UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE, a federally recognized tribe, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	No. 5:22-cv-5066 (KES)

DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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INTRODUCTION

The Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 5301 *et seq*., allows tribes and tribal organizations to take over operation of federal programs operated by the Bureau of Indian Affairs ("BIA") or the Indian Health Service ("IHS") for the benefit of tribes and their members. Under the ISDEAA, over 700 federally-recognized tribes and tribal organizations have entered into contracts to operate a broad range of programs, including health care, education, and law enforcement.

Plaintiff Oglala Sioux Tribe ("OST") is a federally-recognized tribe that has, under a number of ISDEAA contracts, taken over operation of certain BIA Office of Justice Services ("OJS") programs on the Pine Ridge Reservation in South Dakota, including the OJS's law enforcement and criminal investigations programs (collectively referred to hereafter, unless otherwise noted, as "law enforcement"). Although OJS has increased law enforcement funding provided to OST every year since at least 2013, the OST Police Department has struggled to maintain staffing levels, with staffing falling from 55 officers in 2020 to 33 officers in 2022.

In December 2021, the Tribe submitted two proposals to OJS to increase funding for its law enforcement and criminal investigations programs, to take over its claimed "tribal shares" of OJS's nationwide Missing and Murdered Unit ("MMU"), Division of Drug Enforcement, and Internal Affairs programs operated for the benefit of all 574 federally-recognized tribes, and to create an OJS-funded School Resource Officer ("SRO") program at Pine Ridge. OJS partially declined the proposals in March 2022 on the grounds set out in the ISDEAA that OST was seeking more funding than the agency would otherwise provide if it were to operate the programs at Pine Ridge, that the Tribe could not lawfully take over operation of any portion of the nationwide MMU, DDE and IA programs, and that there is no OJS SRO program at Pine Ridge.

Plaintiff responded by filing suit in July 2022 challenging OJS's partial declinations under the ISDEAA and also claiming that (i) the funding levels it receives for law enforcement violate the government's trust obligations arising under treaties, and (ii) OJS's method's for allocating funds for law enforcement are arbitrary and capricious under the Administrative Procedure Act ("APA"). Plaintiff then filed a motion for a preliminary injunction in October 2022 seeking mandatory preliminary relief that would require OJS, during the pendency of the litigation, to start providing, for the first time, funding at a level that the Tribe considers appropriate to hire and maintain a police force of 112 law enforcement officers. The Tribe's preliminary injunction motion also seeks to require OJS to adopt the Tribe's preferred methodologies for allocating appropriated funds among the many tribes that receive them.

With the preliminary injunction motion, Plaintiff pursues only its breach of trust claims, likely in an attempt to end-run the requirements of the ISDEAA. Plaintiff argues that OJS funding for law enforcement programs has been artificially low since 1999, when the Tribe voluntarily chose to reprogram BIA funds away from law enforcement to other BIA programs operated at Pine Ridge. The Tribe claims that it reprogrammed the funds because, at the time, it was receiving Department of Justice ("DOJ") grants to hire and maintain law enforcement officers but that it stopped receiving at least some of those grants after 2006. Plaintiff, however, could have reprogramed its BIA share of non-law enforcement funds back to its law enforcement program any time since. The Tribe also could, and still can, take advantage of other sources of BIA funds, such as those available under 25 U.S.C. § 5324(*l*) (which is payable through a separate appropriation), and free up existing funds for law enforcement by properly characterizing certain costs as Contract Support Costs, which is also payable through a separate appropriation. Rather than pursue any of these other options, Plaintiff seeks an affirmative preliminary injunction requiring the OJS to start paying the Tribe more money than it has ever

previously been paid based on its new interpretation of treaties dating back to 1825, 1851, and 1868.

But Plaintiff cannot point to any specific treaty, statutory, or regulatory language requiring the provision of, or funding for, 112 law enforcement officers at Pine Ridge. Plaintiff instead derives that number from application of an OJS law enforcement officer staffing guideline that sets an aspirational goal of providing 2.8 officers per 1,000 residents. Further, rather than apply that ratio to the approximately 19,800 residents at Pine Ridge as called for in the guideline (which, somewhat inconveniently for the Tribe, would call for 55 officers), Plaintiff wants this Court to *change* how that ratio is applied so that it accounts for Pine Ridge's inhabitants *and* its frequent visitors (which, collectively, Plaintiff claims, total approximately 40,000 individuals) to achieve its preferred level of funding. In pursuing this approach, Plaintiff misapprehends how OJS allocates funds from its annual lump-sum appropriations for law enforcement among the tribes and the limited role that the staffing guideline plays in that allocation.

This Court should deny Plaintiff's preliminary injunction motion and should instead grant Defendant's motion to dismiss Plaintiff's claims. Plaintiff fails to show that it will be irreparably harmed in the absence of preliminary relief because it has not explained why, after decades of allegedly inadequate funding, it is only now filing this motion; because it seeks relief in the form of increased funding that can be obtained in the ordinary course or litigation; and because it fails to otherwise show irreparable harm in the absence of relief.

On the merits of its claims, Plaintiff cannot show that the 1825, 1851 or 1868 treaties impose an enforceable trust duty on the United States to provide the Tribe with its preferred level of staffing or funding for law enforcement and cannot show that subsequent appropriations reaffirmed or implemented any such duty. Nor can Plaintiff show that the United States has an

enforceable trust duty arising under any subsequent statutes. Additionally, Plaintiff fails to show that the United States has a trust duty to provide a historical accounting of its use and allocation of lump-sum funds appropriated for law enforcement programs for tribes across the nation. Finally, Plaintiff fails to show there is any statutory right or otherwise judicially reviewable way to control the way in which the agency distributes funding to all tribes. Boiled down to its essence, the absence of any such obligations is why Plaintiff's Amended Complaint fails to state any claim on which relief can be granted, thus warranting dismissal.

Finally, the balance of harms and public interest weigh against the requested injunction because an order requiring BIA to increase funding for law enforcement at Pine Ridge would only come at the expense of decreased law enforcement funding for all other tribes for whom BIA provides law enforcement services.

This Court should thus deny Plaintiff's preliminary injunction motion and grant Defendant's motion to dismiss.

BACKGROUND

I. STATUTORY BACKGROUND

A. Funding for the Benefit of Indians under Treaties and Statutes

Between 1778 and 1871, the United States entered into approximately 375 treaties with Indian tribes. *See* Decl. of Richard Glen Melville Decl. ¶ 3. Among those treaties were the Treaty of Sioune and Oglala Tribes, 7 Stat. 252 (1825) ("1825 Treaty"); Treaty of Ft. Laramie, 11 Stat. 749 (1851) ("1851 Treaty"); and the Treaty of Ft. Laramie, 15 Stat. 635 (1868) ("1868 Treaty"). Congress ended the practice of entering into treaties with Indian tribes in 1871 but preserved all obligations of the United States previously made by treaty. *See* 16 Stat. 566 (1871), codified at 25 U.S.C. § 71.

Historically, Congress funded its obligations arising under treaties in annual

appropriations acts that contained express references to the articles under the specific treaty under which each appropriation was made. *See, e.g.*, Act Making Appropriations for the Current and Contingent Expenses of the Indian Department and for Fulfilling Treaty Stipulations with Various Indian Tribes, 16 Stat. 335 (Jul. 15, 1870) ("1870 Appropriations Act"). Between 1870 and approximately 1930, Congress expressly funded certain treaty obligations with the Sioux, *see, e.g.*, 21 Stat. 114, 127 (May 11, 1880); 41 Stat. 408, 429 (Feb. 14, 1920), but never funded law enforcement functions pursuant to any treaty obligations. During the same time, Congress provided additional annual appropriations that were not tied to any treaty obligations but were instead appropriated to generally fund various programs and services for the benefit of tribes and tribal members. *See, e.g.*, Act Making Appropriations for the Current and Contingent Expenses of the Indian Department and for Fulfilling Treaty Stipulations with Various Indian Tribes, 20 Stat. 63, 86 (May 27, 1878) ("1879 Appropriations Act"). Over time, Congress appropriated lesser amounts with express references to articles under a specific treaty and appropriated greater amounts to generally fund programs and services for tribes and tribal members regardless of a tribe's treaty status. *See* Melville Decl. ¶ 3.

By 1921, Congress formalized this practice with the adoption of the Snyder Act, 42 Stat. 208 (1921), *codified at* 25 U.S.C. § 13. The Snyder Act provides for the BIA to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians *throughout the United States*" for a number of programs, including education, healthcare, and law enforcement. *Id*. (emphasis added).

B. Indian Self Determination and Education Assistance Act

Recognizing the tribes' desire for self-determination, Congress passed the Indian Self Determination and Education Assistance Act ("ISDEAA") in 1975. *See* 88 Stat. 2203 (1975), codified as amended at 25 U.S.C. § 5301 *et seq*. On the request of a tribe or authorized tribal

organization, the ISDEAA requires BIA to enter into or renew a 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. *See* 25 U.S.C. § 5321(a)(1). The Act provides that the funding transferred pursuant to a contract "shall not be less than the appropriate [federal government 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 § 5325(a)(1) (emphasis added). This amount is sometimes called the "secretarial amount" or referred to as "base funding." The ISDEAA further provides that when a proposal seeks to divide an existing program provided to multiple tribes, the agency must "ensure that services [continue to be] provided to the tribes not served" by that proposal. 25 U.S.C. § 5324(i). The ISDEAA, moreover, does not "require[] the [agency] to reduce funding for programs … serving a [non-contracting] tribe to make funds available to another [contracting] tribe." *Id*. § 5325(b). On the other hand, when a tribe proposes "to perform services benefiting more than one Indian tribe," the ISDEAA provides that "the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." 25 U.S.C. § 5304(*l*).

The ISDEAA provides five reasons for which the BIA may decline all or part of a proposal to takeover, renew, or expand operation of a BIA program:

> (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 5325(a) … ; 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. § 5321(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor.

25 U.S.C. § 5321(a)(2).

C. Law Enforcement in Indian Country

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. *See* Melville Decl. ¶ 4. Tribes have inherent authority to enforce tribal criminal laws against Indians on their lands, as well as the inherent authority to remove non-tribal members from their lands. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 318, 322–23 (1978); *United States v. Lara*, 541 U.S. 193, 199 (2004).

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, including South Dakota, cannot exercise jurisdiction over Indians on tribal lands. *See, e.g., United States v. Baker,* 894 F.2d 1144, 1146 (10th Cir. 1990).[1]

Established by Congress in 1990, BIA's Office of Justice Services ("OJS") has authority to enforce, or enter into ISDEAA contracts with a tribe for the enforcement of, certain federal criminal laws on tribal lands.[2] *See* Indian Law Enforcement Reform Act of 1990 ("ILERA"), 104

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[1] In 1953, Congress gave six states—Alaska, California, Oregon, Minnesota, Nebraska, and Wisconsin—primary jurisdiction to enforce their criminal laws against Indians on tribal lands. *See* 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162(a)-(c)) (known as "Public Law 280").

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. 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." South Dakota is not among these states.

[2] 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

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Stat. 473 (1990), *codified as amended at* 25 U.S.C. §§ 2801, 2802.[3] In addition, OJS has primary responsibility for enforcing, the Indian Country Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, 18 U.S.C. § 1153, on tribal lands in certain states including South Dakota.[4]

D. Funding for BIA Law Enforcement Programs

Congress appropriates funds to BIA for the operation of Indian programs annually in a lump-sum appropriation. *See* Melville Decl. ¶ 6. Congress often bases its appropriation on the budget request it receives from the President. *Id*. The budget request for the operation of Indian programs is contained in the Department's budget justification. *Id*. The budget justification takes approximately one year to develop. *Id*. During that time, BIA holds meetings with tribal leaders to consult with them on developing annual budget requests. *Id*. One result of this consultation is the Tribal Priority Allocation ("TPA"). *Id*. TPA is a process through which a tribe can request new funds and express its preference for how to program its allocation among the various BIA programs operated for the benefit or the tribe or its members. *Id*. BIA programs that are part of the 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 tribes the opportunity to establish their own priorities and to move

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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).

[3] Congress provided for additional authority and obligations for OJS under the Tribal Law and Order Act of 2010 ("TLOA"). *See* 124 Stat. 2258 (2010), *codified at* 25 U.S.C. § 2801 *et seq*., including an annual report to Congress on unmet needs in law enforcement country, *see id*. § 2802(c)(16).

[4] The Indian Country Crimes Act extends the general criminal laws of the United States to Indian country but it 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. *See* 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).

funds among programs accordingly. *Id*.

Funding for BIA law enforcement programs were originally part of the TPA process. *Id*. ¶ 7. Since 1999, however, funds for law enforcement have been listed as a separate program in the Department's budget justification. *Id*. As a result of this change, tribes can still re-allocate unrestricted funds from TPA programs to law enforcement, but they can no longer re-allocate law enforcement funds to other programs. *Id*. Over time, several tribes have completed a base transfer from their Consolidated Tribal Government Programs to law enforcement in their contracts or self-governance funding agreements with BIA. *Id*. Other tribes re-allocate BIA funding from a TPA line item to their law enforcement contracts annually. *Id*.

