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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

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

Defendants.

Case No. CV 12-00556 CRB

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

DATE: September 7, 2012
TIME: 10:00 a.m.
COURTROOM: 6
HON. CHARLES R. BREYER

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INTRODUCTION.

In their Opposition to plaintiff's Motion for Summary Judgment ("Opposition"), the defendants have attempted to rewrite the history of this case. Ignoring the Administrative Record, they have based their Opposition on the Declaration of Darren Cruzan ("Cruzan Declaration"), current Director of the Office of Justice Services ("OJS") for the Bureau of Indian Affairs. That declaration, rather than clarifying the Administrative Record, contradicts the Administrative Record ("AR") on nearly every essential element of the decision making process. It also alleges new facts, and tenders *post hoc* justifications for the decisions that are the basis for this lawsuit. As the very case law cited by the defendants makes clear, the Cruzan Declaration is inadmissible, as is the statement of facts in the Opposition and the Defendants' Memorandum of Points and Authorities in Support of the Opposition.

Once the defendants' newly conjured facts and explanations for their decisions are removed, the defendants' legal arguments collapse. In their motion for summary judgment, the plaintiffs ("Tribes") demonstrated that the decisions made by defendants were arbitrary, in violation of the Administrative Procedures Act, 5 U.S.C. §701, et seq. ("APA"), the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450, et seq. ("ISDEAA"), the Tribal Law and Order Act, P.L. 111-211, 124 Stat. 2258, ("TLOA"), and the Fifth Amendment to the United States Constitution.

I.

THE CRUZAN DECLARATION, DEFENDANTS' STATEMENT OF FACTS AND THE MEMORANDUM OF POINTS AND AUTHORITIES MUST BE STRUCK.

From the beginning of the Tribe's efforts to enter into 638 contracts for law enforcement services, the defendants have played a shell game of denials, inaccurate explanations, and refusals to meet their obligations to assist the Tribes. The submission of the Cruzan Declaration and the citation to that declaration as the factual basis for the defendants' Opposition are yet another cycle of dishonesty and failure to comply with the

law on the part of the defendants.

This case presents a challenge to final decisions of a federal agency. As the defendants state in their Opposition, "the rationale for the agency's decision must be derived from the administrative record." Opposition, p. 15, fn 14. "It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made. . . . not some new record completed initially in the reviewing court." *Environmental Defense Fund, Inc. v. Costle*, 211 U.S. App. D.C. 313, 657 F.2d 275, 284 (D.C. Cir. 1981). Moreover: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). "*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). *Post hoc* rationalizations "have traditionally been found to be an inadequate basis for review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

The defendants filed the Administrative Record on June 22, 2012.[1] The Administrative Record may be supplemented, but only for specific reasons. *Yale-New Haven Hospital v. Leavitt,* 470 F.3d 71 (2d Cir. 2006), cited by the defendants, articulated the relevant standard as: "to the extent that an agency may supplement the record on judicial review . . . , it may do so only if the proffered evidence illuminates the original record and does not advance new rationalizations for the agency's action." *Id.*, at 82. In *Empresa-Cubana Exportadora De Alimentos y Productos Varios v. Dep't of Treasury,* 606 F. Supp. 2d 59, 68 (D.D.C. 2009), cited by the defendants, the court ruled that "[w]hen that record fails to adequately explain the challenged action, a court may also consider agency affidavits or testimony representing a 'contemporaneous explanation of

[1] In yet another telling example of the defendants' failure/refusal to fulfill their obligations to the Tribes, the defendants did not include in the Administrative Record all of the documents that the parties stipulated would constitute the Administrative Record. Stipulation and Order Regarding Admissibility of Exhibits.

the agency decision.'" *Id.,* at 68, citing *Camp v. Pitts,* 411 U.S. 138, 142-143 (1973). Finally, *Bunker Hill Co. v. EPA,* 572 F.2d 1286, 1292 (9th Cir. 1977), also cited by the defendants, made it clear that the supplementing of the Administrative Record is only appropriate where the court requires clarification of the record, as in cases involving highly specific or technical matters:

> (T)he courts are not straightjacketed to the original record in trying to make sense of complex technical testimony, which is often presented in administrative proceedings without ultimate review by nonexpert judges in mind. Here, the 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.
>
> *Id.*, 572 F.2d at 1292.

Despite the clarity of the standard expressed in the cases cited by the defendants in their Opposition, the defendants have submitted the Cruzan Declaration and state that: "This declaration is offered solely to provide back-ground information and to "illuminate[] the original record," citing *Yale-New Haven Hosp.,* 470 F.3d at 82. Even by the loose standard of candor displayed by the defendants in the course of the decision making process that led to the claims at issue in this case, this is a startlingly dishonest assertion. Numerous statements in the Cruzan Declaration directly conflict with statements of officials in the documents that make up the Administrative Record. Where the Cruzan Declaration does not directly conflict with the documents in the Administrative Record, it includes factual allegations that go well beyond the facts in the Administrative Record and *post hoc* rationalizations for those decisions.

