.C. § 450f(a)(1)(B). If the Bureau is not providing the service to a tribe, then there is no service to transfer. This is made clear by the language of the statute itself. 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." *Id.* § 450a(b) (emphasis added). The ISDA requires that the Bureau contract "for the planning, conduct and administration of programs and services *which are otherwise provided to Indian tribes and their members.*" *Id.* § 450b(j) (emphasis added). As noted above, a self-determination contract cannot require the Bureau to create a new federal program for a tribe out of whole cloth.

In this case, OJS correctly declined Hopland's second proposal because it did not offer to take over the *existing* federal law enforcement program that OJS created on the tribe's land when it entered into a deputation agreement with the tribe and was being performed by Hopland's tribal police officers to whom OJS had issued SLECs.[17] Instead, contrary to the ILERA, Hopland's second proposal was not based on OJS's model deputation agreement published in the Federal Register but instead sought to modify its existing deputation agreement to give its tribal officers powers *beyond* those OJS's own law enforcement officers have. Hopland's second proposal asked OJS grant to Hopland's tribal officers the power to enforce all state laws which the State of California has authorized federal law enforcement officials to enforce, *see* AR 264-65, notwithstanding that BIA's law enforcement officers do not have this power. *See* Cruzan Decl. ¶ 22 (noting that OJS law enforcement officials do not have the power to enforce State laws). *See* 25 U.S.C. § 2802(c)(1) ("the responsibilities of the [OJS] in Indian country shall include – the enforcement of Federal law and, with the consent of the Indian tribe, tribal law"). *See also* AR 349, 354. Hopland also sought to have OJS grant the tribe's police authority to travel and conduct ac-

[17] Contrary to plaintiffs' contention, *see* Pls.' MSJ 28, OJS effectively offered technical assistance consistent with 25 C.F.R. § 900.30 when it offered to accept Hopland's proposed deputation agreement under the ILERA subject to a significant number of revisions. *See* AR 276-77.

tivities outside of Indian country, AR 265-67, even though BIA's law enforcement officers exercise limited authority outside of Indian country. Cruzan Decl. ¶ 22. *See* 25 U.S.C. § 2802(c)(1). *See also id.* § 2802(a) ("The Secretary, acting through the Bureau, shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country as provided in this Act."); *id.* § 2803(2) ("The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to – execute or serve warrants, summonses, or other orders relating to a crime committed in Indian country."); *id.* § 2803(3) (authority to make warrantless arrests committed in Indian country). For these reasons, OJS rightfully declined Hopland's second proposal pursuant to 25 U.S.C. § 450(a)(2)(E) because Hopland's proposal included activities that could not be lawfully carried out by the contractor.

For this same reason, OJS was under no obligation to approve the portions of the proposals submitted by Robinson Rancheria and Coyote Valley that did not seek funding. Pls.' MSJ 28. Under the ISDA, the agency has an obligation to approve any severable portion of a contract that does not support a declination, and the tribe may elect to carry out that portion. 25 U.S.C. § 450f(a)(4). But like Hopland's proposal, the proposals of both Robinson Rancheria and Coyote Valley sought proposed amendments to the model deputation agreement that went well beyond the authority that would have provided tribal officers with authority beyond the authority that OJS law enforcement officials have. Cruzan Decl. ¶ 22. Accordingly, there was no severable portion of their proposals for the agency to approve.

In sum, OJS validly declined plaintiffs' proposals for law enforcement services under the ISDA.

C. Plaintiffs Cannot Prevail on Their APA Claims or Their ISDA § 450k Claim

Contrary to plaintiffs' contention, *see* Pls.' MSJ 18, this Court lacks jurisdiction under the APA to review OJS's allocation of funds for law enforcement services among the 566 federally-recognized Indian tribes. Such funding decisions are not susceptible to judicial review under the APA because they are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). For similar reasons, plaintiffs cannot prevail on their claims that the Secretary violated § 450k of the ISDA of the notice and comment requirements on the APA.

