

1 contracts are commonly known as “638 contracts.” (Plaintiff’s Motion for Summary Judgment
2 (“PMSJ”) ¶ 1.)

3 Plaintiff claims the denial was based on an internal, unwritten policy that the Defendants do not
4 provide law enforcement funds to tribes located in a state subject to 18 U.S.C. § 1162, commonly
5 referred to as “P.L. 280.” California is a P.L. 280 state. (PMSJ ¶ 1.) Plaintiff cites to evidence in the
6 administrative record supporting the existence of this unwritten policy. Defendants, however, dispute
7 the existence of this internal, unwritten policy. (*See* Defendants’ Response to Plaintiff’s Statement of
8 Material Facts, Doc. No. 33-5 at p. 3.)

9 Defendants based their denial of the 638 contract on Sections 450(a)(2)(D) and 450j-1(a) of the
10 ISDEAA, which provide that a contract may be denied if the amount of funds requested exceeds the
11 amount of funding the Department would have otherwise provided to operate the program itself.
12 Defendants explained that because they provided zero law enforcement funding to tribes in California
13 (allegedly because it is a P.L. 280 state), any amount of funding requested by Plaintiff was in excess of
14 the applicable funding level for the contract. (PMSJ ¶ 1.)

15 Plaintiff has been a federally recognized tribe since 1889. To combat crime on its reservation,
16 Plaintiff in 2007 hired a Chief of Police funded through a federal grant from the Bureau of Justice
17 Assistance, but the grant ended in 2009. Consequently, in February 2009, Plaintiff submitted a written
18 request to OJS seeking a 638 contract for tribal law enforcement services as authorized under the
19 ISDEAA. (PMSJ ¶¶ 8-11.)

20 OJS denied Plaintiff’s request in July 2010, and Plaintiff requested an informal conference with
21 OJS in an attempt to find a compromise, as provided under 25 C.F.R. § 900.51. The informal conference
22 was properly conducted by a “designated representative” appointed by OJS. (PMSJ ¶¶ 13-14.) The OJS
23 designated representative then issued a recommended decision finding that:

- 24 1. OJS’s underlying rationale for making zero law enforcement funding available to tribes
25 in P.L. 280 states was not valid because P.L. 280 did not divest tribes of their criminal
26 jurisdiction or divest the federal government of its law enforcement responsibility, and
27 there is a need for law enforcement on Plaintiff’s reservation not being met by local law
28 enforcement.

- 1 2. OJS's unwritten policy denying the funding to tribes in P.L. 280 states has been arbi-
- 2 trarily implemented and has deprived Plaintiff equal protection and due process of law.
- 3 3. OJS's unwritten policy violates the mandates of the APA, since such a policy must be
- 4 promulgated and receive tribal consultation. (PMSJ ¶ 16.)

5 In November 2009, Defendants filed a Notice of Appeal with the Interior Board of Indian
6 Appeals ("IBIA"), requesting a decision on whether OJS had a right to appeal its own designated
7 representative's decision and, if not, whether the decision was binding on the department. In January
8 2010, the IBIA issued an Order Dismissing Appeal, finding that OJS did not have a right of appeal
9 under 25 C.F.R. § 900.157 and declining to address whether the designated representative's decision
10 was binding on OJS. Later that month, OJS informed Plaintiff that because it had no right to appeal, the
11 designated representative's decision "is not binding on the Secretary." (PMSJ ¶¶ 18-20.)

12 Plaintiff filed its Complaint for injunctive and declaratory relief on July 13, 2010. Plaintiff
13 challenges Defendants' decision and underlying policy supporting the decision as arbitrary, capricious,
14 and contrary to (1) ISDEAA § 450k, (2) the Administrative Procedures Act ("APA"), (3) 5 U.S.C. §
15 553, (4) equal protection under the U.S. Constitution, and (5) the federal trust responsibilities owed to
16 Plaintiff. (PMSJ ¶ 1.)

17 Plaintiff filed the instant Motion for Summary Judgment on May 25, 2011, and Defendants filed
18 the instant Cross Motion for Summary Judgment on July 28, 2011.

19 II.

20 LEGAL STANDARD

21 "The court shall grant summary judgment if the movant shows that there is no genuine dispute as
22 to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A
23 genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a
24 verdict for the non-moving party. *Miller v. Glenn Miller Prod., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006).