1. The Cruzan Declaration Directly Conflicts with the Administrative Record.

The Cruzan Declaration repeatedly contradicts the explanations and analysis provided in the contemporary documentation in the Administrative Record and replaces them with entirely new explanations and analysis. Most importantly, the Cruzan Declaration changes the explanation for the denial of the Tribes' requests for 638 contracts for law enforcement services. The Administrative Record reflects that the

requests were denied because the OJS has instituted a policy of refusing to provide funding for law enforcement services to Indian tribes in California, because it is a P.L. 280 state. This is evidenced in the denial of the Hopland Band's request for a 638 contract, where Selanhongva McDonald, Special Agent in Charge, District 3, OJS, stated:

> The amount of money that OJS spends in California for law enforcement services is zero. The principle reason for this is that, as you know, California is a P.L. 280 state, and so the costs of law enforcement on Indian reservations are borne by the State, not the BIA. [...] What we are saying is that the BIA-OJS does not spend any money for law enforcement on Indian reservations in the State, so law enforcement is not a program, function, service, or activity that, as a component of its budget, the OJS provides directly to Indian tribes in California.

(AR pp. 34-36. Exhibit D to Complaint).

In the course of his testimony before the Secretary's Designated Representative at the informal conference on the denial of the Hopland Band's application, Pat Ragsdale, Director of Office of Justice Services, Bureau of Indian Affairs, made the following statements in response to the questions of the Hopland Band's counsel:

> But across the board, the Bureau [of Indian Affairs] has never made funding available to law enforcement funding for [P.L.] 280-type jurisdictions in Indian Country.

AR [2] (Exhibit H to complaint, page 27, line 6-8.)

> Marston: And why is that? Why aren't you willing to get funding?
>
> Ragsdale: Because [denial of funds to P.L. 280 states has] been a long standing policy of the Department of the Interior. Not my policy, but long standing policy of the Department of Interior.

AR p. 78. (Exhibit H to Complaint, page 37, line 4-7.)

> Marston: Are you willing to make the request for funds?
>
> Ragsdale: No.
>
> Marston: Why not?
>
> Ragsdale: For the reasons already stated.
>
> Marston: Because it's not the policy of the DOI to fund tribes in P.L. 280

[2]This page was conveniently omitted from the defendants' Administrative Record.

> states? Do you feel any responsibility to request funding?
>
> Ragsdale: Not in a Public Law 280, no, I don't.
>
> Marston: And that is based on the assumption that the Sheriff has jurisdiction to provide law enforcement on the reservation?
>
> Ragsdale: That's my understanding"

AR p. 79. (Exhibit H to Complaint, page 37, line 20-25; page 38, line 6-12).

In his declaration, by contrast, Cruzan denies that the Department has such a policy:

> [...] because of competing demands on OJS's limited resources, OJS has historically directed more resources for direct law enforcement services toward tribes in non-P.L. 280 states than toward tribes in mandatory P.L. 280 states. But OJS does not have a policy prohibiting the allocation of funds to tribes in mandatory P.L. 280 states. In fact, OJS allocates funding to tribes in mandatory P.L. 280 states.

Cruzan Declaration ¶15, pp. 17-22.

While the Cruzan Declaration addresses the question of the funding formula for 638 contracts for law enforcement services at length and offers specific criteria, Janine Brooks, Strategic Planning Officer, Office of the OJS, stated, "There is no formula. Original distributions for programs are just historical base funding amounts that were transferred from TPA [Tribal Priority Allocation] accounts and are now base dollars for the programs. The existing law enforcement programs are all underfunded and redistribution of base funding is not possible." Complaint, p. 9, Exhibit F, p. 1 . It is worth noting that the Cruzan Declaration's discussion of the funding formula relates to *new* funding. Cruzan Declaration, p. 5, ¶ 12. At the same time, he states that the OJS law enforcement services programs are underfunded, so there is no new funding to be distributed. Cruzan Declaration, p. 2, ¶ 5.

Finally, in describing the alleged funding formula, the Cruzan Declaration differs from the criteria referred to in the OJS documentation in the Administrative Record. Compare Cruzan Declaration, pp. 22-28, ¶ 12, to OJS Presentation on Budget and Data Collection, Exhibit F to Complaint, p. 2.

2. The Cruzan Declaration Includes Information that Was not Included in the Administrative Record.

Even where the Cruzan Declaration does not conflict with the information in the Administrative Record, it includes factual allegations relating to information that is not part of the Administrative Record. That information is not offered to illuminate the Administrative Record or to clarify highly technical information contained in the Administrative Record. The obvious purpose is to provide either a new explanation for the defendants' decisions or to cast the decisions in a new, more favorable light.