1. This Court Lacks Jurisdiction to Hear Plaintiffs' APA Claims

a. Congress's Unrestricted Lump-Sum Appropriation for the Operation of Indian Programs Provides No Relevant Law for this Court to Apply

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. However, "'review is not to be had' . . . where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 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 other words, a lump-sum appropriation provides no relevant "law to apply." *Webster*, 486 U.S. at 600.

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, 25 U.S.C. § 13, the program had served physically and mentally handicapped Indian children in the Southwest region of the United States. A unanimous Supreme Court held that the agency's action was simply a decision about how to allocate funds from a lump-sum appropriation for other permissible statutory objectives under the Snyder Act and was therefore committed to agency discretion and precluded from judicial review. 508 U.S. at 193-94. The Court held that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. The Court explained:

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

Id. at 193 (quoting *Chaney*, 470 U.S. at 831) (internal quotation marks omitted). Because the "reallocation of agency resources to assist handicapped Indian children nationwide clearly falls within the Service's statutory mandate to provide health care to Indian people," the Court con-

cluded that "[t]he decision to terminate the Program was committed to the Service's discretion." *Id.* at 194.

Following *Lincoln*, federal courts have consistently recognized that an agency's decision as to how to allocate scarce funding resources from lump-sum appropriations is "committed to agency discretion by law" and therefore unreviewable under the APA so long as the allocated funding is otherwise spent on permissible statutory objectives. *See, e.g.*, *Serrato v. Clark*, 486 F.3d 560, 568-69 (9th Cir. 2007) (prioritizing funds for BOP programs within statutory appropriations mandate was not reviewable);[18] *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).[19]

The unrestricted lump-sum appropriation at the heart of plaintiffs' challenge, *see* 125 Stat. at 996, provides no relevant law for this Court to apply. *Webster*, 486 U.S. at 600. Plaintiffs do not (and cannot) demonstrate that defendants are otherwise using money appropriated under the Snyder Act for impermissible purposes. Rather, plaintiffs attack the OJS's allocation of funds for law enforcement among the tribes solely on the basis of what plaintiffs assert should be a higher budgetary priority for Congress and the BIA. *See, e.g.*, Compl. ¶ 76 (challenging defendants' al-

[18] In *Serrato* the Ninth Circuit 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.

[19] 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 had 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.*

leged "refusal to allocate funds for law enforcement services to tribes in P.L. 280 states"); Pls.' MSJ 22. This argument ignores many other considerations that defendants have in prioritizing limited funds on a nationwide basis, such as including setting a ratio of 2.8 officers for every 1000 inhabitants, assessing costs per officer, costs of dispatch, administrative support, and office space. Cruzan Dec. ¶¶ 11-12. 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 Hopland, for whom state and local law enforcement options are altogether unavailable. *See, e.g., Baker,* 894 F.2d at 1146. It further ignores the fact that OJS simply does not have the resources to provide every tribe with the funding for law enforcement that it seeks. Cruzan Decl. ¶ 11. Ultimately, OJS's allocation of funds among the 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) (Scalia, J.) ("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."), *cert. denied*, 474 U.S. 825 (1985); *Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) ("The federal courts . . . were not established to operate the administrative agencies of government.").

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

b. The Cases Cited by Plaintiffs Are Inapposite Because They Do No Involve an Agency's Discretionary Allocation of a Lump-Sum Appropriation

Rather than acknowledge *Lincoln* and *Serrato*, plaintiffs wrongfully claim that this Court's analysis should be controlled by *Morton v. Ruiz,* 415 U.S. 199 (1974); *Rincon Band of*

Mission Indians v. Califano, 464 F. Supp. 934 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Rincon Band of Mission Indians v. Harris*, 618 F.2d 569 (9th Cir. 1980); and *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). None is apposite to the present dispute.