The Department's annual budget justification includes tables showing the amount of TPA and law enforcement funds requested for each tribe. *Id*. ¶ 8. BIA submits the budget request to the Department, which submits it to the Office of Management and Budget ("OMB"). *Id*. The President's budget that is submitted to Congress includes these tribe-specific requests. *Id*. It also contains the methodology that OJS uses to determine the distribution of new funds for Public Safety and Justice programs. *Id*.

Additionally, the Tribal Law and Order Act of 2010 requires OJS to submit an annual report to congressional appropriations committees that quantifies the overall public safety program needs of Indian country. *See* 25 U.S.C. § 2802(c)(16). OJS prepared and submitted this report for each year since 2011. Melville Decl. ¶ 9. The reports are published on the BIA's website and are presented during annual tribal consultations for BIA's budget development. *Id*. The most recent report, transmitted to the committees on January 31, 2022, identified a state-by-state cost estimate of $1.3 billion for the law enforcement program needs of all 574 tribes. *Id*.

In some years, such as fiscal year 2022, Congress meets or exceeds the President's request for some Public Safety and Justice programs, such as Criminal Investigations & Police

Services; while in other programs, such as Detention/Corrections, it appropriates funding below the level of the Administration's request. *Id.* ¶ 10. For Fiscal Year ("FY") 2022, Congress appropriated $546,280,000 to BIA for Public Safety and Justice Programs. *Id*.

OJS allocates funds appropriated for law enforcement services based on a number of factors. *Id*. ¶ 11. In general, its aspirational policy goal is to provide direct coverage, provide funding, or otherwise arrange for the provision of 2.8 federal law enforcement officers for every 1,000 residents on tribal lands that do not benefit from state law enforcement coverage under Pub. L. No. 83–280. *Id*.[5] However, Congress has not appropriated funds sufficient for the agency to meet all of the law enforcement program needs of the tribes. *Id*. OJS operates or oversees 186 law enforcement programs, 21 of which are directly operated by OJS, and 165 of which are operated by tribes under contracts pursuant to the ISDEAA. *Id*. OJS also operates ten law enforcement programs that do not have defined service populations, which in some cases provide services for multiple tribes. *Id*. As a result of insufficient appropriations and the requirements of the ISDEAA not to reduce funding to a contracting tribe, OJS primarily uses historic amounts allocated for each tribe (*i.e.*, the amount of funds allocated to each tribe or group of tribes in the prior year) to determine the current allocation for each tribe or group of tribes. *Id*.

In addition to allocating funds for the benefit of particular tribes, OJS also allocates funds to operate a number of national OJS Public Safety and Justice programs for the benefit of all 574 tribes. *Id*. ¶ 12. These programs include: (i) the MMU; (ii) Internal Affairs; (iii) the Victim Assistance Program; and (iii) the Division of Drug Enforcement, which includes special agents and K-9 officers. *Id*. Current annual funding for the MMU is $14,500,000 (which funds 63 full-time employee ("FTE") positions), or approximately $25,261 per Tribe (0.17 FTE per Tribe). *Id*.

[5] OJS adopted the goal of 2.8 officers per 1,000 inhabitants based on FBI data indicating that nationally, average county agency report officer staffing is at this level. *See id*.

Drug Enforcement is funded at $12,600,000 (which funds 63 FTEs), or approximately $21,951 per Tribe (0.15 FTE per Tribe). *Id*. IA is funded at $3,700,000 (which funds 25 FTEs), or approximately $6,446 per Tribe (0.04 FTE per Tribe). *Id*. Funding for Drug Enforcement's K-9 officers is $1,522,334 (which funds 10 FTEs), or approximately $2,652 per Tribe (0.02 FTE per Tribe). *Id*.[6]

E. OJS Methodologies for Awarding New Funds

In addition to funding ongoing law enforcement obligations, OJS has developed a methodology for allocating new funds that Congress appropriates for the tribes in a particular year. Melville Decl. ¶ 14. This methodology uses objective criteria to ensure more resources get to the areas of greatest need, based primarily on: (1) reported crime rates; (2) staffing-level shortages; (3) drugs/gang activity; (4) detention facility shortages; (5) reported calls for service; and (6) size of land base covered. *Id*.[7] These criteria and methodology are regularly presented to the tribes during the quarterly budget consultation meetings, during which OJS solicits feedback and alternative allocation proposals from the tribes. *Id*. To date, no tribe has proposed an alternative. *Id*.

For example, for Fiscal Year ("FY") 2022, Congress indicated in the committee report accompanying its annual appropriation that it was providing $92.5 million in new funds for

[6] The Drug Enforcement program also supports OJS's SRO program. *Id*. ¶ 13. OJS provides one SRO each at eight of the 21 locations where the agency provides direct-service law enforcement services, and has funding slotted for a second SRO at three of those locations. *Id*.

[7] OJS used a different methodology for awarding new funds to the six tribes in Oklahoma that have been affected by the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). See Melville Decl. ¶ 16. The *McGirt* decision effectively increased the combined service area of those tribes tenfold (which under OJS's methodology would increase their share of new funds). *Id*. The decision simultaneously increased the effective service population (which would also increase their share of new funds) and decreased reported crime rates (which would decrease their share of new funds). *Id*. As a result, OJS changed the method for how it calculated the service populations for these six tribes to help account for the changes in law enforcement needs brought about by the *McGirt* decision. *Id*.

Public Safety and Justice programs, $7.5 million of which was for Criminal Investigations and Police Services. *Id*. ¶ 15.[8] Based on its allocation criteria for new funds, OJS allocated $2.2 million of these new Criminal Investigations and Police Services funds for direct service locations, $5.3 million to tribes under ISDEAA contracts, and reserved $1 million for the headquarters and nationwide programs described above. *Id*.

II. FACTUAL BACKGROUND

The Oglala Sioux Tribe is located on the Pine Ridge Reservation in South Dakota. Melville Decl. ¶ 19. It has approximately 19,800 inhabitants and a land base of almost 3,500 square miles. *Id*. The Tribe has administered OJS's Law Enforcement program at Pine Ridge under an ISDEAA contract for over 40 years. *Id*. In 1999, OST reprogramed funds from its law enforcement program to other of its BIA programs and, to date, has not reprogramed those funds back to law enforcement. *Id*. In 2020, OST expanded its ISDEAA contract to take over operation of the OJS Criminal Investigations program operated at Pine Ridge. *Id.*

For FY 2022, OJS applied its criteria for awarding new funds for tribes. *Id*. ¶ 20. OJS ranked OST tenth out of 197 locations evaluated and accordingly allocated OST the tenth largest increase. *Id*. As a result, of the 165 tribes that operate Public Safety and Justice Programs under ISDEAA contracts, OST currently receives $5,521,117, the third largest annual amount of any tribe in the United States. *Id*.[9] (Only Navajo Nation ($25,537,575) and Gila River ($6,397,098) currently receive more funding. *Id*.) Additionally, OJS currently allocates $4,550,894 for Adult Corrections and $2,484,871 for Juvenile Corrections under separate ISDEAA contracts with

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[8] Of the other $85 million, Congress directed that $62 million be allocated for tribes affected by the Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), and marked $23 million for Detention programs, the Missing and Murdered Indigenous Persons Initiative, Body-Worn Cameras, and Tribal Courts/Tribal Justice programs.

[9] OST is paid additional amounts to reimburse their Contract Support Costs. *See* 25 U.S.C. § 5325(a)(2)–(3). Contract Supports Costs are paid out of a separate appropriation and are not at issue in this case.

OST. *Id*. Despite these and other annual funding increases every year since at least 2013, the OST Police Department has struggled to maintain staffing levels, with staffing levels falling from 55 law enforcement officers in 2020 to 33 officers in 2022. *Id*.

On December 27, 2021, OST submitted two ISDEAA proposals to OJS. *See* Ltr. fr. OST Pres. Kevin Killer to SAC William McClure re: ISDEAA proposals (Dec. 27, 2021), Ex. 3; OST Law Enforcement ("LE") ISDEAA Proposal, Ex 4; OST Criminal Investigation ("CI") ISDEAA Proposal, Ex 5. The first proposed an increase in funding beyond OST's current law enforcement budget of approximately $4.025 million for its Law Enforcement program, *see* Ex. 4 at 51 (proposed budget), proposed to take over the Tribe's claimed "tribal share" of officers in OJS's K-9-Unit, and proposed to create an OJS-funded SRO program at Pine Ridge, *see id*. at 6 (Proposal Tit. B, § 1(A)). The second proposed to increase funding beyond its current budget of approximately $1,327,3781 for its Criminal Investigation program, *see* Ex. 5, at 47, and proposed to take over OST's claimed "tribal share" of OJS's nationwide MMU, Drug Enforcement, and Internal Affairs programs, *see* id. at 4 (Proposal Tit. B. § 1(A)). OST's transmittal letter also indicated that OST would be seeking startup costs under the ISDEAA as a result of the proposed increases. *See* Ex. 3.

OJS acknowledged receipt of OST's proposals on January 5, 2022, *see* Ltr. from Acting SAC Tino Lopez to OST Pres. Kevin Killer (Jan. 5, 2022), Ex. 6, and provided initial responses to OST's proposals on January 28, 2022, *see* Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: LE Proposal (Jan. 28, 2022), Ex. 7; Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: CI Proposal (Jan. 28, 2022), Ex. 8. At that time, OJS informed the Tribe that its law enforcement proposal appeared to be improperly seeking an increase of approximately $3,196,553 and appeared to be proposing to take over a portion of a program that was not contractable because it was provided for the benefit of more than one tribe. *See* Ex. 7. OJS also

informed the Tribe that its criminal investigations proposal sought an increase of approximately $310,592.24 and proposed to take over a portion of three programs that were not contractable because they benefitted more than one tribe. *See* Ex. 8. The responses identified a number of other substantive and technical problems with OST's proposal, suggested corrections for each, and offered assistance with revising the proposals. *See* Exs. 7-8. OST did not respond to either letter or otherwise request assistance.

On March 30, 2022, OJS partially declined OST's Law Enforcement and Criminal Investigation ISDEAA proposals. *See* Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: LE Proposal (Mar. 30, 2022), Ex. 9; Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: CI Proposal (Mar. 30, 2022), Ex. 10. OJS informed OST that it was partially declining each proposal pursuant to 25 U.S.C. § 5321(a)(2)(D) because each of the increases was in excess of the amounts OJS would have otherwise provided to operate the respective programs and was partially approving each proposal up to the amounts that OJS would have otherwise paid. *See* Exs. 9–10. OJS also declined OST's proposals to take over a portion of OJS's nationwide MMU, Drug Enforcement, and Internal Affairs programs pursuant to 25 U.S.C. § 5321(a)(2)(E) because as national OJS programs they are activities that could not lawfully be carried out by OST. *See* Exs. 9-10. Additionally, OJS declined OST's requests for startup costs because it was declining the Tribe's requests to expand its programs. *See* Exs. 9-10.

In September 2022, BIA allocated additional, one-time funds, from the American Rescue Plan in the amount of $800,000 to OST and advised that the funds could be used to assist OST in carrying out its law enforcement programs. Melville Decl. ¶ 26. Also in September, and then in October, BIA made offers of Technical Assistance to the Tribe and the OST Police Department. *Id*. ¶ 27. For example, BIA offered Technical Assistance regarding how OST might be able to take title to existing federal buildings located on the Pine Ridge Reservation and then might be

eligible to enter into leases with the BIA pursuant to 25 U.S.C. § 5324(*l*) to provide reasonable compensation to OST for the allowable costs associated with operating federal programs under ISDEAA contracts in those facilities. *Id*. ¶¶ 28–29.[10] BIA also offered Technical Assistance regarding how the OST Police Department could allocate certain costs associated with the operation of federal law enforcement services between the annually appropriated amounts allocated to OST to amounts paid for the Tribe's Contract Support Costs (which are paid out of a separate appropriation). *Id*. ¶ 30. Additionally, OJS offered to consider any written requests for a waiver of applicable OJS policies and procedures to facilitate the expeditious hiring and training of additional law enforcement officers. *Id*. ¶ 31. To date, OST has not taken up BIA's offers of Technical Assistance or submitted any waiver requests. *Id*. ¶ 32.

III. PROCEDURAL BACKGROUND

Plaintiff filed suit on July 26, 2022, *see* Compl., ECF No.1, and filed an amended complaint on October 4, 2022, *see* Am. Compl., ECF No. 24. Plaintiff alleges that the amount of federal funds it receives under its ISDEAA contract to operate the OJS Law Enforcement and Criminal Investigation program at Pine Ridge violates the United States' trust duties under the 1825, 1851, and 1868 treaties, as allegedly affirmed by the 1877 Act, the Snyder Act, the ILERA, the TLOA, and the ISDEAA. *See, e.g*., Am. Compl. ¶¶ 18-19, 21. Plaintiff seeks: (i) a declaration that Defendants breached their trust obligations, *see id*., Count One; (ii) injunctive relief requiring the government to provide an accounting of funds appropriated for law enforcement services, Count Two; (iii) injunctive relief requiring BIA to approve the Tribe's ISDEAA proposals, Counts Three—Six; and (iv) injunctive relief under the APA, requiring the BIA to "properly" fund the Tribe's current ISDEAA contracts, Count Seven. *See also id*., Prayer for

[10] Section 105(*l*) leases are paid out of a separate appropriation. *Id*.

Relief.