The Administrative Record reveals that the stated basis for the decisions to deny 638 contracts to the Hopland Band, the Robinson Rancheria, and the Coyote Valley Band was that the OJS adopted a policy of not providing law enforcement services to Tribes in California. See, e.g., AR pp. 35, 308, 335. The Administrative Record further reveals that the "policy" was not based on an analysis of the needs of tribes in California for law enforcement services compared with those of tribes in non-P.L. 280 states, but rather the policy was inconsistently implemented and based on an absence of analysis of the needs of tribes. The emails from OJS officials stating that there was no funding formula underlying the decisions supports this conclusion. Funding allocation was simply a continuation of TPA funding to tribes that had received funding before the OJS was created. Exhibit F to Complaint, p .1. The decision to deny funding for law enforcement services was based on laziness and bureaucratic inertia. *Id.*, pp. 1-2.

The Cruzan Declaration, by contrast, provides a detailed, if somewhat self-contradictory,[3] portrayal of the budgetary process for the BIA and the OJS. The impression that the Cruzan Declaration is intended to give, is that the denial of the Tribes' applications for 638 contracts was based on a careful analysis of the needs of all federally

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[3]The Cruzan Declaration discusses the lump-sum budget process, but then discusses the fact that the OJS funding is budgeted separately from the other items in the BIA's budget. Cruzan Declaration, p. 2, ¶ 4. It does not provide an explanation as to whether and how this effects the analysis of the legal requirements for OJS's budgetary process.

recognized tribes and the available law enforcement services within the context of limited Congressional Tribal law enforcement appropriations. This is clearly an attempt to backfill the Administrative Record in order to make the defendants appear to have had a reasonable funding policy and allocation processes, in contrast with the evidence in the Administrative Record that the process was arbitrary and based on the TPA funding levels established before of the OJS was created.[4]

The Cruzan Declaration is an obvious attempt at a "do-over." The Cruzan Declaration is also an attempt to denigrate the Tribes. The declaration repeatedly refers to the funding provided to the Tribe by the BIA. Cruzan Declaration, p. 3, ¶ 6. The declaration does not and cannot claim that the cited funding is relevant to funding for law enforcement or any of the claims brought in this lawsuit. The funding referred to is general funding from the BIA for programs other than law enforcement. The references are included to suggest that the Tribes are already getting lots of money from the federal government and the request for the 638 contracts is just an example of greedy Indians wanting more.

Based on the foregoing, it is clear that the Cruzan Declaration must be struck

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[4]The defendants' attempt to reframe the funding analysis through the Cruzan Declaration includes a number of statements that, if not outright dishonest, are intentionally misleading. A particularly clear example is the statement in the Cruzan Declaration that, " [i]n addition to funds for direct services, OJS has allocated funds for law enforcement for a full time law enforcement position in Sacramento, California, ..." Cruzan Declaration, p. 8, ¶ 20. This statement is intended to give support to the notion that the OJS does not have a policy of denying law enforcement services to the tribes of California. The OJS assigned one law enforcement special agent in charge, Carleen Fisher, to the Sacramento Office of the BIA, OJS on April 12, 2012, more than two months after this lawsuit was filed. Ms. Fisher does not do any criminal investigations or provide any patrol services on any Indian reservation in California. Her duties are limited to assisting tribes with their SLECs applications, technical support, contracting issues, resource information, and assistance to set up training. The OJS informed John Irwin, Commander of the Robinson Rancheria of Pomo Indians of California's Police Department that it will not provide any law enforcement personnel to assist the Tribe because the Reservation is located in California, a Public Law 280 state. Declaration of John Irwin in Support of the Tribe's Motion for Summary Judgment, pp. 4-5, ¶ 12.

because it does not fall within the narrow criteria for the acceptance by the Court of declarations and information to supplement the Administrative Record. For the same reason, the statement of facts in the Memorandum of Points and Authorities must be struck, because it is based almost entirely on the Cruzan Declaration. Finally, the Memorandum of Points and Authorities filed in opposition to the Tribes' motion for summary judgment and in support of the defendants' motion for summary judgment must also be struck because defendants' arguments are based almost entirely on the Cruzan Declaration. Declarations, statements of fact and memoranda may be struck where they go beyond the limitations for those documents and evidence that are permitted to supplement the Administrative Record. *Yale- New Haven Hospital Inc., v. Thompson*, 198 F. Supp. 2d 183, 185-87 (D. Conn. 2002).

3. The Cruzan Declaration is Inadmissible Because It Does Not Comply With the Requirements of Fed. R. Civ. P. 56 (c)(4).

Any affidavit or declaration used to support or oppose a motion must be made on personal knowledge. Fed. R. Civ. P. 56(c)(4). Here, the Cruzan Declaration was filed to clarify the Administrative Record. However, Darren Cruzan was not present at the administrative proceedings nor is Mr. Cruzan responsible for the overall preparation of the budget submitted to Congress by the BIA.

The Cruzan Declaration cannot therefore be based upon personal knowledge, is hearsay, and is not admissible as an affidavit to oppose the Tribes' motion for summary judgment.