Morton is irrelevant because it did not address the agency's allocation of resources from a lump-sum appropriation. In *Morton*, the Supreme Court confronted a challenge to the BIA's policy announced in a manual of limiting general assistance benefits only to Indians who lived on reservations. *See* 415 U.S. at 201. After holding that Congress intended no such limitation on general assistance payments to Indians, and noting that, in practice, the Bureau was providing general assistance payments to Indians living on or near reservations, *id.* at 213, the Court found that the BIA's *own regulations* required it to publish the policy in the Federal Register, which the BIA had failed to do. *Id.* at 233-34. The Court thus held that the BIA's failure to abide by its own regulations rendered its policy invalid. *Id.* at 236.

Contrary to plaintiffs' contention, *see* Pls.' MSJ 21-22, the present dispute does not concern a violation of BIA's own regulations. Rather, the instant challenge concerns only OJS's unreviewable decisions about how to allocate scarce funds for law enforcement services from its unrestricted lump sum appropriation among the 566 federally-recognized tribes. Thus, *Lincoln*, rather than *Morton*, controls this Court's review of plaintiffs' challenge.

Nor does *Rincon* advance plaintiffs' case. In *Rincon*, the district court addressed an equal protection challenge to the IHS's allocation of funds to California Indians. 464 F. Supp. at 935. Citing *Morton* for a proposition for which it does not stand,[20] the district court held that IHS had failed to articulate a rational basis for denying California Indians health services comparable to those available to Indians in other parts of the country. *Rincon*, 464 F. Supp. at 939. On appeal, the Ninth Circuit explicitly did not address the district court's equal protection holding, *Rincon*, 618 F.2d at 570. Instead, the Court of Appeals held that IHS failed to compute the unmet health care needs of California Indians, *id.* at 572, and found that IHS had an obligation under the Snyder Act to rationally and equitably distribute all program funds, *id.* at 573, although not necessarily a per capita proportionate share for California Indians versus Indians in other parts of the

[20] In *Morton*, the Court expressly declined to reach the plaintiff's constitutional arguments. *See* 415 U.S. at 238.

country. *Id.* at 573 n.4.

In light of the Supreme Court's 1993 decision in *Lincoln*, *Rincon* is no longer good law. As the Supreme Court explained in *Lincoln*, because the Snyder Act speaks about Indian programs in "only general terms," *Lincoln*, 508 U.S. at 194, the agency's decision about how to allocate law enforcement resources on a nationwide basis clearly falls within the agency's statutory mandate and is thus committed to the agency's discretion. *See id.* The Snyder Act simply authorizes the BIA to expend whatever funds Congress may appropriate for the "benefit, care, and assistance" of Indians in a number of broad subject areas, including the "[g]eneral support and civilization[,] . . . [f]or the employment of . . . Indian police[,] . . . [f]or the suppression of traffic in intoxicating liquor and deleterious drugs[,] [f]or the purchase of . . . motor-propelled passenger-carrying vehicles for official use[,] [a]nd for general and incidental expenses in connection with the administration of Indian affairs." 25 U.S.C. § 13. But the Snyder Act does not require funds to be spent for any particular purpose; nor does it prescribe specific criteria to be followed by the BIA in allocating resources among their various programs for the "benefit, care, and assistance" of Indians. In short, the Snyder Act imposes no obligation on the BIA to expend funds on one or the other of numerous programs that could come within the general "benefit, care, and assistance" standard, and it provides no judicially manageable standard for judging whether the decision to expend funds on a particular program was proper. *Cf. Scholder v. United States*, 428 F.2d 1123, 1128 (9th Cir. 1970) (rejecting contention that Snyder Act "present[s] federal courts with the unenviable task of reviewing individual [BIA] expenditures and speculating in each instance about [who are the] potential beneficiaries").[21]

Ramah is also inapposite to the present dispute. In *Ramah*, the D.C. Circuit addressed a challenge to a BIA notice published in the Federal Register announcing that, because Congress had not provided sufficient appropriations for the agency to give all tribes with *existing* 638 con-

[21] Even if *Rincon* were good law, it would not be applicable to the present dispute. Unlike the tribe in *Rincon* challenging IHS's allocation of health care resources, plaintiffs here cannot establish that their situation is in all respects similar to those of tribes for whom OJS provides, or contracts for the provision of, direct law enforcement services. *See, infra*, Section IV(D), at 32-37 (citing, *e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167-68 (9th Cir. 2005) ("[D]ifferent treatment of unlike groups does not support an equal protection claim.")).

tracts 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 court held that, because the ISDA's CSC provisions, *see* 25 U.S.C. § 450j-1(a)(2), gave the agency *no* discretion about paying CSC to tribes, the agency's announced policy for allocating CSC among the tribes was judicially reviewable and did not in fact comply with the ISDA provisions governing payment of CSC. 87 F.3d at 1344, 1348.