On October 25, 2022, Plaintiff filed the present motion for a preliminary injunction. *See* Pl.'s Mot. for a Prelim. Inj., ECF No. 25. Plaintiff's motion seeks preliminary relief:

(i) prohibiting BIA from basing the Tribe's current funding levels on past amounts provided;

(ii) prohibiting BIA from using allegedly outdated data concerning the Tribe's population; and

(iii) affirmatively requiring BIA to increase funding for BIA law enforcement programs at Pine Ridge to an amount "sufficient … to address the ongoing public safety crisis at the Pine Ridge Reservation pending the outcome of this litigation." *Id*. at i; *see also* Pl.'s Proposed Order, ECF No. 25-9 (requesting increased funding sufficient to hire and maintain a police force of 112 law enforcement officers).

Defendants oppose Plaintiff's motion and move to dismiss Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

STANDARDS OF REVIEW

Plaintiff seeks a preliminary injunction pursuant to Federal Rule of Civil Procedure 65. *See* Fed. R. Civ. P. 65. The primary purpose of issuing a preliminary injunction is to preserve the status quo and prevent irreparable harm until a court can make a final decision on the merits. *See Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974); *Ferry-Morse Seed Co. v. Food Corn, Inc*., 729 F.2d 589, 593 (8th Cir. 1984). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008) (quoting *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id*. (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of

injunction." *Id*. (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

In considering a request for preliminary relief, a court should evaluate four factors: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 113 (8th Cir. 1981) (en banc)). "[W]hen the [g]overnment is the opposing party," the balance of the equities and the public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (quoting *Calvin Klein Cosms. Corp. v. Lenox Lab'ys, Inc*., 815 F.2d 500, 503 (8th Cir. 1987)). Plaintiff bears the burden of establishing the propriety of a preliminary injunction by a preponderance of the evidence. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). That burden is even heavier where, as here, the preliminary injunction would, in effect, give the movants substantially the same relief they could obtain after a trial on the merits. *Rathmann Grp. v. Tanenbaum*, 889 F.2d 787, 789-90 (8th Cir. 1989); *see Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co*., 997 F.2d 484, 490 (8th Cir. 1993).

And that burden becomes that much heavier where, as here, the movant is seeking affirmative relief. *See Noem v. Haaland*, 542 F. Supp. 3d 898, 911 (D.S.D. 2021), *appeal dismissed*, 41 F.4th 1013 (8th Cir. 2022).[11] Such injunctions are never granted as a matter of

[11] Unlike the preliminary injunction sought here, a typical preliminary injunction is "prohibitory," and "merely freezes the positions of the parties until the court can hear the case on the merits." *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983) (Rehnquist, C.J. in chambers). In other words, a preliminary injunction is usually meant only to "preserve the relative positions of *(cont'd)*

right, but rather in the exercise of sound judicial discretion. *See Heckler*, 463 U.S. at 1333 (citation omitted). Moreover, this Court should exercise its discretion with "'caution,' and grant the preliminary injunction only if the movant has shown that 'the balance of other factors tips *decidedly* toward the movant.'" *Noem*, 542 F. Supp. 3d at 911 (quoting *United Indus. Corp. v. Clorox Co*., 140 F.3d 1175, 1179 (8th Cir. 1998)).

Defendants move to dismiss Plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity "to raise a right to relief above the speculative level." *Id*. at 555; *see also Glick v. W. Power Sports, Inc*., 944 F.3d 714, 717 (8th Cir. 2019) (court should disregard conclusory allegations or legal conclusions). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating such a motion, courts consider the well-pleaded factual allegations in the complaint, which must be taken as true, and may also consider documents attached to the complaint and matters of public and administrative record referenced in the complaint. *See Great Plains Trust Co. v. Union Pacific R. Co.*, 492 F.3d 986, 990 (8th Cir. 2007); Fed. R. Evid. 902(5) (court can take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Courts, however, are not required to accept as true legal conclusions "couched as … factual allegations[s]." *Ashcroft*, 556 U.S. at 678.

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the parties until a trial on the merits can be held." *Ahmad v. City of St. Louis*, 995 F.3d 635, 641 (8th Cir. 2021) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

ARGUMENT

This Court should deny Plaintiff's request for a preliminary injunction and grant Defendants' motion to dismiss. Plaintiff claims that the United States has a trust duty to provide, or provide funding for, 112 officers on Pine Ridge. *See* Pl.'s Am. Compl. ¶ 71; Pl.'s Proposed Order. But Plaintiff does not point to language in any treaty, statute, or regulation, requiring this number of officers. It relies instead on OJS's aspirational staffing guideline of providing 2.8 officers per 1,000 residents and separately seeks to apply that ratio not to the approximately 19,800 residents of Pine Ridge but, instead, to what it asserts are approximately 40,000 residents and frequent visitors. Plaintiff also seeks an order requiring BIA to adjust the way it allocates funds among the hundreds of tribes. But Plaintiff fails to establish that it is entitled to such relief, or to explain how such a methodology adjustment would actually translate to more funding for OST. Moreover, Plaintiff ignores its own power to increase its funding for law enforcement as well as obtain and make use of other BIA funds without the Court's assistance.

As a preliminary matter, this Court should deny Plaintiff's motion solely because the relief sought by the Tribe "is not preliminary injunctive relief designed to preserve the status quo. Rather, the requested relief is relief that would alter the status quo and grant the Tribe relief on the merits of its complaint." *Flandreau Santee Sioux Tribe v. USDA*, No 4:19-cv-4094-KES, 2019 WL 2394256, at *3 (D.S.D. June 6, 2019). This Court should hold that "[b]oth a declaration and writ of mandamus are forms of relief that may be obtained after a full trial on the merits but not at the preliminary relief stage." *Id*. This Court should also deny Plaintiff's motion for preliminary relief because Plaintiff cannot show irreparable injury, a likelihood of success on the merits, or that the balance of the harms and the public interest weigh in the Tribe's favor. This Court should instead grant Defendants' motion to dismiss Plaintiff's Amended Complaint because it fails to state a claim on which relief can be granted.

A. Plaintiff Has Not Shown Irreparable Injury

Plaintiff has failed to meet its burden of demonstrating that it will suffer irreparable injury in the absence of the extraordinary relief it seeks. Plaintiff's failure to demonstrate irreparable harm precludes the award of a preliminary injunction. *Sampson v. Murray*, 415 U.S. 61, 88 (1974) ("[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies."); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732–33 & n.5 (8th Cir. 2008) (en banc) (citation omitted).

"In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). "Speculative harm" or a mere "possibility of irreparable harm" is not enough. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012); *Winter*, 555 U.S. at 22. And economic loss alone is not irreparable harm unless the injuries cannot be recovered. *See Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.") (citation omitted).

Plaintiff's claims of irreparable harm fail for numerous reasons, each of which serve as independent grounds for denying its motion for preliminary relief. *See Grasso Enters., LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1040 (8th Cir. 2016); *Watkins*, 346 F.3d at 844 ("Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.").

First, Plaintiff's extreme delay filing this motion is, on its own, sufficient grounds for denying Plaintiff's request for a preliminary injunction. Without question, a "long delay by

plaintiff after learning of the threatened harm may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction." *Adventist Health System/SunBelt, Inc. v. U.S. Dep't of Health & Human Servs.*, 17 F.4th 793, 805 (8th Cir. 2021) (quoting Wright & Miller, 11A Fed. Prac. & Proc., § 2948.1 & n.13 (3d ed. 2013)) and citing *Hubbard Feeds, Inc. v. Animal Feed Supp., Inc*., 182 F.3d 598, 603 (8th Cir. 1999) (denying preliminary injunction based on one-year delay in requesting relief) (cleaned up); *see also Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977); *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 894 (8th Cir. 2013). If, according to Plaintiff, BIA has been failing to provide sufficient funds for law enforcement as required under Treaties or statutes for decades, the Tribe has not even attempted to show why it must suddenly obtain the relief it seeks in the form of preliminary injunction rather than pursue its claims in the ordinary course of litigation. *See Hubbard Feeds*, 182 F.3d at 603. Plaintiff's "failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Watts v. Fed. Home Loan Mortg. Corp*., No. 12-cv-692, 2012 WL 1901304, at *4 (D. Minn. May 25, 2012) (citation omitted).

Second, Plaintiff's contention that it cannot calculate damages from the harm it allegedly suffers, *see* Pl.'s Mem. at 25, is undermined by the form of extraordinary relief it seeks—additional funding (which, in turn, could only be awarded under its existing ISDEAA contract) at a level that it claims would allow it to fund 112 law enforcement officer positions. *See* Pl.'s Proposed Order; *cf*. *Watkins*, 346 F.3d at 844 ("When there is an adequate remedy at law, a preliminary injunction is not appropriate."); *Register.com, Inc. v. Verio, Inc*., 356 F.3d 393, 404 (2d Cir. 2004). Likewise, Plaintiff's requests for an order enjoining OJS from using certain methodologies to allocate appropriated funds for law enforcement would also result, or so the Tribe hopes, in nothing more than greater monetary payments to Plaintiff. Thus, Plaintiff fails to

demonstrate it suffers from irreparable harm.

Third, Plaintiff fails to meet its burden of demonstrating that, in the absence of extraordinary relief, it will face imminent harm in the form of increased crime. *See* Pl.'s Mem. at 25. Although Plaintiff describes a number of violent crimes that have occurred at Pine Ridge, *see id*., that is insufficient to demonstrate that violent crime will continue at the same rate unless funding is increased. *Compare id. with Frost v. Sioux City, Iowa*, 920 F.3d 1158, 1161 (8th Cir. 2019) ("An injunction is inherently prospective and cannot redress past injuries.") (quoting *Harmon v. City of Kansas City, Mo*., 197 F.3d 321, 327 (8th Cir. 1999)); *see also Miller v. Honkamp Krueger Fin. Servs., Inc*., 9 F.4th 1011, 1015 n.3 (8th Cir. 2021) ("The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without" the injunction) (quoting *DTC Energy Grp., Inc. v. Hirschfeld*, 912 F.3d 1263, 1270 (10th Cir. 2018))). Because crimes are committed by third parties not before the Court, Plaintiff cannot simply assume crime will continue in the future as it has in the past. "'Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.'" *Packard Elevator v. Interstate Com. Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). In the complete absence of any evidence of imminent harm, Plaintiff cannot demonstrate that the harm it fears is "certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising*, 725 F.3d at 895 (citation omitted).

Fourth, Plaintiff cannot show that the relief it seeks from Defendants will actually cure its injuries. Plaintiff has not (and cannot) show that their preferred funding level will necessarily translate to lower crime rates. Crime could remain the same, or it might rise. Plaintiff also claims that the level of funding that BIA has provided for the Tribe to administer law enforcement programs at Pine Ridge has caused staffing shortages in its Police Department, and alleges that

those staffing shortages, in turn, have led to unsafe working conditions for its remaining law enforcement officers and an inability to respond to all calls for assistance. *See* Am. Compl. ¶¶ 73–75; Pl.'s Mem. at 36 (alleging that staffing levels have fallen to 33 full-time law enforcement officers). But Plaintiff cannot reasonably trace this claimed harm to the level of funding Defendants provide, to the exclusion of a myriad of other possible factors—including general law enforcement recruitment challenges across the country, particular recruitment challenges in rural areas, and what could be OST-specific human resource and management issues. *See, e.g.*, U.S. Police Departments Struggle with Critical Staffing Shortages, CNN (July 20, 2022), https://perma.cc/87GU-6YQ8.

Indeed, Plaintiff has not shown, and cannot show, that Defendants' funding for its administration of BIA's law enforcement program has, at least since 2013, decreased. To the contrary, law enforcement funding has *increased* in each of at least the last ten years that the Tribe has operated the program. *See* Melville Decl. ¶ 19. And, as recently as two years ago, that funding was sufficient for Plaintiff to maintain a police department force of 55 full-time law enforcement officers, *see id.* ¶ 19; *see also* Melville Decl. Ex. 2 (noting OST's 2019 staffing levels), 20 more officers than the Tribe now employs, and consistent with the OJS law enforcement officer staffing policy goal that Plaintiff touts. That guideline sets a policy goal of providing 2.8 officers per 1,000 residents, *see* Melville Decl. ¶ 11, which when applied to the approximately 19,800 residents to Pine Ridge works out to roughly 55 officers.[12]

[12] Notably, Plaintiff does not seek to apply the OJS staffing guideline as written, but instead would prefer that it be applied to Pine Ridge's residents *and* its frequent visitors (totaling, according to the Tribe, about 40,000 people). *See, e.g.*, Am. Compl. ¶ 72. But that's not how the guideline is designed to be applied. *See* Melville Decl. ¶ 11.