II.

THE REDDING RANCHERIA AND THE RINCON BAND HAVE STANDING.

The defendants argue that the Redding Rancheria and the Rincon Band do not have standing to be parties to this lawsuit because neither "demonstrates *any* government conduct that caused a concrete injury to the tribe." Opposition, p. 16. They argue that the Redding Rancheria does not have standing because it "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." Opposition, p. 16. They argue that the Rincon Band lacks standing because it "fails to demonstrate, for example, that it proposed and defendants denied a 638 contract for law enforcement services."

The defendants' argument is meritless. The basic requirements for standing, as articulated by the Supreme Court are: (1) the plaintiff must have suffered an injury in fact, which is (a) concrete and particularized, meaning that the injury must affect the plaintiff in a personal and individual way, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, i.e., the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). The Redding Rancheria and Rincon Band clearly meet the latter two of the three basic requirements for standing. There is a clear causal connection between the OJS's policy of denying 638 contracts for law enforcement services to California tribes and the fact that Redding Rancheria and Rincon Band have been unable to enter into such a contract. Clearly, a decision finding that the defendants' policy is a violation of the APA, ISDEAA, and the TLOA and requiring them to grant the relief requested in the complaint would redress the injury suffered by the Redding Rancheria and Rincon Band. They are, furthermore, within the zone of interests to be protected by the statute sought to be enforced, and the statutes do not preclude review. *Hood River County v. United States,* 532 F.2d 1236, 1238 (9th Cir. 1976). Clearly, the Redding Rancheria and Rincon Band, as Indian tribes seeking to enter into 638 contracts for law enforcement services, are within the zone of interests intended by Congress in enacting the ISDEAA and TLOA. As was discussed in the Tribes' memorandum in support of its motion for summary judgment, the ISDEAA itself provides for judicial review of denials of those contracts.

The only issue remaining under the *Defenders of Wildlife* criteria is whether the Redding Rancheria and the Rincon Band have suffered an injury in fact. They are not compelled to demonstrate that they have suffered such an injury because it would be futile for them to exhaust the administrative process necessary to be denied 638 contracts for law enforcement services.

In *Taniguchi v. Schultz,* 303 F.3d 950, 957 (9th Cir. 2002), cited by the defendants, the Ninth Circuit, stated, "We have consistently held that standing does not require exercises in futility." Citing *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496(9th Cir. 1981) ("*Aleknagik*"). In *Aleknagik*, the Ninth Circuit articulated the standard for determining whether a party is required to exhaust administrative remedies:

> Although exhaustion of administrative remedies is typically required as a condition for judicial review, the requirement is not absolute. . . . The doctrine must be applied in each case with an understanding of its purposes and the particular administrative scheme involved. . . . Where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions. Thus, exhaustion is not required if administrative remedies are inadequate or not efficacious. . . ; where pursuit of administrative remedies would be a futile gesture. . . . Where irreparable injury will result unless immediate judicial review is permitted, . . . ; or where the administrative proceeding would be void, ... Unless statutorily mandated, application of the doctrine is in the sound discretion of the courts. . . . In deciding how to exercise its discretion, the court should balance the litigant's need for judicial resolution against the agency's interests in having an opportunity to make a factual record and exercise its discretion without the threat of litigious interruption, in discouraging frequent flouting of the administrative process, and in correcting its own mistakes to obviate unnecessary judicial proceedings.

Id., 648 F.2d at 499-500. See, *Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle*, 571 F.2d 359, 363 (7th Cir.); *City Farmers Trust Co. v. Schnader*, 291 U.S. 24, 34 (1934); *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928).

In asserting that the Redding Rancheria and Rincon Band do not meet the standard for futility, the defendants misstate the legal standard. "Only when a challenged statute 'flatly prohibit[s]' the conduct at issue does the standing requirement excuse 'exercises in futility.'" Opposition, p. 16, fn 15, citing *Taniguchi, supra,* and *Desert Outdoor Adver.,*

Inc. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996). Both of these cases cite *Aleknagik* as the basis for their discussion of the doctrine of futility. Neither *Tanaguchi* nor *Desert Outdoor Advertising* state that the "only" basis for a finding of futility is "when a challenged statute 'flatly prohibit[s]' the conduct at issue." *Tanaguchi* cites a statutory prohibition as an example of futility, not the exclusive basis for such a finding. *Id.*, 303 F.3d 950, 957 (9th Cir. 2002). *Desert Outdoor Advertising,* 103 F.3d 814, 818 (9th Cir. 1996) lists a statutory prohibition as one of two bases for the finding of futility in that case, without any suggestion that the application of the doctrine of futility was restricted to statutory prohibitions or any other individual basis.