Unlike the CSC provisions at issue in *Ramah*, the ISDA provisions at issue in this case provide no relevant "law to apply," *see Webster,* 486 U.S. at 600, and thus preclude review of the BIA's allocation of funds from an unrestricted lump-sum appropriation. The present dispute, unlike *Ramah,* does not involve extant 638 contracts, and has nothing to do with the ISDA provisions governing CSC. Once tribes obtain a funded ISDA contract, they have a statutory entitlement to CSC (subject to congressional appropriations). *See* 25 U.S.C. §§ 450j-1(a)(2), 450j-1(g). By contrast, the ISDA provisions at issue in this case concern the transfer of direct services, currently 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 (the secretarial amount), transferring as well. *See* 25 U.S.C. § 450f(a)(1)(B). But while the ISDA provisions at issue in this case govern the transfer of existing programs and services to a contracting tribal organization,[22] nothing in the ISDA requires the BIA to create and fund new federal programs for a tribe. Indeed, the ISDA expressly allows the BIA to decline the contract proposal if BIA is not currently operating a program, and thus not allocating any funding to carry it out. *See id.* at §§ 450f(a)(2)(D), (4)(B). Thus, the ISDA does not otherwise limit the BIA's discretion under the Snyder Act or the ILERA about how to allocate funds from its unrestricted lump-sum appropriation for operation of Indian programs among the 566 tribes.

[22] 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. § 450l(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). None of these provisions speak to the agency's allocation of resources among the tribes.

Accordingly, plaintiffs are unable to demonstrate that this Court can review OJS's allocation of funds under the APA.[23]

2. OJS's Allocation of Funds for Law Enforcement Violates Neither 25 U.S.C. § 450k Nor the Notice-and-Comment Rulemaking Requirements of the APA

This court should reject plaintiffs' claim that OJS's allocation of funds for law enforcement services among the 566-federally recognized tribes violates ISDA § 450k or the APA notice and comment requirements.

Contrary to plaintiffs' contention, *see* Pls.' MSJ 23-24, OJS did not decline to enter into the tribes' proposals for a "non-regulatory" reason in violation of 25 U.S.C. § 450k. Section 450k of the ISDA sets out 16 topics about which BIA can issue regulations but otherwise prohibits the agency from imposing non-regulatory requirements and promulgating regulations relating to the approval, award, or declination of self-determination contracts. The essence of plaintiffs' claim seems to be that the OJS's explanation of why, in light of the fact that tribes in California and other P.L. 280 states have the benefit of state criminal law jurisdiction over crimes committed by Indians on tribal lands, it has generally allocated fewer law enforcement resources than to those tribes that do not enjoy that benefit was somehow equivalent to a "non-regulatory requirement" imposed upon plaintiffs. But that was simply an explanation of how OJS exercises its discretion over its lump-sum appropriation, not a non-regulatory requirement under the ISDA. OJS declined plaintiffs' proposals pursuant to 25 U.S.C. § 450f(a)(2)(D) & (E). Quite simply, declining plaintiffs' proposals pursuant to the statutory criteria set out in § 450f(a)(2) cannot be reasonably be considered a violation of § 450k. As demonstrated above, moreover, OJS does not even have a categorical policy of denying funds to tribes in P.L. 280 states. *See* Section V(B)(1), *supra,* at 17-21. In other words, there is no policy that could be subject to analysis under ISDA § 450k.[24] In

[23] Even assuming *arguendo* that this Court could review OJS's allocation of funds from its lump-sum appropriation, it should, for the reasons set forth in Section V(D), *infra,* that OJS has a rational basis for its allocation.