By way of comparison Defendants note that the combined state and local funding for law enforcement and law enforcement coverage is several rural South Dakota counties is on par with that at Pine Ridge: (i) the recent combined law enforcement budgets of Spink, Beadle, Clark, and Kingsbury counties is approximately $4,568,321, which supports a combined total of

(cont'd)

One part of Plaintiff's duties under its ISDEAA contracts to operate BIA's law enforcement programs at Pine Ridge is to hire and maintain a staff of qualified law enforcement officers. As unfortunate as the Tribe's staffing shortages may be, they cannot reasonably be traced to Defendants' funding levels or any other conduct on the part of Defendants. *Cf. Colorado v. EPA*, 989 F.3d 874, 888 (10th Cir. 2021) (holding that Colorado failed to show irreparable harm because that harm was not "fairly traceable to the [federal government]'s alleged unlawful conduct."). As the party administering BIA law enforcement programs at Pine Ridge, OST Police Department staffing levels are the Tribe's responsibility. Plaintiff thus fails to "satisfy the irreparable harm requirement" because the harm about which it complains is self-inflicted. 11A Wright & Miller, Fed. Prac. & Proc. § 2948.1 (3d ed.)*; see also San Francisco Real Estate Investors v. Real Estate Invest. Trust of American*, 692 F.2d 814, 818 (1st Cir. 1982) (vacating injunction in part on holding that an injury for which the plaintiff is responsible does not amount to irreparable harm).

But even assuming *arguendo* that BIA's current funding level only permits OST to maintain a police force of 33 law enforcement officers, the Tribe has always had, and continues to have, the ability to reallocate funds from other BIA programs to its law enforcement budget but has chosen not to do so. Plaintiff acknowledges that the BIA bases current funding for law enforcement, in part, on an allocation from 1999. *See* Am. Compl. ¶ 93; Pl.'s Mem. at 6-7, 24. The Tribe appears to single out 1999 because until that time, funds for all BIA programs,

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approximately 44 law enforcement officers, including supervisory staff; (ii) the combined population of these counties is approximately 35,000 residents: and (iii) the combined land mass is similar to that of Pine Ridge. *See* South Dakota Office of Attorney General, Division of Criminal Investigation, Criminal Statistical Analysis Center, 2020 Police Management Study, at 4-7 (Aug. 2020), https://perma.cc/CZG4-MHZU; South Dakota Office of Attorney General, Division of Criminal Investigation, Criminal Statistical Analysis Center, 2021 Sheriff's Management Study, at 4-5 (Aug. 4. 2021), https://perma.cc/ESE5-WDNP. This combined staffing level works out to roughly 1.26 officers per 1,000 residents.

including law enforcement, were part of the agency's Tribal Priority Allocation. *See* Melville Decl. ¶ 7. In 1999, however, Congress began dividing its annual appropriation for the operation of Indian programs into two separate lump-sum amounts—one for law enforcement programs and one for all other programs. *Id*. The result was that, while tribes could still choose how to apportion funds allocated to them for all other programs each year, after 1999, they could no longer allocate funds *away* from law enforcement programs. *Id*.

In 1999, Plaintiff was receiving additional money to hire and retain law enforcement officers via DOJ grant programs. *See* Am. Compl. ¶ 90. The Tribe acknowledges that, relying on those grants, it chose to move BIA funds for law enforcement to other BIA programs operated at Pine Ridge. *See id*.; *see also* Dubray Decl. ¶¶ 5-9, ECF No. 7. Plaintiff claims that it lost access to those DOJ grant programs after 2006 and complains that it has been living with its 1999 decision to reprogram funds away from law enforcement programs ever since. *See* Am. Compl. ¶¶ 93–95. But nothing has ever prevented the Tribe from reprogramming funds for other BIA programs operated at Pine Ridge back to its law enforcement program, and nothing would prevent it from doing so now. *See* Melville Decl. ¶ 7. Several other tribes have done, and currently do, exactly that. *See id*. Thus, Plaintiff cannot reasonably trace its injuries arising from its 1999 TPA allocation decisions to any conduct on the part of Defendants and, accordingly, fails to meet its burden of showing irreparable injury. Likewise, Plaintiff has turned down several offers of Technical Assistance from BIA to help the Tribe obtain access to separately appropriated funds pursuant to 25 U.S.C. § 5324(*l*). *See Salt Lake Trib. Pub. Co., LLC v. AT&T Corp*., 320 F.3d 1081, 1106 (10th Cir. 2003) (denying preliminary injunction on grounds that the harms the plaintiff alleged—personnel changes—resulted from "the express terms of a contract [the plaintiff] negotiated, and therefore … [was] a harm that [the plaintiff] inflicted upon itself."); *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003).

Plaintiff also asks the Court to prohibit OJS from continuing to use an allegedly "outdated and arbitrary law enforcement service population base." Pl's. Mot. at i. But again, OST fails to tie its preferred method for calculating service population to any relief that the Court would provide to the Tribe. At most, resident population plays a marginal role in OJS's allocation new funds its annual lump-sum appropriations among the tribes. *See* Melville Decl. ¶¶ 11, 14, 16. Moreover, Plaintiff currently receives the third highest amount of funding for law enforcement of any tribe in the United States, *id*. ¶ 20, and has not shown that use of its preferred methodology, if applied to every tribe that receives funds for law enforcement programs, would actually increase the Tribe's share of funding. Thus, Plaintiff cannot reasonably trace its injuries to the way OJS calculates the Tribe's service population and, as a result, that any change to the way OJS calculates that population would actually redress Plaintiff's alleged harms. *Cf. Ass'n of Am. Physicians & Surgeons v. FDA*, No. 20-1784, 2020 WL 5745974 (6th Cir. Sept. 24, 2020) ("Loss of life would constitute irreparable harm, but because that harm is not fairly traceable to Defendants' actions, there is no risk of irreparable harm redressable by the injunction [plaintiff] seeks.").

In sum, because Plaintiff has not shown that it is likely to suffer irreparable harm absent the relief it seeks, it is not entitled to a preliminary injunction. *See Mgmt. Registry, Inc. v. A.W. Cos., Inc*., 920 F.3d 1181, 1184 (8th Cir. 2019).

B. Plaintiff Cannot Show a Likelihood of Success on the Merits; This Court Should Instead Dismiss Plaintiff's Claims

1. Plaintiff Fails to State a Claim for Breach of Trust

Plaintiff fails to state a claim for breach of trust arising from the United States' alleged duty to provide, or provide funding for, a particular level of law enforcement personnel at Pine Ridge. The existence of a "general trust relationship between the United States and the Indian people" is beyond dispute. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*").

However, this general trust relationship is not enough to establish any particular trust duty. *United States v. Mitchell*, 445 U.S. 535, 542–44 (1980) ("*Mitchell I*"). Rather, the United States has an enforceable trust obligation to Indian tribes only to the extent that it expressly accepted those responsibilities by statute, regulation, or treaty. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006). In other words, the analysis of any such enforceable trust duties "must train on specific rights-creating or duty-imposing" prescriptions in the relevant statute, regulation, or treaty, *see Navajo I*, 537 U.S. at 506, and "the burden is on a tribe to 'identify a substantive source of law that establishes specific fiduciary or other duties.'" Mem. Op. & Order Granting Defs.' Mot. for Sum. J. & Denying Pl.'s & Intervenor's Mots. for Sum. J., *Cheyenne River Sioux Tribe v. Zinke*, No. 3:15-cv-3018-KES (Sept. 28, 2018), ECF No. 108 (quoting *Navajo I*, 537 U.S. at 506); *accord United States v. Navajo Nation*, 556 U.S. 287, 296, 302 (2009) ("*Navajo II*").

"Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility," however, "courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *Nat'l Wildlife Fed'n v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980). Thus, whether enumerated in a statute, regulation, or treaty, the United States' general trust responsibility to Indian Tribes "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations." *Gros Ventre*, 469 F.3d at 810 (citing *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995)); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

In this case, Plaintiff claims that the 1825, 1851, and 1868 Treaties impose specific trust duties on the United States to "provide the Tribe with competent and effective law enforcement" and that the Snyder Act, ILERA, TLOA, and ISDEAA reaffirmed those duties. Am. Compl.

¶¶ 17–18; Pl.'s Mot. 13–19; *see also* Am. Compl. ¶ 19 (alleging that the United States has a trust duty to "provid[e], or provid[e] sufficient funding for, a sufficient number of law enforcement officers and criminal investigators within…the Pine Ridge Indian Reservation."). Plaintiff further claims that providing law enforcement officer staffing at the level of 2.8 officers per 1,000 inhabitants (which also, in the Tribe's view, should additionally include "frequent visitors" to the Reservation) is the "minimum required by the United States to provide the Tribe with competent and effective law enforcement pursuant to the 1825, 1851, and 1868 Treaties, ILERA, and TLOA." *E.g.*, Am. Compl. ¶ 71.[13]

As show below, neither the 1825, 1851, and 1868 Treaties, nor any of the statutes that Plaintiff identifies, impose a specific trust duty to provide law enforcement personnel or funding at the Tribe's preferred level.

a. The United States Has Not Taken Exclusive Control of Law Enforcement at Pine Ridge

Plaintiff cannot show that the United States has taken exclusive control of law enforcement at Pine Ridge. As a sovereign, OST retains its inherent authority to govern its internal affairs among its members as well as other Indians, and to detain non-Indians suspected of committing a crime. *See, e.g., Wheeler*, 435 U.S. at 318, 322–23 (recognizing each tribe's inherent power "to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions"); *Talton v. Mayes*, 163 U.S. 376 380 (1896); *Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883); 18 U.S.C. § 1152; *see also Lara*, 541 U.S. at 210 (recognizing each tribe's inherent power to also prosecute non-member Indians); *United States v. Cooley*, 141 S. Ct. 1638,

[13] Contrary to Plaintiff's suggestion, there is no statute, regulation, or treaty that imposes a duty on, or otherwise requires, OJS to provide 2.8 officers per 1,000 inhabitants. *See, e.g.,* Melville Decl. ¶ 11. OJS's policy goal of providing 2.8 officers per 1,000 residents is instead an aspirational policy goal based on the average number of officers in county agencies as identified in the Federal Bureau of Investigations, Uniform Crime Reporting, Crime in the United States report for 2019. *Id*.

1644 (2021) (tribes retain authority to detain non-Indian people suspected of committing a crime.).

In *Ex parte Crow Dog*, the Supreme Court expressly considered the "bad men" clauses in the 1868 Treaty at issue here. The clauses provide that:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.
>
> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws.

1868 Treaty, art. I, 15 Stat. at 635. The Court held that the clauses did not apply to a "wrong committed by one Indian upon the person of another of the same tribe." *Crow Dog*, 109 U.S. at 567. The Court also recognized the tribes' inherent retention of sovereignty over such offenders, noting the tribes' right to decline to deliver an accused offender, with the sole consequence being that a "deduction … from the annuities payable to the tribe, for compensation to the injured person." *Id*. at 568. Additionally, the Court held that Article 8 of the Treaty and, separately, the Act of 1877, 19 Stat. 254, "necessarily implie[d]" the tribes' right to preserve "the maintenance of order and peace among their own members by the administration of their own laws and customs." *Id*. Congress, moreover, continues to recognize the tribes' retention of authority over law enforcement and criminal prosecutions. *See* 18 U.S.C. § 1152.[14] Contrary to Plaintiff's

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[14] Section 1152 extends the general laws of the United States to the punishment of offenses to Indian country, but expressly restricts application of the general laws to

> offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has

(cont'd)

contention, the United States can, at most, be seen as exercising concurrent jurisdiction over OST tribal members for certain expressly enumerated offenses. *See* 18 U.S.C. § 666(a)(2); § 922(g); § 1153; *id*. § 1163; § 1170; § 2261(a)(1)-(2); *id.* § 2262; and 21 U.S.C. §§ 841(a), 844. Thus, neither the Bad Men clauses in the 1868 Treaty, nor the Act of 1877, nor any other Act, can reasonably be read as meaning that OST has surrendered to the United States, or that Congress has otherwise divested the Tribe of its sovereign authority to police Pine Ridge. *Ore. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (courts "cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' ... clearly runs counter to a tribe's later claims.") (citation omitted); *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs*., 533 F.3d 634, 644 (8th Cir. 2008) ("The Tribe has not identified any assets taken over by the government such as tribally owned land, timber, or funds which would give rise to a special trust duty.") (citing *Mitchell II*, 463 U.S. at 225). In the absence of Plaintiff's ability to show that the United States has assumed exclusive control, it cannot show a trust duty, *see Mitchell II*, 463 U.S. at 224; *Ashley v. U.S. Dep't of the Interior*, 408 F.3d 997, 1002 (8th Cir. 2005), *Cheyenne River Tribe, supra*, at 39, let alone a breach of that trust duty.

b. Plaintiff Cannot Show a Trust Duty to Provide Any Particular Amount of Law Enforcement Personnel or Funding Under Treaties

Plaintiff fails to show that the United States has a trust duty arising under the 1825, 1851, and 1868 treaties to provide any particular amount of law enforcement personnel or funding at Pine Ridge. The "canons of construction applicable in Indian law" establish that "treaties should be construed liberally in favor of the Indians, with *ambiguous provisions* interpreted to their benefit." *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1023 (8th Cir. 2021) (citations

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> been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

omitted) (emphasis added); *see also Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (courts should "interpret [Indian treaties] to give effect to the terms as the Indians themselves would have understood them."). Canons of construction, however, "are not mandatory rules" but are "guides that need not be conclusive." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Thus, a court need not "accept as conclusive the[se] canons [if they] would produce an interpretation that [it] conclude[s] would conflict with the intent embodied" in the terms of the treaty itself. *Id*.