There is no question that the submission of 638 contracts for law enforcement services or a request for funding for law enforcement services pursuant to the Redding Rancheria's self-governance contract would be futile. In the letters denying requests for 638 contracts for law enforcement to the other plaintiff Tribes, the OJS stated, repeatedly, that it does not grant 638 contracts for law enforcement services to California tribes, because there are no law enforcement programs to transfer from the federal government to the tribes. AR pp. 35, 308, 335. None of those letters state that the denial was based on any specific circumstance of the applicant tribe or any specific element of a proposed 638 contract. The proposals were *categorically* denied, based exclusively on the tribes' location within California. The denials do not identify any exceptions that would allow any California tribe to receive approval of a 638 contract for law enforcement services. See generally, AR pp. 34-36, 307-309, 334-336.

If the Court "balance[s] the litigant's need for judicial resolution against the agency's interests in having an opportunity to make a factual record and exercise its discretion without the threat of litigious interruption, in discouraging frequent flouting of the administrative process, and in correcting its own mistakes to obviate unnecessary judicial proceedings," *Aleknagik,* 648 F.2d at 500, the Court will be compelled to conclude that the defendants have no legitimate interest in requiring the Redding Rancheria and

the Rincon Band to submit applications for 638 contracts.

Thus, there is no basis for concluding that the Redding Rancheria application for law enforcement funding pursuant to its self-governance contract or the Rincon Band's the application for approval of a 638 contract for law enforcement services would be anything but a futile act.

III.

THE DEFENDANTS' DISCRETION TO ALLOCATE LUMP FUND APPROPRIATIONS DOES NOT RELIEVE THEM OF THE REQUIREMENT TO ESTABLISH A REASONABLE FUNDING FORMULA.

The defendants ask the Court to dismiss all of the Tribes' claims for lack of jurisdiction. The defendants' Opposition is based almost entirely on the argument that the OJS has absolute discretion to allocate the money appropriated to it by Congress:

> [T]his 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'. . . . 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.

Opposition, p. 23.

The defendants go on:

> "'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. [182] at 191 [(1993)] (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* [*v. Doe*],, 486 U.S. [592]at 600 [(1988)].

Opposition, p. 24.

Once again, the defendants' argument is based on sleight of hand. The defendants argue that they have absolute discretion to allocate OJS funding any way that they want, and, because of that, the line of cases requiring that federal agencies have a rational funding formula, *Morton v. Ruiz*, 415 U.S. 199 (1974) ("Ruiz"); *Rincon Band of Mission*

Indians v. Califano, 464 F. Supp. 934 (N.D. Cal. 1979) ("Rincon");[5] and *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir 1996) ("Ramah)", have no application. The defendants even go as far as to argue that some of those cases have actually been overturned.

The problem with the defendants' argument is that it is conflating two concepts and two lines of court decisions. The fundamental case cited by the defendants, *Lincoln v. Vigil*, 508 U.S. 182 (1993), indeed concluded that federal agencies have broad discretion to allocate funding, and that parties are generally not permitted to challenge individual allocation decisions. In that case, the plaintiffs sought to prevent the Indian Health Service from reallocating funding for a health services program for handicapped Indian children. That program was not listed in the agency's overall budget. It was simply a program that the agency decided to modify and expand to provide nationwide service. It is a clear example of precisely the type of individual budgetary decision that is within the discretion of a federal agency.

The Tribes are not disputing that federal agencies have discretion to allocate the funding in their budgets. The Tribes claims are based on the fact that federal courts have established that agency discretion is not absolute and that federal agencies have, at a minimum, rational funding formulas that are made known to the public. *Ruiz, Rincon* and *Ramah*.

The defendants attempt to blur the distinction between agency discretion and the

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[5]The defendants repeatedly reject the application of federal case law, based on their view that the cases are poorly reasoned, or they disagree with the decision. The defendants shunt aside the District Court's decision in Rincon v. Califano, "Citing *Morton* for a proposition for which it does not stand . . .," (Opposition, p. 27), and then dismisses entirely the Ninth Circuit's decision, "*Rincon* is no longer good law." The defendants then blithely dismiss the *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, 2011 U.S. Dist. LEXIS 125213 (S.D. Cal. 2011) decision, "there was no basis to its finding that the tribe's request did not receive a "fair evaluation." Opposition, p. 21. Obviously, the defendants' lack of respect for federal court decisions is irrelevant to their application as legal precedent.

requirement that an agency establish a rational, publically noticed, funding policy by arguing that agency discretion extends to situations in which there is limited funding available: "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." Opposition, p. 25, citing *Serrato v. Clark*, 486 F.3d 560, 568-69 (9th Cir. 2007), *Collins v. United States*, 564 F.3d 833, 839 (7th Cir. 2009) ("*Collins*"), *St. Tammany Parish v. FEMA*, 556 F.3d 307, 325 (5th Cir. 2009) ("*St. Tammany Parish*"), *Board of County Commissioner of the County of Adams v. Isaac*, 18 F.3d 1492, 1498 (10th Cir. 1994) ("*Isaac*"). Nothing in those cases, however, eliminates or even addresses the requirement that federal agencies establish and give the public notice of rational funding policies established in *Ruiz*, *Rincon*, and *Ramah*. In *Serrato*, the court cites to *Ruiz*, but distinguishes it on the bases that *Ruiz* did not address the APA's notice and comment requirement. *Serrato*, 486 F. 3d at 570, fn 6. It did not address the *Ruiz* requirement that agencies establish and make known rational funding formulas. The *Collins*, *St. Tammany Parish*, and *Isaac* decisions make no reference to the *Ruiz* line of cases and does not address the requirement for a rational funding formula.