[24] This Court should disregard the district court's contrary holding in *Los Coyotes, supra,* that, BIA's supposed P.L. 280 "policy cannot constitute a 'general statement of policy,' due to the B[IA]'s limited discretionary powers under the" ISDA. *See* 2011 WL 5118733, *5 (citing *Ramah,* 87 F.3d at 1344). Unlike the present case, *Ramah* dealt with ISDA's CSC provisions, codified at 25 U.S.C. § 450j-1(a) and 450j-1(g), over which the *Ramah* court held the agency had no discretion about allocating CSC among the tribes. But the ISDA provisions at issue in this case govern only the transfer of programs and services already provided for the benefit of a tribe

the end, all that plaintiffs really can complain of is that OJS has not allocated funds for law enforcement to every one of the 566 federally-recognized tribes. Thus, plaintiffs cannot reasonably maintain that declining plaintiffs' proposals for law enforcement programs pursuant to 25 U.S.C. § 450f(a)(2)(D) imposed a non-regulatory requirement on the tribe.

Nor does § 450k require OJS to promulgate regulations governing its allocation of funds for law enforcement services among the 566 federally-recognized tribes. OJS's process for allocating funds for law enforcement among the 566 federally-recognized tribes is a budgetary process committed to agency discretion, and does not constitute a binding rule either on the agency or on third parties. Cruzan Decl. ¶¶ 3-6. *See also Lincoln*, 508 U.S. at 193. Because the ISDA does not govern OJS's allocation of funds for law enforcement, but only provides for the transfer of programs and related funding already allocated to a tribe, the requirements of § 450k cannot be reasonably read to require that OJS's initial allocation of law enforcement funds be published for notice and comment.[25]

Because OJS's allocation of funds among the 566 federally-recognized tribes is simply a question of budgetary priorities, *Lincoln, supra,* also controls resolution of plaintiffs' APA notice-and-comment rulemaking claim. In *Lincoln*, a unanimous Supreme Court held that the discontinuance of the Indian Children's Program was a general statement of policy, not subject to notice and comment, because it was a "statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." 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

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and the associated transfer of funds already allocated to that tribe. *See id.* §§ 450(a), 450f(a)(1)(B), 450l(c). Contrary to the district court's conclusion in *Los Coyotes*, moreover, whether OJS takes the effect of P.L. 280 into account in making these budget allocations is irrelevant to plaintiffs' ability to obtain judicial review of OJS's alleged violation of ISDA § 450k or its alleged failure to publish these allocations for notice and comment. *See infra*.

[25] Nor, contrary to plaintiffs' contention, *see* Pls.' MSJ 23 n.8, do the Tribal Law and Order Act amendments to the ILERA require OJS to develop an "equitable funding formula. *See* 25 U.S.C. § 2802(c)(16)(D). That provision only requires OJS to submit to "appropriate committees of Congress" a detailed spending report regarding tribal public safety and justice that includes, among other things, "*the formula, priority list, or other methodology*" used to determine the method of disbursement of funds for public safety and justice programs administered by OJS. *See id.* OJS includes in Interior's budget justification its ongoing funding obligations and has developed a methodology for distributing new funds which it submits to Congress on an annual basis. Cruzan Decl. ¶¶ 4, 11-12.

held that: "[w]hatever 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, supra*, the Ninth Circuit 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 the Ninth Circuit held, "[b]ecause *Lincoln* controls, BOP's decision is a general statement of policy; notice and comment simply was not required." *Id.* at 569-570.

Like the agency actions in *Lincoln* and *Serrato* – neither of which was designed to implement, interpret, or prescribe its policy, but rather were about allocating lump-sum appropriations – nothing about the BIA's declinations of plaintiffs' proposed 638 contracts or its discretionary decision about how to allocate funds for law enforcement services among the tribes under the ILERA, the Snyder Act, or its unrestricted lump-sum appropriation required notice and comment.