Ultimately, courts are bound by the text of a treaty, *see Ore. Dep't of Fish & Wildlife*, 473 U.S. at 774, and "may not interpret [it] in a way that the United States would not reasonably have agreed to adopt at the time of the signing." *Jones v. United States*, 846 F.3d 1343, 1356 (Fed. Cir. 2017); *see also NW Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) ("We stop short of varying [treaty] terms to meet alleged injustices" because doing that is a task "for the Congress," not the courts); *The Amiable Isabella*, 19 U.S. 1, 22 (1821) (courts lack "any treaty-making power" … "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. … [O]ur duty is to follow [the text and original understanding of the Treaty] as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.").

i. 1825 Treaty

Plaintiff fails to show that the 1825 Treaty imposes a trust duty on the United States to "provide basic law enforcement services in Oglala territory." Am. Compl. ¶ 28. The purpose of the 1825 Treaty was to bring peace by ending hostilities between the U.S. Army, Oglala and Sioux Tribes, and white settlers; allow the United States to regulate trade with the Sioux and Oglala Tribes; and ensure the safe passage of traders and other citizens traveling through the

Tribes' territory. 1825 Treaty, arts. 1, 4. In return for the Tribes' agreement not to retaliate against such traders and citizens if issues arise, Article 5 provided, in pertinent part:

> …it is hereby agreed, that for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the injured party, to the superintendent or agent of Indian affairs, or other person appointed by the President; and it shall be the duty of said Chiefs, upon complaint being made as aforesaid, to deliver up the person or persons, against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And, in like manner, if any robbery, violence or murder, shall be committed on any Indian or Indians belonging to the said bands, the person or persons so offending shall be tried, and if found guilty shall be punished in like manner as if the injury had been done to a white man…

1825 Treaty, 7 Stat. 252.[15] Article 5 provided for individual Tribal members to make complaints to the agent of Indian affairs about crimes committed by non-Indians and, upon the Tribe producing the offender, for the federal government to punish that person in accordance with federal law and provided for crimes committed by non-Indians against Tribal members to be prosecuted by the United States. *See Greywater v. Joshua*, 846 F.2d 486, 493 (8th Cir. 1988); *accord* 18 U.S.C. § 1152. Thus, Article 5 afforded the United States the ability to enforce peace by exercising criminal jurisdiction over non-Indian offenders and concurrent criminal jurisdiction over Indian offenders that commit crimes against non-Indians.

Contrary to Plaintiff's contention, Article 5 contains no language that can be interpreted as obligating the United States to provide a particular number of law enforcement officers, or funding therefor, to the Tribe. To the contrary, Article 5 expressly states that the United States'

[15] Following creation of the Bureau of Indian Affairs within the War Department in 1824, the general duties of Indian agents were to "manage and superintend the intercourse with the Indians within their respective agencies agreeably to law; to obey all legal instructions given by the Secretary of War, the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into such effect such regulations as may be prescribed by the President." Report of the Secretary of the Interior, 52nd Cong., 2d Sess., at 21 (1892). Indian Agents' administrative duties covered the full range of Indian affairs in their districts, including trade, civilization, surveying, recordkeeping, education, agriculture, labor, sanitation, and missionary work.

agreement to punish wrongdoers is contingent upon *Tribal Chiefs apprehending and producing* the alleged offenders to the federal government. Thus, Article 5 can reasonably be read to contemplate an extension of legal jurisdiction over certain offenders on the Tribes' lands, not the provision of law enforcement officers to investigate or arrest such offenders. Article 5 of the 1825 Treaty thus lacks rights-creating, duty-imposing prescriptions evidencing the existence of a duty to provide, or provide funding for, law enforcement officers on the Pine Ridge Indian Reservation. Simply put, it fails to provide a basis for Plaintiff's claims. Moreover, even assuming *arguendo* that Article 5 of the 1825 Treaty creates a trust duty, at most, it is the duty to exercise criminal jurisdiction on the Pine Ridge Indian Reservation. The United States fulfills that duty by exercising such jurisdiction pursuant to statutes such as 18 U.S.C. § 1152 and the ILERA.

ii. 1851 Treaty of Ft. Laramie

Plaintiff cannot show that the 1851 Treaty of Ft. Laramie created a "promise of exclusive federal law enforcement protections." Pl.'s Am. Compl. ¶¶ 30–31; Pl's Mot. at 14. The purpose of the 1851 Treaty was to establish and confirm peaceful relations and to allow the United States to establish roads, military, and other posts within the Tribes' territory. *See* 1851 Treaty, arts. 1-2, 11 Stat. 749. In return, the United States promised "to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States." *Id.* art. 3.

The broad grant of general protection set forth in Article 3 lacks language indicating congressional intent to impose a specific fiduciary duty on the United States to provide law enforcement on the Pine Ridge Indian Reservation, let alone to provide, or provide funding for, a particular level of law enforcement staffing or funding. The 1851 Treaty "merely recognize[s] a general or limited trust obligation to protect the Indians against depredations [by non-Indians] on Reservation lands: an obligation for which [the court has] no way of measuring whether the

government is in compliance, unless [it] look[s] to other generally application statutes or regulations." *Gros Ventre*, 469 F.3d at 812; *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 225 F. Supp. 3d 101, 155 (D.D.C. 2017) (finding that the 1851 Treaty does not establish specific fiduciary duties on the United States). Such a general or limited trust obligation is insufficient to establish the specific trust duties for law enforcement that Plaintiff alleges. At most, the 1851 Treaty imposes a general duty of protection that the United States fulfills through the provision of law enforcement services under generally applicable statutes such as the Snyder Act, the ILERA, and the TLOA.

iii. 1868 Treaty of Ft. Laramie

Plaintiff cannot show that the 1868 Treaty of Ft. Laramie requires the United States to provide any particular level of law enforcement personnel or funding at Pine Ridge. The 1868 Treaty promised an end to hostilities between the United States and the Arapaho and the Blackfeet, Brule, Cuthead, Hunkpapa, Miniconjou, Oglala, Two Kettle, Sans Arcs, Santee, and Yanktonai Sioux Tribes, established a discrete reservation for the Tribes, and provided for Tribal members to relinquish claims outside the reservation. *See* 1868 Treaty, arts. 1-3, 11, 15 Stat. at 635–36. The Treaty thus resolved potential for conflict arising from the construction of railroads, military posts, and roads on the plains as well as conflicts arising from individuals traveling on the Bozeman Trail. *See id*., art. 11.

In return for these agreements, the United States promised, on "proof made to the agent and forwarded to the Commissioner of Indian Affairs" to cause "bad men among the whites," who commit wrongs on the persons or property of Indians, to be arrested and punished, as well as compensate injured Tribal member(s). *Id*., art. 1. The Tribes, in turn, agreed, on "proof made to their agent and notice by him," *either* to deliver to the United States for prosecution and punishment "bad men among the Indians" who commit wrongs against non-Tribal members *or* to

have funds deducted from funds due under the Treaty to "re-imburse" the injured person for his or her loss. *Id*.

Contrary to Plaintiff's contention, Article 1 places the burden on the Tribes to provide the Indian agent with "proof" of the alleged wrongs committed by the "bad men among the whites" and, in the case of "bad men among the Indians," the option for the Tribes themselves to "deliver" the accused to the United States. *See id*. Any other reading would suggest a loss of tribal sovereignty to which the Tribes cannot be reasonably found to have agreed to. *See Wheeler,* 435 U.S. at 318, 322–23; *Ex parte Crow Dog*, 109 U.S. at 567; *see also Cooley*, 141 S. Ct. at 1644. Nor can this article reasonably be read as obligating the United States to provide Plaintiff's preferred level of law enforcement personnel or funding. *See id*. Further, while the Indian agent may "cause" white "bad men" to be arrested, Article 1 is devoid of language indicating that the Indian agent will perform such arrests or establish a police force for that purpose. Thus, the Indian agent's duties under Article 1 cannot be reasonably construed as obligating the United States to provide law enforcement services to the Tribes, much less imposing a specific trust duty to provide, or provide funding for, a particular level of law enforcement personnel on the Pine Ridge Indian Reservation.

Nor does Article 5 provide any basis for obligating the United States to provide law enforcement personnel or funding at Plaintiff's preferred level. In Article 5 the United States promised to provide a single agent for the Tribes, who will "make his home at the agency building [and] … keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation." *Ex Parte Crow Dog*, 109 U.S. at 564. To conclude, as Plaintiff urges, that the language in Article 5 providing for an Indian agent who will make inquiry into matters of complaint was intended to establish a trust duty to provide, or provide funding for, a particular level of law

enforcement on the Pine Ridge Indian Reservation, requires the court to read language into the Treaty that simply is not there.

Like Article 1, Article 5 cannot reasonably be read to suggest that the Tribes surrendered their authority to prosecute their own members, *see Wheeler*, 435 U.S. at 318, 322–23; *Ex Parte Crow Dog*, 109 U.S. at 567, and does not suggest that the Indian agent is responsible for investigating complaints among members of the same Tribe. *See* 1868 Treaty, art. 5. Further, in providing that "[i]n all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner, whose decision … shall be binding," *id*., Article 5 makes clear that the Indian agent's duties include investigating non-criminal matters, as this article places the decisionmaking authority with the Commissioner rather than a prosecutor. *See id*. In short, all "[t]he Tribes can argue is that the Treaty requires the United States Government to have a physical presence on the reservation." *Cheyenne River Tribe, supra*, at 44. The United States is fulfilling that requirement.

The absence of trust duties to provide, or provide funding for, law enforcement personnel in Articles 1 and 5 is supported by the 1868 Treaty's other provisions. A review of the 1868 Treaty reveals that, where commitments of personnel and funding were contemplated, the parties expressly identified them. For example, in Article 13, the United States agreed to provide annually "the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated" and states that "such appropriations shall be made…as will be sufficient to employ such persons." 1868 Treaty, art. 13, 15 Stat. at 639. Further, Article 9 specifies that the United States may withdraw the physician, farmer, blacksmith, carpenter, engineer, and miller after ten years but, in such instance, "an additional sum … of ten thousand dollars per annum shall be devoted to the education of said Indians." *Id*. art 9, 15 Stat. at 638. Thus, the United States' commitments to provide personnel under the 1868 Treaty are itemized, the occupations of

the personnel are clearly described, and the terms of such provision of and funding for such personnel are express. *See id. passim*.

In sum, the 1868 Treaty cannot be reasonably read to require the United States to provide Plaintiff with its preferred level of law enforcement personnel or funding. *Cf. Cheyenne River Tribe, supra*, at 40–44 (refusing to expand the requirements of the 1868 Treaty beyond the plain language); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1083 (D.S.D. 2009) (dismissing trust claim arising under treaty based on the failure to identify language that imposes a "specific duty" on the government). To the extent that Articles 1 and 5 of the 1868 Treaty can be interpreted as establishing any trust duties, they are the duties to provide an Indian agent, punish non-Indian and certain Indian offenders who commit depredations on persons or property only after the Tribe presents any such offender to the Indian agent, investigate complaints, and make written reports of depredations.[16] The United States fulfills its obligation under the 1868 Treaty to investigate complaints, make reports, and punish offenders through the OJS Uniformed Patrol and Criminal Investigation programs on the Reservation, both of which Plaintiff operate under an ISDEAA contract, as well as through the myriad of other federal law enforcement programs that also may operate from time to time on Pine Ridge, including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, the U.S. Marshall's service, *etc*., not to mention the resulting criminal prosecutions in the federal court system.

iv. Congressional Appropriations for Treaty Stipulations

Congress's actions following ratification of treaties further support the conclusion that the treaties do not create a trust duty to provide a certain amount of law enforcement or law

[16] The Commissioner of Indian Affairs abolished the post of Indian agents in the early 1900s, replacing them with Superintendents; the BIA Pine Ridge Agency, located on the Pine Ridge Indian Reservation, remains today, and is run by a Superintendent.

enforcement funding. Congress began appropriating funds to fulfill the commitments in the 1868 Treaty in 1870. *See* 1870 Appropriations Act, 16 Stat. 335. Under the heading "Sioux of different tribes," Congress made specific line-item appropriations pursuant to its obligations under certain articles of the Treaty. For example, Congress expressly appropriated $2,500 for "erection of warehouse or store-room, as per *fourth article* treaty of the twenty-ninth of April, eighteen hundred and sixty-eight." 16 Stat. at 353 (emphasis added). Congress also expressly appropriated $10,400 for the "pay of one physician, five teachers, one carpenter, one miller, one engineer, one farmer, and one blacksmith, per *thirteenth article* same treaty." *Id*. at 353 (emphasis added). Congress appropriated funds to fulfil its obligations arising under Article 13 over the next 60 years, tying line items to the relevant Treaty articles or the specific personnel contemplated thereunder. *See, e.g*., 1880 Appropriations Act; 1890 Appropriations Act, 26 Stat. 336, 348 (Aug. 19, 1890); 1900 Appropriations Act, 31 Stat. 221, 232 (May 31, 1900); 1910 Appropriations Act, 36 Stat. 269, 283 (Apr. 4, 1910); 1920 Appropriations Act, 41 Stat. 408, 429 (Feb. 14, 1920); 1930 Appropriations Act, 46 Stat. 279, 300 (May 14, 1930). Critically, neither the 1870 Appropriations Act, nor any subsequent appropriations acts, include appropriations to fulfill treaty obligations to provide law enforcement personnel or funds for law enforcement personnel under Articles 1 or 5.

c. Plaintiff Fails to Show that the 1877 Act, Subsequent Appropriations, or the Snyder Act Reaffirm a Trust Duty to Provide a Particular Level of Law Enforcement Personnel or Funding

Plaintiff fails to show that the 1877 Act, subsequent appropriations, or the Snyder Act reaffirm a specific trust duty to provide a particular level of law enforcement personnel or funding at Pine Ridge. Plaintiff claims that the 1877 Act reaffirms "the obligation to provide effective law enforcement services" under Articles 1 and 5 of the 1868 Treaty and that Article 8 of the 1877 Act "unilaterally added additional commitments" for law enforcement. Am. Compl.