In their memorandum, the Tribes demonstrated in detail that the OJS has no funding formula for allocating 638 contract funding for law enforcement. The Tribes that receive funding do so as a result of their having received TPA funding in the past, before the establishment of the OJS. Exhibit F to Complaint, pg. 1. The Tribe also demonstrated that the OJS categorically excludes California tribes from consideration for law enforcement funding, including 638 contracts, because California is a P.L. 280 state. AR p. 35; p. 308; p. 335. The Tribes further demonstrated that, despite its significance to tribes in California and around the country, and its mandatory duty to establish an equitable funding formula pursuant to formal rule making under the APA provide notice

of the policy, the BIA/OJS has not published notice of that policy, let along developed it. All of these acts are arbitrary, in violation of the APA. The failure to give notice is a violation of 25 U.S.C. § 450k. The failure to establish an implement a funding formula is also a violation of the TLOA, which requires that the OJS establish "the formula, priority list or other methodology used to determine the method of disbursement of funds for the public safety and justice programs administered by the Office of Justice Services;". 25 U.S.C. § 2802(c)(16)(D).

> . . . the responsibilities of the Office of Justice Services in Indian country shall include - (D) the formula, priority list or other methodology used to determined the method of disbursement of funds for the . . . program administered by the Office of Justice Services, . . .

25 U.S.C. 2802 (c)(16)(D).

The defendants' argument that their discretion to allocate lump sum allocations eliminates any obligation to implement a funding formula is not only in conflict with *Ruiz et al*, *Rincon,* and *Ramah*. It is also in conflict with the federal government's own interpretation of the applicable case law. The General Accounting Office's "Principals of Federal Appropriations Law," commonly know as the "RED BOOK" is the federal government's guideline to the legal requirements for budget appropriations and allocations. The Red Book devotes a section to lump sum allocations. RED BOOK, Vol. II, pp. 6-5 to 6-26. Within that section, the Red Book discusses the applicable standard for allocations where the appropriations are insufficient. "'Zero Funding' Under a Lump Sum Appropriation" analyzes federal agencies obligations is based on the standard established in *Ruiz*. RED BOOK, Vol I., pp. 3-49 to 3-52. The Red Book specifically acknowledges that federal agencies are required to establish a rational funding formula for funding allocations, based on *Ruiz* and citing as further examples, *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996);*Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Secretary, Department of Health & Human Services*, 279 F.3d 660 (9th Cir. 2002); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999).

Clearly, the defendants' attempt to sweep *Ruiz* away ("*Morton* [*v. Ruiz*] is irrelevant because it did not address the agency's allocation of resources from a lump-sum appropriation." Opposition, p. 27) is insupportable.

Thus, the defendants' attempts to dismiss all of the Tribes' claims based on the OJS's discretion to allocate lump sum appropriations is not supported either by the applicable federal case law or the federal government's own guidelines relating to appropriation and allocation. The Court does have law to apply: the standard set forth in the *Ruiz* and subsequent cases requiring the establishment and publication of a rational funding policy, the TLOA's requirement that the BIA establish a funding policy, the ISDEAA's requirements for rulemaking, and the APA's prohibition on arbitrary actions on the part of federal officials.

IV.

DEFENDANTS ASSERTION THAT THE DENIAL RESULTED FROM THE TRIBE'S SEEKING POWERS THAT THE OJS HAS NO POWER TO GRANT IS BOTH FALSE AND IS AN IMPERMISSIBLE POST HOC JUSTIFICATION FOR THE DENIALS.

Defendants do not just attempt to rewrite the history of this case by basing their Opposition almost entirely on the Cruzan Declaration instead of the Administrative Record, they make up new bases for the denial of the proposed 638 contracts. The decisions listed as the basis for denying the Hopland Band's, Robinson Rancheria's, and Coyote Valley Band's 638 contracts for law enforcement services that the Tribes were located in California and the OJS has no law enforcement program to transfer to the Tribes. Those denial was based on 25 U.S.C. § 450f(a)(2)(D). AR p.34; p. 306; p 334. The OJS decision denying approval of the Hopland Band's, the Robinson Band's and the Coyote Valley Band's proposed 638 contracts that sought no funding was denied, because those proposed contracts had **not** sought funding. That denial was based on 25 U.S.C. § 450f(a)(1) and § 450f(a)(2). AR pp. 276-281 (Hopland).