Thus, both plaintiffs' ISDA § 450k claim and APA rulemaking claim fail.

D. Neither the Declination of Plaintiffs' Proposals Nor OJS's Allocation of Funds for Law Enforcement Violate the Equal Protection Component of the Due Process Clause of the Fifth Amendment

This Court should reject plaintiffs' equal protection challenges. Plaintiffs contend that, because OJS allocates funds to tribes located in non-P.L. 280 states and to some tribes located in P.L. 280 states, OJS's declination of the tribes' proposals for law enforcement services violates the Fifth Amendment. Compl. ¶¶ 89, 104; Pls.' MSJ 25-29. It is axiomatic, however, that equal protection analysis comes into play only 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 groups 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. at 485 ("[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)).

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

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. at 319 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)); *Kahawaiolaa v. Norton*, 386 F.3d at 1283, *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)).

In this case, plaintiffs fail to demonstrate that they are similarly situated to tribes in non-P.L. 280 states that have 638 contracts for law enforcement services. Nor could they, because tribes in non-P.L. 280 states do not have the benefit of state law enforcement authority on their tribal lands. *See, e.g., Baker,* 894 F.2d at 1146.[26] But even assuming *arguendo* that plaintiffs' allegations were sufficient to demonstrate similarity to those tribes, there is an obvious "conceivable basis" (*Lehnhausen, supra*) for the agency's distinction in allocating resources between plaintiffs and tribes in non-P.L. 280 states. Again, because the latter do not have the benefit of state law enforcement services on tribal lands, *see, e.g., Baker,* 894 F.2d at 1146, it would be rational for OJS to allocate more of its scarce resources to tribes in those states.

There are also obvious "conceivable bases" for the distinction between plaintiffs and tribes in both non-P.L. 280 states and optional P.L. 280 states that have obtained self-determination contracts or toward which OJS has otherwise allocated resources. OJS can enforce the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, in both non-P.L. 280 states and optional P.L. 280 states, but cannot enforce these statutes in mandatory P.L. 280 states. *See* 18 U.S.C. § 1162(c). These statutes prohibit most major felonies, including homicide, rape, assault, felony child abuse, burglary and robbery, and also assimilate relevant state laws prohibiting conduct not defined or punished by Federal law. *Id.* § 1152. In light

[26] We note that in *Los Coyotes, supra*, the district court correctly found that tribes in P.L. 280 states, which have the benefit of state criminal law jurisdiction over crimes on tribal lands, are not similarly situated to tribes in non-P.L 280 states, which have no such benefit. *See* 2011 WL 5118733, at *6-7. However, the district court in *Los Coyotes* mistakenly held that, because there was some disparity with the agency's allocation of funds for law enforcement among tribes within P.L. 280 states, the disparity gave rise to an equal protection violation. *See id.* at *7. For the reasons set out below, this latter holding is untenable.

of their limited geographic applicability, it is rational for OJS to allocate its scarce resources to tribes that can benefit from the enforcement of these laws.

Similarly, there are obvious "conceivable bases" for the distinction between plaintiffs and other tribes located in mandatory P.L. 280 states that may have obtained self-determination contracts for law enforcement services (again, assuming *arguendo*, that plaintiffs' allegations were sufficient to demonstrate similarity). Such tribes have obtained these contracts for a variety of geographical, legal, and historical reasons. Some tribes have used the TPA process to reallocate funds from other BIA programs to law enforcement, and then taken over operation of that program via a 638 contract. Cruzan Decl. ¶ 16. Plaintiffs have not even alleged that they would be precluded from doing the same. *See* Compl. *passim*. *Cf.* Cruzan Decl. ¶ 4.

Other tribes that obtained 638 contracts for law enforcement services in mandatory P.L. 280 states have elected to become self-governance tribes, *id.* ¶ 17; 25 U.S.C. § 458aa *et seq.*, which has given them even broader discretion about how to allocate the funds they already receive from BIA among various Indian programs, including the decision to allocate funds for law enforcement. *See* 25 U.S.C. § 458cc(b). Plaintiffs have not alleged that they would be precluded from becoming self-governance tribes themselves, much less that self-governance tribes have a special right to seek (let alone obtain) *additional* funds for law enforcement services. Compl. *passim*.