¶¶ 42–43; Pl's Mot. at 16-17. Plaintiff also claims that subsequent appropriations, including those under the Snyder Act, "display the federal government's recognition of, and intent to uphold their duties under the 1825, 1851, and 1868 Treaties." *Id.* Plaintiff's claims are without merit.

First, Article 8 of the 1877 Act does *not* mention the treaties at issue in this litigation. Instead, it references a *different* treaty, one between the United States and the Northern Cheyenne and Northern Arapahoe Tribes of Indians, also dated 1868, but that treaty is entirely unrelated to this case. *See* Treaty of Ft. Laramie with the United States and the Northern Cheyenne and Northern Arapahoe Tribes of Indians, 15 Stat. at 655. But even if Article 8 of the 1877 Act was intended to address both 1868 Treaties, however, the Act's language regarding the securing "of an orderly government" and general protection of individuals is insufficient to establish the existence of the specific trust duty to provide law enforcement personnel or funding at Plaintiff's preferred level.

Second, Congress's subsequent appropriations for Indian police in 1878 and thereafter do not reference any treaty obligation. *See, e.g.*, 1878 Appropriations Act.[17] Congress's appropriation for Indian police instead falls under the section of the 1878 Appropriations Act titled "Miscellaneous." The line item is "[f]or the services of not exceeding four hundred and thirty privates at five dollars per month each, and not exceeding fifty officers at eight dollars per month each, of Indian police, to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations, [30,000] dollars." *Id.* at 86. While there are citations

[17] The Act includes line items to expressly fulfill obligations arising under Articles 10 and 13 of the 1868 Treaty and to comply with the stipulations in the 1877 Act for subsistence of the Sioux, removal of the bands under Red Cloud and Spotted Tail, and for the payment of the agent, trader, farmer, carpenter, blacksmith, and other artisans employed. *See* 20 Stat. at 80–81. These appropriations are set forth in the section of the 1878 Appropriations Act titled "Fulfilling Treaties with Indian Tribes." 20 Stat. at 66–83. However, that section does not reference, or otherwise provide funding for, Indian police on the Pine Ridge Indian Reservation, or any other reservation.

to relevant statutes for other line items in the "Miscellaneous" section, the 1878 Appropriations Act does not cite the 1825, 1851, or 1868 Treaties, the 1877 Act, or any other statute as giving rise to the funding for Indian police. Moreover, the 1878 Appropriations Act does not allocate the funding for Indian police officers to any particular reservation. This is true of the subsequent appropriations for Indian police as well.[18]

The location of the appropriation for Indian police in the "Miscellaneous" section of the 1878 Appropriations Act without reference to any treaty at issue in this case supports the conclusion that, contrary to Plaintiff's claim, such appropriations were for "contingent and current expenses of the Indian Department," not for "Fulfilling Treaty Stipulations with Indian Tribes." Accordingly, post-1877 appropriations acts containing funding for Indian police do not reaffirm Plaintiff's claim that the United States has a trust duty to provide, or provide funding for, a particular level of law enforcement personnel on the Pine Ridge Indian Reservation. *See Lincoln v. Vigil*, 508 U.S. 182, 194–95 (1993) (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908), for the "distin[ction] between money appropriated to fulfill treaty obligations, to which trust relationship attaches, and 'gratuitous appropriations'").

Third, Plaintiff fails to show that the Snyder Act reaffirms the United States' trust duties under the 1825, 1851, and 1868 Treaties because "from the Snyder Act's enactment forward, Congress has directed the Secretary to use funding appropriated by Congress to pay for 'Indian police.'" Am. Compl. ¶ 51; Pl's Mot. at 19. The Snyder Act simply authorizes the BIA to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the

[18] *See, e.g.*, An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, 21 Stat. 114, 131 (May 11, 1880); An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, 26 Stat. 336, 355 (Aug. 19, 1890); An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, 31 Stat. 221, 224 (May 31, 1900).

benefit, care, and assistance of Indians *throughout the United States*" including, among many other things "employment of … Indian police." 25 U.S.C. § 13 (emphasis added). Thus, the Snyder Act does not reaffirm any trust duty to provide law enforcement funding or personnel to Plaintiff.

Contrary to Plaintiff's contention, the Snyder Act consists only of broad language and does not impose any specific statutory duty on the United States. *See McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987); *Quechan Tribe of the Ft. Yuma Indian Reservation v. United States*, No. 10-cv-02261, 2011 WL 1211574, at *2 (D. Ariz. Mar. 31, 2011), *aff'd*, 599 F. App'x 698, 699 (9th Cir. 2015). At most, the Snyder Act imposes a "duty of fairness when dealing with Indians," *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989), but it does not "contain[] sufficient trust-creating language on which to base a judicially enforceable duty." *Quechan Tribe of Ft. Yuma*, 599 F. App'x at 699; *see also id*. ("This Court cannot compel [the government] to allocate greater funding" to a program provided for the benefit of the tribe); *Lower Brule Sioux Tribe v. Haaland*, No. 3:21-cv-3018-RAL, 2022 WL 4131194, at *12 (D.S.D. Sept. 12, 2022) (dismissing complaint for the tribe's failure to identify a specific provision in the Snyder Act that "'establishes [a] specific fiduciary or other dut[y]' that it alleges the government has breached.") (quoting *Yankton Sioux Tribe*, 533 F.3d 634, 644 (8th Cir. 2008)); *Cheyenne River Tribe, supra*, at 40.

d. Plaintiff Cannot Show that the ILERA, the TLOA, or the ISDEAA Reaffirm and Implement a Trust Duty to Provide a Particular Level of Law Enforcement Personnel or Funding

Plaintiff cannot show that the ILERA, the TLOA, or the ISDEAA "reaffirm the United States' law enforcement treaty obligations in the modern era." Am. Compl. at 16 (*Section III heading*); Pl's Mot. at 19. Specifically, Plaintiff fails to show that ILERA "along with the Oglala Treaties, distinguishes law enforcement from other federally created programs, and made

competent law enforcement an obligation of the Secretary and the BIA." Am. Compl. ¶ 52; Pl's Mot. at 19.[19] Plaintiff likewise incorrectly claims that the TLOA "reinforced" the United States' "existing law enforcement duty owed to the Tribe." Am. Compl. ¶ 56; Pl's Mot. at 20.[20]

As amended by the TLOA, the ILERA recites the United States' general trust relationship with the tribes. *See* Pub. L. No. 111-211, § 202(a)(1), 124 Stat. 2258 (2010), codified at 25 U.S.C. § 2801 note (a)(1). However, a statute that recites a general trust relationship between the United States and the Indian people is insufficient to establish a specific trust duty or enforceable obligations to a particular Tribe. *See Jicarilla*, 564 U.S. at 165; *Navajo I*, 537 U.S. at 506; *Mitchell I*, 445 U.S. at 541–42 (holding statutory "trust" language in General Allotment Act of 1887 insufficient to impose specific trust responsibilities); *Ashley*, 408 F.3d at 1002 ("The fact that a statute uses the word 'trust' does not mean that an actionable duty exists, for a 'bare trust' that does not impose upon the government the extensive and well-articulated duties described above falls short of creating such a duty.") (citation omitted). As a result, neither the ILERA nor the TLOA establish specific trust duties. *See Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, No. 10-cv-1448, 2011 WL 5118733 at *8 (Oct 28, 2011) (holding that the ILERA does not establish a duty to provide law enforcement services and the TLOA does not provide a

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[19] Plaintiff also notes that the ILERA authorized the adoption of a handbook for law enforcement program standards, which Plaintiff claims is further evidence the United States' trust obligations. *See* Am. Compl. ¶ 54; Pl's Mot. at 19–20. OJS's law enforcement handbook is for internal agency guidance and lacks the force of law. *Cf. Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981); *see also Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995). As the United States' trust duties are defined solely by statute, regulation, or treaty, language in, or the existence of, the OJS handbook fails to provide support for Plaintiff's claim.

[20] Plaintiff cites the TLOA's "Findings" language wherein Congress acknowledges that "[t]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country" as evidence of the existence of the duty alleged. Am. Compl. ¶ 56; Pl's Mot. at 20. Prefatory trust language, such as that in the TLOA's "Findings" provision, does not constitute a substantive source of law that establishes a specific fiduciary duty. *See El Paso Nat. Gas Co*., 750 F.3d 863, 898 (D.D.C. 2014) (finding although the Indian Agricultural Act mentions the government's "trust responsibility" in its findings section, the act does not impose independently enforceable trust duties).

specific fiduciary duty), *rev'd on other grounds*, 729 F.3d 1025; *Hopland Band of Pomo Indians v. Jewell*, 624 Fed. App'x 562, 563 (9th Cir. 2015) (affirming the district court's holding that the TLOA did not create a specific fiduciary duty). And "[w]ithout a specific duty, there can be no violation of the trust doctrine." *Los Coyotes*, 2011 WL 5118733 at *8. Accordingly, neither the ILERA nor the TLOA can reasonably be interpreted as imposing a specific trust duty on the United States to provide, or provide funding for, a particular level of law enforcement personnel on the Pine Ridge Indian Reservation.

Plaintiff's claim that the ISDEAA creates an enforceable trust duty also fails. Plaintiff contends that "[t]he amount of funds that the Secretary of the Interior "would have otherwise provided" for competent law enforcement" under § 5325(a) of ISDEAA "is no less than the amount tha[t] the Secretary is required to expend under the Tribe's treaties, the ILERA and TLOA." Am. Compl. ¶ 64; Pl's Mot. at 20. However, the ISDEAA cannot be "reasonably read to impose on the United States a specific fiduciary obligation to approve the Tribes' contract applications or to allocate funding for law enforcement." *Hopland Band of Pomo Indian*, 624 Fed. App'x at 563 (citing *Gros Ventre*, F.3d at 810–11); *see also Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005) (holding that congressional statement of policy in ISDEAA fails to create a specific trust relationship).

Instead, the only resources at issue here are congressional lump-sum appropriations that can be allocated at BIA's discretion. *See Lincoln*, 508 U.S. at 194–95. In *Lincoln*, a unanimous Supreme Court expressly rejected the Tribe's argument here—that "the special trust relationship existing between Indian people and the Federal Government" might somehow alter the Court's conclusion that the allocation of funds from a lump-sum appropriation is committed to the agency's discretion. *Id*. at 194; *see also Cheyenne River Sioux Tribe, supra*, at 37–38 (recognizing, despite the general trust relationship, the Bureau of Indian Education's discretion to

reorder its priorities through a restructuring that aimed to improve Indian education nationwide).

e. Plaintiff fails to show that *Rosebud Sioux Tribe v. United States* Establishes the Existence of a Trust Duty to Provide a Particular Level of Law Enforcement Personnel or Funding

Plaintiff fails to show that the Eighth Circuit's holding in *Rosebud Sioux Tribe* supports its claims. In *Rosebud*, a divided panel of the Eighth Circuit affirmed the district court's declaration that the Tribe had a right to competent physician-led health care. *See Rosebud*, 9 F.4th at 1026, *aff'g* 450 F. Supp. 3d 986 (D.S.D. 2020). The majority found that the express language in the 1868 Treaty promising that the United States "would 'furnish annually' a physician and that 'such appropriations shall be made from time to time ... as will be sufficient to employ' the physician," coupled with appropriations expressly made pursuant to the treaty, created a duty under trust. *Id*. at 1024 (*citing, e.g., Quick Bear*, 210 U.S. 50, for the proposition that a trust duty attaches to appropriations that fulfill treaty obligations). Notably, however, the Eighth Circuit did not hold that the government had breached this duty. *See id*. And the district court expressly held that the "declaration of the duty owed under the 1868 Treaty of Fort Laramie would not direct how [the government] is to expend [its] lump sum appropriations," *Rosebud*, 450 F. Supp. 3d at 1005; *see also id*. ("[N]either the declaratory judgment nor any later action by this Court would tinker with the apportionment of [the government's] lump-sum appropriation. The equitable relief requested by the Tribe is not a veiled attempt to force expenditures of funds[,]"), a holding which the Eighth Circuit did not disturb, *see Rosebud*, 9 F.4th at 1024–25.