In their Opposition and the Cruzan Declaration, the defendants suddenly assert

that there was another reason for the denial of the second set of contracts. "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." Opposition, p. 23. Specifically, the defendants assert that "Hopland's second proposal [638 Contract] asked OJS to 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, . . . notwithstanding that BIA's law enforcement officers do not have this power. " Opposition, p. 22. "[L]ike 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." Opposition, p. 23. The Opposition cites the Cruzan Declaration as the basis for these assertions.

Section I, p. 1 of this brief demonstrated that an agency may not assert new reasons for an agency decision in litigation challenging the agency decision. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). Those arguments need not be repeated here. The invalidity of defendants' attempt to offer new rationalizations for its decision is compounded here by the fact that it is based on a document that is also outside of the Administrative Record, the inadmissible Cruzan Declaration. But even beyond the fact that these arguments and the declaration upon which they are based are inadmissible, they are also demonstrably false.

The proposed 638 contracts cited by the defendants do not attempt to grant to the tribal officers authority "to enforce all state laws which the State of California has authorized federal law enforcement officials to enforce". Rather, the language was added solely to clarify that the exercise by the Tribes' SLEC Officers of State Peace Officer Power granted to them by Penal Code § 830.8 would not be considered a violation by the Tribes

of the 638 Contract and attached Deputation Agreement.

The language contained in the proposed 638 Contracts could not have made that clearer:

> Nothing in this Agreement shall be construed as authorization of a SLEC from the BIA/OJS to exercise any peace officer powers created under state law, provided, however, that nothing in this Agreement shall prohibit a SLEC Officer from exercising any authority granted to a federal law enforcement officer by the State of California under California Penal Code § 830.8(a).

AR p. 265; p. 291; p. 325.

Based upon the plain wording of the language, any other characterization is an out-and- out lie.

V.

EVEN IF THE COURT DOES NOT STRIKE THE CRUZAN DECLARATION, IT DOES NOT CLARIFY AND OF THE ISSUES RAISED IN THE ADMINISTRATIVE RECORD AND THERE SHOULD NOT BE CONSIDERED.

Even if the Court does not strike the Cruzan Declaration, it should not give it any weight since it does not clarify any of the issues raised in the Administrative Record.

First, the Cruzan Declaration does not illuminate or clarify what is in the record; it adds new information that is contrary to what is in the Administrative Record and further confuses the issues contained in the record. For example, Cruzan claims that funding for 638 contract law enforcement programs is not categorically prohibited in the State of California because its P.L. 280 status. This is in direct conflict with statements made by Selanhongva McDonald, AR p. 35; p. 308; p.335., and Pat Ragsdale, in Exhibit H to the Complaint, p. 27, AR pp. 78-79, which clearly state that OJS does not fund law enforcement services in California, principally, because California is a P.L. 280 state, and the costs of law enforcement services are borne by the State, not the OJS.

Another significant example is the discrepancies between the methodology outlined

by Cruzan for allocating new funds appropriated by Congress for OJS Programs, and the methodology outlined in the OJS Presentation on Budget and Data Collection, prepared by Jeannine Brooks, Strategic Planning Officer - Justice Services, contained in Exhibit F of the Complaint. While more examples could be given to demonstrate that Cruzan is adding to, or attempting to revise statements contained in the Administrative Record, these two examples should be sufficient to show that Cruzan's declaration is not designed to illuminate or clarify confusing terminology, methodology, or statements contained in the Administrative Record. In fact, Cruzan's Declaration has the opposite effect: it amply demonstrates that there is no uniform methodology or criteria used to assess the need for law enforcement services, and no uniform methodology or criteria used to distribute funds to meet the need for law enforcement services on Indian reservations.

Second, the information contained in Cruzan's Declaration is predominantly irrelevant. The issue currently in need of clarification relates to the methodology that is used to assess the need for tribal law enforcement services on Indian reservations in California; the process for requesting the necessary law enforcement funds from OJS which were not originally distributed as part of TPA accounts that were transferred to OJS; and the methodology for distributing those funds via a 638 contract. The information contained in Cruzan's declaration clarifies how the original distributions transferred over from TPA accounts became the current base funding amounts distributed through 638 contracts prior to the establishment of OJS. This avoids the claim that OJS prohibits the allocation of funds to tribes in mandatory P.L. 280 states.

Cruzan claims that it is not the policy of OJS to prohibit the allocation of funds to tribes in mandatory P.L. 280 states; and claims that OJS does allocate funds to tribes in mandatory P.L. 280 states. Cruzan Declaration, p. 7, ¶ 15. The examples Cruzan gives at at pp. 7-8, ¶ 16 of his declaration, reference tribes that have reallocated funds from TPA to establish BIA law enforcement programs and subsequently assumed control over the law enforcement programs through 638 contracts. These are examples of tribes who

received funding prior to the establishment of the OJS, and now receive OJS funding according to distributions made pursuant to historical funding policies. The examples are not relevant to Tribes requesting funds after 1999, and no methodology for distribution is, therefore, outlined, because no specific methodology is used.