Additionally, some tribes that have obtained 638 contracts for law enforcement services have tribal lands located, for example, in both Arizona, which is not a P.L. 280 state, and California, which is a mandatory P.L. 280 state, so those tribes do not have the benefit of state criminal law jurisdiction over their tribal lands in Arizona. Cruzan Decl. ¶ 19. As a result, OJS has a rational basis for allocating law enforcement funds to those tribes, which would then allow those tribes to take over those programs via a 638 contract.

Finally, there are "conceivably rational" bases for the distinction between plaintiffs and all tribes to which OJS has allocated its scarce resources. OJS has rationally decided that there are greater crime problems (or crime problems that were not being sufficiently addressed by state authorities, for whatever reason) that warranted allocating some of its limited resources toward

providing law enforcement services for those tribes. *See, e.g.*, Cruzan Decl. ¶ 18.

At the very least, all of this is "rational speculation" (*Beach Commc'ns*, 508 U.S. at 315), and plaintiffs are not in a position to "negative" (*Lehnhausen*, *supra*) these rationales. Under rational basis scrutiny, that suffices to carry the day.

E. Defendants Do Not Have a Trust Obligation to Approve Plaintiffs' Proposals

This court should reject plaintiffs' trust claims. Plaintiffs claim that defendants have a trust obligation to approve their proposals for law enforcement programs. *See* Compl. ¶ 98; Pls.' MSJ 35-39. However, OJS's decisions to decline plaintiffs' proposal do not violate the trust obligations of the United States. *See generally Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986).

The Indian Trust doctrine is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quotation marks and citation). This doctrine does not, however, give rise to any duty on the part of the United States beyond complying with generally applicable statutes and regulations. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). Rather, the trust relationship between the United States and all Indian tribes is insufficient to create legal obligations by the United States to provide funding for a particular tribe. *See Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921, 927-28 (9th Cir. 2008) (affirming dismissal of Plaintiffs' claim that HUD violated its trust responsibility). As the Ninth Circuit has explained, "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Gros Ventre Tribe*, 469 F.3d. at 810 (quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). Thus, for example, the government does not bear fiduciary responsibility to a particular tribe "unless it has 'take[n] full control of a tribally-owned resource and manage[d] it to the exclusion of the tribe.'" *Gros Ventre Tribe*, 469 F.3d. at 813 (quoting *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 984 (9th Cir. 2006)) (alteration in original, emphasis omitted).

When a tribe sues the government for equitable relief, it must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government

has failed faithfully to perform those duties. *See Gros Ventre Tribe.*, 469 F.3d at 812. Plaintiffs' contend that OJS has "taken over management" of funds appropriated by Congress for the benefit of the tribes and has "mismanaged" the funds by denying plaintiffs' their "proportionate share." Pls.' MSJ 38. Although plaintiffs attempt to characterize their claim as a trust claim, they fail to identify a trust relationship with their tribes that arises under a statute.

The Snyder Act *authorizes* the United States to provide "[g]eneral support and civilization . . . [f]or the employment of . . . Indian police . . . [f]or the suppression of traffic in intoxicating liquor and deleterious drugs[,] [f]or the purchase of . . . motor-propelled passenger-carrying vehicles for official use[,] [a]nd for general and incidental expenses in connection with the administration of Indian affairs." 25 U.S.C. § 13. But it imposes no specific legal duty to provide law enforcement services, let alone provide them to a particular tribe. *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987); *Quechan Tribe of the Ft. Yuma Indian Reservation*, 2011 WL 1211574, at *2. Thus, the Snyder Act imposes no trust obligation on defendants to provide law enforcement services to plaintiffs.