In contrast with *Rosebud Sioux*, Plaintiff can point to no treaty language expressly requiring the law enforcement services or funding they seek and can point to no appropriations expressly made to fulfill such claimed treaty obligations. Nor does Plaintiff only seek declaratory relief; it is also seeking a mandatory injunction to force the expenditure of funds from the BIA's

lump sum appropriation. Thus, *Rosebud Sioux* does not advance Plaintiff's claims.

f. Plaintiff Fails to Show a Trust Duty to Provide an Accounting

Plaintiff fails to show that the United States has a trust duty "in fulfillment of their treaty" obligations to provide "an accounting of the use of funds requested from and allocated by Congress under the TLOA, the ILERA, and the 1921 Snyder Act for law enforcement services" for "each individual division of BIA and OJS from 1998 through the present." Am. Compl. ¶¶ 152, 154. As previously discussed, the United States has only those trust duties imposed by statute, regulation, or treaty. *See Jicarilla*, 564 U.S. at 177; *Navajo I*, 537 U.S. at 506. Plaintiff, however, fails to cite any statute, regulation, or treaty giving rise to the United States' alleged duty to provide an accounting of the law enforcement funds Congress has provided in its annual appropriations. Plaintiff instead cites case law for the propositions that the Tribe can seek an accounting in District Court and that the United States must complete historical accountings of assets. *See* Am. Compl. ¶¶ 143, 148 (citing *Cobell v. Babbitt,* 30 F.Supp.2d 24 (D.D.C. 1998); *Cherokee Nation v. U.S. Dep't of Interior*, 531 F. Supp. 3d 87, 99 (D.D.C. 2021)). Additionally, Plaintiff cites case law purportedly establishing that "all funds held by the United States for Indian tribes are held in trust." *Id.* ¶¶ 146, 147 (citing *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983)).

Plaintiff's failure to identify a substantive source of law establishing the alleged duty to account for appropriated funds is fatal to their claim. Moreover, the case law Plaintiff cited is wholly inapplicable to the case at bar. In *Cobell*, individual beneficiaries of Individual Indian Money ("IIM") accounts brought a class action suit for an accounting of the *trust funds* held in their IIM accounts. Similarly, in *Cherokee*, the Cherokee Nation sought a historical accounting of *trust funds* held in their tribal trust account. The plaintiffs in both cases cited the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4011, as the source of the United

States' alleged duty to account and the court found such duty thereunder.

Contrary to Plaintiff's assertion, the funds appropriated to the Department of the Interior are not "trust funds." As set forth in 25 C.F.R. § 115.002, trust funds are defined as "money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept into trust." Appropriated funds are not derived from trust resources or held in Tribal or individual trust accounts; they are funds from Treasury that Congress provides the Department to carry out budgeted government programs. Thus, neither *Cobell* nor *Cherokee* held that the United States has a duty to account for appropriated funds.

Plaintiff also misrepresents the holding in *Rogers*. In that case, individuals filed suit challenging the denial of their applications to receive their shares of funds appropriated to satisfy judgment awards for the Northern Paiute Nation. *See Rogers*, 697 F.2d at 888. The Ninth Circuit held that, with respect to funds appropriated to satisfy Indian judgments, "there is a presumption that absent explicit language to the contrary, all funds held by the United States for Indian tribes are held in trust." *Id*. at 890 (citing *Moose v. United States*, 674 F.2d 1277 (9th Cir. 1982)).[21] Thus, *Rogers* is applicable to funds appropriated in satisfaction of judgment awards. But there is no judgment award at issue in this case, and *Rogers* cannot reasonably be read to stand for the proposition that all appropriated funds for Indian programs are "trust funds.".

This Court should thus reject Plaintiff's accounting claim.

2. Plaintiff Fails to State a Claim under the Indian Self Determination and Education Assistance Act

This Court should dismiss Plaintiff's claims arising under the ISDEAA because BIA had a valid basis for partially declining the Tribe's proposal to increase funding for the BIA law

[21] In *Moose,* the court likewise held that "a statute enacted several years after the Distribution Act to establish a uniform procedure for distributing Indian judgment funds indicates a congressional understanding that all such funds are held in trust." *Moose*, 674 F.2d at 1282.

enforcement program it administers at Pine Ridge beyond what the agency would have otherwise provided to operate the program, and because the agency had a valid basis for declining the Tribe's proposal to take over operation of various nationwide BIA law enforcement program operated for the benefit of multiple tribes.[22]

a. Plaintiff Has Been Paid Everything it is Entitled to Under the ISDEAA

Contrary to Plaintiff's claims, BIA had a valid basis for declining the Tribe's proposal to increase the amount of funds it receives to operate the BIA law enforcement program at Pine Ridge pursuant to 25 U.S.C. § 5321(a)(2)(D). Section 5321(a)(2)(D) "does not require the [BIA] to increase the amount of money it spends on any program, it simply requires the [agency] to transfer control of that program to a requesting tribe." *Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1035 (9th Cir. 2013). As the Ninth Circuit explained, "if the BIA spends $500,000 on law enforcement on a reservation, the [agency] can decline a contract

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[22] This Court should review the BIA's declinations under the APA's arbitrary and capricious standard of review. *See Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103, 107–09 (D.D.C. 2009) (applying arbitrary and capricious standard of review to declinations challenged under the ISDEAA and APA). The ISDEAA itself does not specify a standard of review, *see* 25 U.S.C. § 5331(a), and the Eighth Circuit has held that "[w]here Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, … consideration is to be confined to the administrative record and … no *de novo* proceeding may be held." *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 808 (8th Cir. 1998) (quoting *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963)); s*ee also Carlo Bianchi*, 373 U.S. at 715; *but see Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059, 1067 (D.S.D. 2007) (noting the rule in the Eighth Circuit but nevertheless following nonprecedential district court decisions from outside the Circuit to apply de novo review to ISDEAA claims).

In reaching this decision, this Court should reject any claim that 25 U.S.C. § 5321(e)(1) supplies a standard of review. Section 5321(e)(1) states that the agency "shall have the *burden of proof* to establish by clearly demonstrating the validity of the grounds for declining the contract proposal." 25 U.S.C. § 5321(e)(1) (emphasis added). By its terms, § 5321(e)(1) supplies a burden of proof, not a standard of review. *See Dep't of Workforce Devel.-Div. of Vocational Rehab. v. U.S. Dep't of Ed.*, 980 F.3d 558, 566 (7th Cir. 2020) (differentiating between burden of proof and standard of review); *Mondaca-Vega v. Lynch*, 808 F.3d 413, 417 (9th Cir. 2015). Accordingly, a party may bear the burden of proving some fact by clear and convincing evidence, while a reviewing court must use an arbitrary and capricious standard of review. *See, e.g.*, *Musengo v. White*, 286 F.3d 535, 539 (D.C. Cir. 2002).

request if the tribe asks for $700,000 to take over law enforcement on the reservation. In that scenario, the Tribe would be entitled only to a contract for $500,000." *Id*. Any other result would render Section 5321(a)(2)(D) "meaningless—a result that [courts] must avoid," and "would also lead to the illogical result that the [agency] must fund every contract request, for any amount—another result we must avoid." *Id*. at 1036 (citing *Aponte v. Gomez*, 993 F.2d 705, 708 (9th Cir.1993)).

Nor, to be clear, can Plaintiff employ the ISDEAA to force the BIA to increase the amount of funds it has allocated for law enforcement at Pine Ridge. In *Lincoln*, 508 U.S. 182, the Supreme Court addressed a tribe's challenge to the Indian Health Service's decision to discontinue funding a program for a tribe. *See id*. at 186–88. The Court held that the agency's allocation of funds from a lump sum appropriation was committed to agency discretion and therefore unreviewable. *See id.* at 192. Following *Lincoln*, the Ninth Circuit held that the BIA's allocation of funds from its lump sum appropriation is also unreviewable. *See Los Coyotes*, 729 F.3d at 1038 ("The BIA's funding decisions are therefore unreviewable acts of agency discretion."). It further held that a tribe could not use the ISDEEA to challenge the agency's allocation of funds for law enforcement from its annual lump sum appropriation. *See id*. at 1039 ("The district court avoided binding precedent forbidding courts from reviewing discretionary funding decisions."); *see also id*. at 1035 (the ISD[EA]A "requires that the Tribe first obtain BIA funding for a program, and then request a contract to operate the program."); *id*. at 1037 (holding that the ISDEAA "is silent on how the BIA should prioritize its funding.").

In this case, BIA correctly declined the portion of Plaintiff's proposal that sought an increase in the amount of funds in excess of the amount that BIA provides for the operation of law enforcement programs at Pine Ridge. *See* 25 U.S.C. § 5325(a)(2)(d); *Los Coyotes*, 729 F.3d at 1035. Plaintiff can make no reasonable argument to the contrary. The ISDEAA simply does

not provide a tribe with a right to obtain additional funds for the BIA programs it administers under contract. Nor can Plaintiff use the ISDEAA to force BIA to create a new OJS-funded SRO program at Pine Ridge. *See id*. at 1035 ("[T]he Tribe here is attempting to use the ISD[EA]A to create a program that does not exist. This is inconsistent with the ISDA, which requires that the Tribe first obtain BIA funding for a program, and then request a contract to operate the program."). Plaintiff must instead rely on the BIA's tribal consultation process to request additional funds from the agency, or it could simply choose to reprogram its existing funds during the TPA process. *See* Melville Decl. ¶¶ 6-7.

b. Defendants Correctly Denied Plaintiff's Proposal to Take Over Nationwide Programs Operated for the Benefit of Multiple Tribes

BIA also correctly declined OST's proposal to take over operation of a portion of BIA's nationwide MMU, Drug Enforcement, and Internal Affairs programs pursuant to 25 U.S.C. § 5325(a)(2)(D), because there are not sufficient funds for the agency to award a contract to the Plaintiff and continue to provide services to all other tribes that benefit from these programs.

The ISDEAA provides that where, as here, a proposal seeks to divide an existing program provided to multiple tribes, the BIA must "ensure that services [continue to be] provided to the tribes not served" by that proposal. 25 U.S.C. § 5324(i). Further, the ISDEAA does not "require[] the [agency] to reduce funding for programs … serving a [non-contracting] tribe to make funds available to another [contracting] tribe." *Id*. § 5325(b). To the contrary, § 5325(b) requires the BIA to "maintain …. services to the non-contracting tribes." *N. Arapaho Tribe v. LaCounte*, No. 1:16-cv-11, 2017 WL 2728408, at *7 (D. Mont. June 23, 2017); *Shoshone-Bannock Tribes of Ft. Hall Reservation v. Shalala*, 988 F. Supp. 1306, 1325 (D. Ore. 1997). In short, if the agency does not have sufficient funds to simultaneously award a proposed contract and maintain services for a non-contracting tribe, it can properly decline the proposal. *See N. Arapaho Tribe*, 2017 WL 2728408, at *7 (affirming BIA's declination of a ISDEAA proposal to take over funding of

shared program under § 5325(a)(2)(D) and finding that "BIA could not continue to provide these services to [the non-contracting tribe], as required by § 5325(b), without spending 'in excess' of current funding levels.").

In this case, OJS operates the MMU, Drug Enforcement, and Internal Affairs programs on a nationwide basis for all 574 federally-recognizes tribes. *See* Melville Decl. ¶ 11. These programs operate on a national scale, carry out law enforcement operations that span the country, and serve all tribes. *Id*. Employees are generally stationed around the nation because of co-location with existing BIA facilities and infrastructure, not to serve one particular tribe to the exclusion of others. *Id*. OJS allocates $14,500,000 to the MMU program, which funds 63 full-time employee ("FTE") positions, or approximately 0.17 FTEs per tribe. *Id*. OJS allocates $3,700,000 to its Internal Affairs program, which funds 25 FTEs, or approximately 0.04 FTEs per tribe. *Id*. And OJS allocates $12,600,000 to its Division of Drug Enforcement, which funds 63 FTEs, or approximately 0.15 FTEs per tribe.[23] If OJS were required to transfer even a portion of those positions to Plaintiff (or to any other tribe that made a similar ISDEAA proposal), then the agency could not adequately maintain that program for non-contracting tribes. *See* 25 U.S.C. § 5324(i). OJS thus correctly declined Plaintiff's proposal to take over a portion of these nationwide programs pursuant to 25 U.S.C. § 5325(a)(2)(E).

Further, Plaintiff's ISDEAA proposal was defective because, while it requested to take over the funds associated with its claimed "tribal shares" of funds allocated for OJS's MMU, Drug Enforcements, and Internal Affairs programs, OST did not propose to perform any of those agency functions, let alone demonstrate how such functions could be parceled out solely to the Tribe. *See* Melville Decl., Exs. 3-4. OJS thus correctly declined Plaintiff's proposal pursuant to

[23] The K-9 Unit is funded at $1,522,334, which funds 10 FTEs, or approximately 0.02 FTE per tribe. *Id*.