In addition, the examples given in p. 8, ¶ 17 of the Cruzan Declaration relate to tribes with self-governance agreements, where, much like the TPA funds, a lump-sum is given to the tribes and the tribes are then free to allocate the money for law enforcement services according to their individual needs. This method of distribution, like TPA funds, is not comparable to the issue at hand, because those funds are not OJS law enforcement funds, distributed in accordance with a 638 contract. Although p. 8, ¶ 18 of Cruzan's Declaration does reference tribes in California, those tribes are receiving funds in accordance with historically set distributions, which antedate the establishment of OJS, and are not distributed pursuant to an OJS methodology. While OJS does fund two law enforcement programs through 638 contracts in California, the distributions are made according to historical base funding amounts that were transferred over from TPA accounts, or according to some other methodology that antedates the establishment of OJS, and antedates any distribution criteria/methodology currently utilized by OJS.

Finally, the examples given in at p. 8, ¶ 19 of the Cruzan Declaration fail to address the issue at hand, for the same reasons as the previous examples: they are not evidence in support of the claim that OJS funds 638 contracts law enforcement programs, which did not exist prior to the establishment of OJS. In fact, the examples given reinforce the claim that OJS does prohibit the allocation of funds to tribes in mandatory P.L. 280 states, because all of the examples represent historical obligations, and are not examples of funding 638 contract law enforcement programs after the establishment of OJS. Cruzan fails to provide any evidence of instances where OJS allocated funds for law enforcement services through a 638 contract, which did not stem from a historical practice or policy that existed prior to the establishment of OJS.

Despite Cruzan's efforts to clarify the funding process, it is still unclear how new requests for funding are distributed. The term "new" is problematic due to ambiguity. "New" may simply mean the funds in excess of the amount of base funding awarded the previous fiscal year. Cruzan's Declaration states that "Tribes without existing self-determination contracts can compete for these new funds on an equal footing with tribes that already have self-determination contracts for law enforcement services" Cruzan Declaration, p. 6, ¶ 13. While this claim appears egalitarian, closer examination illustrates the inherent inequity in the competition for funds. An email authored by Jeannine Brooks, attached as Exhibit F to the Complaint, clearly states that the "existing law enforcement programs are all under funded and redistribution of base funding is not possible". Exhibit F to the Complaint, p. 1. This raises the question: If the increase to base funding is less than the historical obligations for funding, will the under-funded historical obligations be prioritized over those tribes making a request for new funds? In other words, will new money be allocated to satisfy old contract debt? Furthermore, Cruzan's claim that competition is equal in relation to "new funds" suggests that equal opportunity to compete for funding only occurs relative to those funds that are in excess of historical base funding obligations. If this is the case, then it would seem that "new funds" would be a subcategory within the category of base funding, as opposed to historical base funding. Here, it becomes clear that tribes with new 638 contracts are not only competing amongst themselves, but are also competing with tribes who already receive funds pursuant to historical base funding. Rather than encouraging fair competition and equality of opportunity to receive funds, this method is prejudicial toward tribes with new self-determination contracts, and in particular, it is prejudicial against tribes who submit new 638 contracts and in particular residing in California and other mandatory P.L. 280 states. In fact, Cruzan confirms this in p. 5, ¶ 15 of his declaration by candidly admitting preference for non-P.L. 280 states.

These ambiguities are further compounded by Jeannine Brooks' assertion that there is no formula for the allocation of funds. Exhibit F to Complaint, p. 1. Yet, in Brooks' Presentation on Budget and Data Collection, she states that budget increases are to be "distributed based on specific criteria" Exhibit F to Complaint, p. 6. If these budget increases mean more base funding, then Brooks is claiming there is and is not a formula for distribution. The only way this makes sense, is if there are actually subcategories that separate the increased funding, or new funding, from the baseline funding, or those funds that automatically fund old existing contracts; but there is no indication that this is the case. In other words, there is no uniform methodology, applicable to all tribes in competition for funding, that distributes funds according to need, from annual base funding. Even if it is the case that there is a separate subcategory of "new funding" within the general category "base funding," the distribution criteria outlined in Brooks' OJS Presentation differs significantly from the distribution criteria set forth in Cruzan's Declaration; further demonstrating that there is, in fact, no uniform distribution criteria/methodology.

CONCLUSION.

The defendants' attempt to substitute a new history for this litigation by submitting inadmissible evidence is consistent with the behavior of the defendants throughout this case. It provides a window into the Tribes' experience in seeking the assistance of the defendants in providing law enforcement for their communities. The defendants' impermissible litigation technique, like their refusal to meet their obligations under federal law, cannot be continued by this Court.

Dated: July 20, 2012

Respectfully submitted,

RAPPORT AND MARSTON

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2012, my office electronically filed the foregoing document using the ECF System for the United States District Court, Northern District of California, which will send notification of such filing to the following:

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