Nor can plaintiffs sustain a claim that trust obligations of the United States arise under the ISDA. Because the ISDA aims to foster tribal self-determination, it would be inconsistent to hold that it makes the United States exclusively responsible for providing or otherwise funding plaintiffs' law enforcement operations. *See Navajo Nation*, 537 U.S. at 508 (holding that because the Indian Mining Lease Act encouraged tribal self-determination, the statute did not impose fiduciary duties); *see also McNabb*, 829 F.2d at 792 (finding that while the federal government may have some responsibility for Indian health care, it is not the exclusive provider). Thus, plaintiffs have failed to state a claim for defendants' violation of United States' trust obligations.

F. Plaintiffs Are Not Entitled to Monetary Damages

Contrary to plaintiffs' contention, *see* Pls.' MSJ 40-41, they are not entitled to monetary damages in this case. The ISDA provides a damage remedy only for breaches of contracts, not an alleged breach of a duty to enter into a contract, which is all that is at issue in this case.

The ISDA contains a limited waiver of sovereign immunity by granting the district court jurisdiction over:

> any civil action or claim against the appropriate Secretary arising under this subchapter and . . . over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. 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 the subchapter 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 subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

25 U.S.C. § 450m-1(a). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo Nation,* 537 U.S. at 502 (quotation marks and citation omitted). A waiver of sovereign immunity must be "'unequivocally expressed' in statutory text," *FAA v. Cooper,*132 S. Ct. 1441, 1448 (2012) (citations omitted), and the "scope" of any such waiver must be "strictly construed . . . in favor of the sovereign," *Lane v. Peña,* 518 U.S. at 192, and "not enlarge(d) . . . beyond what the language requires." *U.S. Dep't of Energy v. Ohio,* 503 U.S. at 615 (quotation marks and citation omitted). *See also Cooper,* 132 S. Ct. at 1448.

Contrary to plaintiffs' contention, *see* Pls.' MSJ 40-41, the sole reference to damages in the ISDA's waiver of sovereign immunity is one for money damages arising under contracts. *See* 25 U.S.C. § 450m-1.The remedy to claims of wrongful declination, by contrast, is for injunctive relief. *See id.* Because the remedy of monetary damages for wrongful declinations is not clearly expressed in the ISDA, the statute cannot be read to allow the recovery of damages.

The Federal Circuit, which handles appeals in cases for damages against the government, has expressly held that it does not have jurisdiction to provide damages sought by a tribe for the failure to carry out a statutory duty under the ISDA. *See Samish Indian Nation,* 419 F.3d at 1365 (noting that, "absent a contract, the ISDA does not provide a damage remedy"). In *Samish,* the government allegedly prevented the plaintiff tribe from obtaining self-determination contracts by wrongfully refusing to accord it federal recognition. *Id.* at 1362-63. Like the instant plaintiffs, the tribe in *Samish* claimed program money for the years during which it was allegedly wrongly deprived of a contract under the ISDA. The court found, however, that in the absence of an existing contract, ISDA did not confer a private damage remedy for this funding. It held instead that,

since program funds are derived from benefits under statutes other than ISDA, the existence of a damage remedy "cannot be determined by reference to ISDA itself." *Id.* at 1365. A damage remedy, by contrast, could only be determined according to the terms of an actual self-determination contract that was the mechanism for directing those benefits. *Id.*

In this case, plaintiffs allege that OJS wrongfully declined their proposals to enter into contracts under the ISDA. They do not allege (and could not demonstrate) that they had existing 638 contracts and that OJS breached those contracts. Absent a showing of a breach of contract, the only remedy available for a wrongful declination under § 450m-1 is that of specific performance.

VI. CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for summary judgment, grant defendants' cross motion for summary judgment, and should enter judgment for defendants.

Respectfully Submitted,

/s/ James D. Todd, Jr.
JAMES D. TODD, JR.
Senior Counsel
U.S. DEPARTMENT OF JUSTICE
Attorney for Defendants

Dated: June 22, 2012

CERTIFICATE OF SERVICE

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

LESTER J. MARSTON
RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, CA 95482
marston1@pacbell.net
Attorney for Plaintiffs

/s/ James D. Todd, Jr.
JAMES D. TODD, JR.