25 U.S.C. § 5321(a)(2)(E).

Additionally, the ISDEAA provides that, where a proposed ISDEAA contract would "perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." 25 U.S.C. § 5304(*l*). Although OST provided a tribal resolution on behalf of itself, it did not provide resolutions for each of the other tribes that benefit from the BIA's MMU program. *See* Melville Decl. Exs. 3-4. OJS properly declined Plaintiff's proposal in this circumstance. *See N. Arapaho Tribe*, 2017 WL 2728408, at *6 (noting that § 5304(*l*) requires the approval of non-contracting tribes benefitting from a shared BIA program).[24]

3. Plaintiff Fails to State a Claim for Relief under the Administrative Procedure Act

Plaintiff fails to state a claim for relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. The APA allows a plaintiff to seek judicial review of federal agency actions and to obtain non-monetary relief for legal wrongs resulting from a final agency action, where, as here, no other statute provides a cause of action. 5 U.S.C. §§ 702, 704, 706. The APA,

[24] This Court should reject any claim that an inadequately justified agency decision requires the automatic approval of a contract, because such a result conflicts with the Supreme Court's repeated holdings that "[i]f the record before the agency does not support the agency action, … or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it," remand to the agency is the appropriate remedy. *E.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). When an agency explanation is inadequate, even when the government bears the burden of proof under a higher standard, courts regularly remand decisions for further explanation. *See, e.g.*, *Chambers v. Dep't of Interior*, 602 F.3d 1370, 1381-82 (Fed. Cir. 2010); *Pierce v. Colvin*, 565 F. App'x 621, 621–22 (9th Cir. 2014). Indeed, remand is the path other courts reviewing ISDEAA challenges have followed. *See, e.g., Yukon-Kuskokwim Health Corp. v. N.L.R.B.*, 234 F.3d 714, 718 (D.C. Cir. 2000) (remanding ISDEAA claim to agency for further consideration); *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 115 (D.D.C. 2019) (remanding ISDEAA case to agency for further factual development); *N. Arapaho Tribe*, 2017 WL 2728408, at *5 (remanding denial of ISDEAA proposals back to BIA for further consideration); *Aleutian Pribilof Islands Ass'n, Inc. v. Kempthorne*, 537 F. Supp. 2d 1, 13 (D.D.C. 2008) (remanding declination back to agency after concluding that "Defendants failed to meet their burden with respect to demonstrating APIA was not entitled to the Section 14(h)(1) funds for fiscal year 2006"). Thus, in the event that this Court were to find that the reasons for the OJS's declinations were inadequate, it should remand those decisions to back to the agency.

however, does not make every agency action subject to judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 828 (1985).

a. BIA's Allocation of Funds for Programs Operated for the Benefit of Plaintiff and its Tribal Members is Committed to Agency Discretion

Plaintiff cannot obtain judicial review of the amount of funds BIA allocates to OST for law enforcement programs at Pine Ridge. The APA exempts from judicial review all actions that are committed to an agency's discretion. *See* 5 U.S.C. § 701(a)(2). An agency's decision about how to allocate funds from its annual lump sum appropriation is committed to agency discretion, and the courts have no power to review that allocation under the APA. *See Lincoln*, 508 U.S. at 191.

In *Lincoln*, the Supreme Court reviewed a challenge to a decision of the Indian Health Service ("IHS") to discontinue a pilot program assisting Indian children in the Southwest operated pursuant to the Snyder Act, 25 U.S.C. § 13, and instead reprogram those funds to support a national program to assist Indian children. 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. *See* 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. Because the "reallocation of agency resources to assist handicapped Indian children nationwide clearly falls within the Service's statutory mandate to provide health care to Indian people," the Court concluded that "[t]he decision to terminate the Program was committed to the Service's discretion." *Id.* at 194.[25]

[25] Following *Lincoln*, federal courts have consistently recognized that an agency's *(cont'd)*

In this case, it is beyond dispute that the distribution of annual lump-sum appropriations for the operation of Indian programs, including the specific line items for law enforcement, is committed to the BIA's discretion because there is no law for this Court to apply to determine the propriety of the BIA's decision. *See Lincoln*, 508 U.S. at 194; *Webster v. Doe,* 486 U.S. 592, 600 (1988). OJS's allocation of funds among the tribes for law enforcement purposes involves a discretionary decision in keeping with a permissible statutory objective, and there is no role for the judiciary to second-guess the agency's decision. *See Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 66 (2004) ("[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."); *Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971) ("The federal courts … were not established to operate the administrative agencies of government.").

Nor can Plaintiff otherwise challenge the amount of funds it receives for law enforcement programs at Pine Ridge by attacking OJS's aspirational guidelines for law enforcement staff and methodologies for calculating tribal service populations. First, contrary to Plaintiff's contention, OJS has not used and does not use its guideline and methodologies to allocate existing funds from its annual unrestricted lump-sum appropriation to any particular tribe, and, at most, it plays

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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. *See, e.g.*, *Quechan Tribe of Ft. Yuma Indian Reservation v. United States*, 599 Fed. App'x 698, 699 (9th Cir. 2015) (holding that a court could not compel the IHS to allocate greater funding to the Unit, because IHS's allocation of the lump-sum appropriation for Indian health care is committed to its discretion); *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).

a small role in OJS's allocation of new funds. *See* Melville Decl. ¶¶ 11, 14, 16. OJS has instead, for a host of reasons (not the least of which is the ISDEAA requirement generally not to reduce amounts provided to a tribe in subsequent years, *see* 25 U.S.C. § 5325(b)(2)), primarily relied, and continues to rely, on historic funding amounts allocated to each tribe as the method for allocating funds from current lump-sum appropriations. *See* Melville Decl. ¶ 11. As a result, the staffing guidelines, which are a policy goal, do not offer any law for this Court to apply, and how OJS allocates funds for law enforcement among the tribes remains fully committed to the agency's discretion. Thus, the APA does not provide a cause of action for Plaintiff to challenge the amount of funds it receives for law enforcement.

b. Plaintiff Fails to State a Claim for Relief Arising Under Section 706(1) of the APA

Plaintiff fails to state a claim for relief under Section 706(1) of the APA. Section 706(1) allows a court to compel agency action unlawfully withheld or unreasonably delayed. See 5 U.S.C. § 706(1). In *Norton*, 542 U.S. 55, a unanimous Supreme Court held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id*. at 64 (emphasis in original). The Court explained that this limit on review under § 706(1) arises from the need "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." *Id*. at 66. The Eighth Circuit has found that relief under § 706(1) is akin to a writ of mandamus. *See Org. for Competitive Markets v. USDA*, 912 F.3d 455, 462 (8th Cir. 2018). Relief under § 706(1), like a writ of mandamus, is considered "an extraordinary remedy reserved for extraordinary situations." *Id*.

In this case, Plaintiff challenges OJS's failure to use the Tribe's preferred method of calculating the OST service population and challenges OJS's alleged failure to adhere to its

aspirational policy goal of providing 2.8 officers per 1,000 residents. But Plaintiff does not (and could not) point to any treaty, statute, or regulation requiring OJS to use any methodology for allocating funds from its lump sum appropriations, let alone a discrete duty to calculate service population in any particular way or otherwise apply its staffing guideline. Rather, OJS's methodology is entirely discretionary and, as result, Plaintiff cannot pursue its claim under § 706(1) because OJS has not failed to take a discrete action that it was *required to take*. *See New Holy v. U.S. Dept. of Interior*, No. 19-cv-5066, 2020 WL 3542251, at *4 (D.S.D. June 30, 2020) (absence of law requiring BIA to waive a deadline prevents court from compelling such a waiver).

Moreover, Plaintiff brings its challenge as a "failure to act," but OJS has, in fact, issued a final decision denying the Tribe's ISDEAA proposals for increased funding to operate the law enforcement program at Pine Ridge. A "failure to act" is not the same as a "denial." *SUWA*, 542 U.S. at 63. "The 'extraordinary remedy' afforded under § 706(1) is not available when a federal agency merely denies a request." *Noem*, 542 F. Supp. 3d at 924. Thus, Plaintiff fails to state a claim for relief under § 706(1) of the APA.

C. Plaintiff Has Not Shown that the Balance of Harms Tips in its Favor or that the Public Interest Will be Served by the Extraordinary Relief it Seeks

The balance of harms and the public interest tip heavily against a preliminary injunction. As a general matter, the balance of harms analysis requires a court to weigh the harm resulting to each party from granting or denying the injunction. *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 114 (8th Cir. 1981) (en banc). A court should also consider harm to interested third parties. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994). As is self-evident, the public-interest factor requires courts to consider the interest of the public when deciding whether to issue a preliminary injunction. *Dataphase Sys., Inc*., 640 F.2d at 114. These factors merge when the government is the party opposing preliminary relief. *Nken*, 556 U.S. at

435.

In this case, Plaintiff seeks an order of this Court requiring Defendants to provide funding under the Tribe's ISDEAA contract for law enforcement services sufficient to hire and maintain a total of 112 law enforcement officer positions. *See* Pl.'s Proposed Order. Plaintiff additionally seeks an order enjoining BIA from continuing to: (i) rely on the decisions Plaintiff made in 1999 to reprogram its TPA funds away from law enforcement and to other BIA programs operated at Pine Ridge: and (ii) use an allegedly inaccurate service population to calculate the law enforcement needs at Pine Ridge. *See id*.

As an initial matter, Plaintiff has failed to show that any of the relief it requests is likely to prevent its claimed injuries. Plaintiff's claim of harm arises from recent violent crimes at Pine Ridge and its unsupported assertion that, absent immediate relief, violent crime will continue. *See* Pl.' Mem. at 27. Plaintiff also points to its staffing shortage and the resulting problems caused by that shortage, including decreased police response time and overworked officers. *Id*. at 27–28. Any claims of harm arising from alleged underfunding of law enforcement obligations under treaties or in calculating the Tribe's funding levels for law enforcement are undermined, however, by Plaintiff's decades-long delay in pursuing preliminary relief. See *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("In considering the balance of equities among the parties, we think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request.").

Moreover, Plaintiff has not shown that increased funding for 112 law enforcement officers will reduce violent crimes occurring on Pine Ridge. Instead, Plaintiff essentially asks this Court to assume that a larger police presence will reduce violent crime. But Plaintiff has not explained why crime has suddenly increased within the last two years, much less how it would use the additional funding or potential new officers to mitigate any increases.

Similarly, Plaintiff has not shown that it is likely that an order requiring OJS to provide law enforcement funding sufficient to hire and retain up to 112 police officers will lead to better officer hiring and retention rates at Pine Ridge. As recently as two years ago, OJS's funding was sufficient for the Tribe to maintain a police force of 55 officers. *See* Melville Decl. ¶ 19. OJS has increased funding for law enforcement for each of the last two years, *see id*., but in that same time frame the Tribe has lost 22 officers and now employs somewhere between 28 and 33 officers. *See* Pl.'s Mot. at 5-6. Thus, Plaintiff fails to prove that it is anything more than speculative that having still more funds on hand will result in increased hiring and retention.

Additionally, Plaintiff asks this Court to adjust the funds allocated for law enforcement up from the amount that the Tribe chose to allocate in 1999; as noted in the sections above, *see supra* at 25–26, Plaintiff does not need a Court order to increase law enforcement funding. The Tribe can make this change on its own.

Plaintiff has similarly failed to show that it is likely that an order requiring OJS to change how it calculates the Tribe's service population will have any effect on the amount of law enforcement funds. As noted above, OJS does not rely on a tribe's service population to allocate funds from its unrestricted lump-sum appropriation, and, at most, service population plays a limited role in OJS's allocation of new funds. *See* Melville Decl. ¶¶ 11, 14, 16. Instead, in light of its obligations to all tribes, including those administering law enforcement programs under ISDEAA contracts, OJS primarily relies on historic funding amounts allocated to each tribe as the basis for its current allocations. *Id*. ¶ 11. But even assuming *arguendo* that OJS did rely on service population for all its allocations to tribes, it is pure speculation that an order requiring OJS to change its method for calculating service populations would affect the amount of funds Plaintiff would receive, as changing the formula would mean that OJS would have to recalculate the service population of every tribe that receives law enforcement funds, not just that of

Plaintiff.

This Court must also consider the harms to the government and to third parties if it were to grant Plaintiff's request. If this Court were to rebalance the government's assessment of law enforcement needs among the 186 federally-recognized tribes for which it provides direct law enforcement, or funds for law enforcement, pursuant to an ISDEAA contract, the government would face the prospect of tremendous harm in its government-to-government relations with each of the other tribes for which it provides law enforcement services, directly or under ISDEAA contracts. *See* Melville Decl. ¶ 33; *cf. In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 761 (8th Cir. 2003) (noting a situation in a preliminary injunction context where "Congress has already balanced the harm"); *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544–45 (8th Cir. 1982) (per curiam) (public interest served by avoiding "greater expenditures from the public treasury"); *Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1047 (N.D. Iowa 2011) (noting that courts should not second guess public safety decision of legislatures). And those other tribes would, by necessity, be harmed by any injunction requiring Defendants to increase funding for law enforcement at Pine Ridge because OJS would reduce funding to other tribes. *See United States v. Blackfeet Tribe of Blackfeet Indian Reservation*, 364 F. Supp. 192, 195 (D. Mont. 1973) (balancing the harm to other tribes in denying preliminary relief to plaintiff), *reh'g denied*, 369 F. Supp. 562 (D. Mont. 1973).

As for the public interest, it would be served by denying Plaintiff's requested relief. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) ("public interest … is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding"). Indeed, it would rarely be in the public interest for a court—especially in preliminary proceedings—to enjoin the Executive Branch from guiding agency action according to its

assessment of the public interest. *See Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1126–27 (9th Cir. 2008) (where "responsible public officials … have already considered [the public] interest," the court's authority to substitute its own policy judgment is "constrained").

This Court should thus hold that the balance of harms and the public interest weigh against injunctive relief.

CONCLUSION

This Court should deny Plaintiff's motion for a preliminary injunction and instead grant Defendants' motion to dismiss. A proposed order is attached.

Dated: November 23, 2022

Respectfully submitted,

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