25 In order to prevail, a party moving for summary judgment must show the absence of a genuine
26 issue of material fact with respect to an essential element of the nonmoving party's claim, or to a
27 defense on which the nonmoving party will bear the burden of persuasion at trial. *Nissan Fire & Marine*
28 *Ins. Co. v. Fritz Cos. Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the nonmoving party would bear

1 the burden of proof at trial, the moving party may satisfy its burden on summary judgment by simply
2 pointing out to the Court an absence of evidence from the nonmoving party. *Miller*, 454 F.3d at 987.
3 “The moving party need not disprove the other party’s case.” *Id.*

4 Once the movant has made that showing, the burden shifts to the opposing party to produce
5 “evidence that is significantly probative or more than ‘merely colorable’ that a genuine issue of material
6 fact exists for trial.” *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1137 (9th Cir. 2009) (citing *FTC v.*
7 *Gill*, 265 F.3d 944, 954 (9th Cir. 2001)); *see also Miller*, 454 F.3d at 988 (“[T]he nonmoving party must
8 come forward with more than ‘the mere existence of a scintilla of evidence.’”) (quoting *Anderson v.*
9 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

10 The Court must review the record as a whole and draw all reasonable inferences in favor of the
11 nonmoving party. *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 736, 738 (9th Cir. 2000). However,
12 unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. *Id.*;
13 *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1103 (9th Cir. 2008). “Thus, ‘[w]here the record taken
14 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
15 issue for trial.’” *Miller*, 454 F.3d at 988 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*
16 *Corp.*, 475 U.S. 574, 587 (1986)).

17 III.

18 DISCUSSION

19 As discussed below, the Court finds that Defendants may not decline Plaintiff’s 638 contract for
20 law enforcement funding solely on the basis of Plaintiff’s location in a P.L. 280 state. Defendants’
21 policy violates the ISDEAA, the APA, and Plaintiff’s right to equal protection of the law. To be clear,
22 the Court is not requiring that Defendants issue the contract or otherwise dictating how Defendants
23 should allocate their funds. Instead, to level the playing field and ensure that Plaintiff’s request receives
24 a fair evaluation, the Court enjoins Defendants from using California’s P.L. 280 status as the sole reason
25 for declining Plaintiff’s contract proposal.

1 **A. ISDEAA § 450k**

2 The ISDEAA allows an Indian tribe to contract with the Department of the Interior (“DOI”) to
3 take over operations of federal service programs—including law enforcement—that DOI maintains and
4 operates for the benefit of Indian tribes. 25 U.S.C. § 450f(a)(1)(B).

5 Under the ISDEAA, the Secretary’s authority to promulgate implementing regulations is limited
6 to sixteen specific topics. Outside of those topics, the Secretary may not promulgate any regulation or
7 impose any nonregulatory requirement relating to self-determination contracts. ISDEAA § 450k(a); *see*
8 *also* 25 C.F.R. § 900.5 (“[A]n Indian tribe or tribal organization is not required to abide by any
9 unpublished requirements such as . . . policy directives of the Secretary, unless otherwise agreed to by
10 the Indian tribe . . . , or otherwise required by law.”). Section 450k(a)(2) requires that any implementing
11 regulation be promulgated under the APA’s rulemaking provisions, 5 U.S.C. §§ 552, 553. Under Section
12 450k(d)(1), when promulgating regulations, Defendants must confer with representatives of Indian
13 tribes, tribal organizations, and individual Indians.

14 Plaintiff argues that Defendants’ current policy of not funding law enforcement in P.L. 280 states
15 has not been promulgated under the APA as required by Section 450k(a)(2), so it cannot be viewed as a
16 valid regulation. Further, the policy *cannot* be promulgated because it does not fall within one of the
17 sixteen delineated areas defining the Defendants’ regulatory authority. The policy must therefore be
18 deemed a nonregulatory requirement, since it directly relates to self-determination contracts. As such, it
19 is in violation of ISDEAA Section 450k(a)(1).

20 Plaintiff relies on *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), which
21 challenged the BIA’s policy that a tribe failing to timely file for certain funds would be penalized and
22 only receive 50 percent of its funding request. The court held that the Secretary has limited discretion in
23 funding matters. Beyond the sixteen delineated areas, the Secretary had no delegated authority to impose
24 or implement any regulations, rules, or policies affecting the approval or disapproval of a 638 contract.
25 The court in *Ramah* held that if the 50 percent policy constituted a “regulation,” it violated the ISDEAA
26 because it was never subjected to the APA’s notice and comments procedure, which is required by
27 Section 450k(a)(2). Alternatively, if the policy were not a regulation, then it constituted a nonregulatory
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1 requirement, which is strictly prohibited under Section 450k(a)(1). *Id.* at 1350. Plaintiff asserts that the
 2 same reasoning applies here with regard to Defendants' policy of not funding P.L. 280 states.

3 Defendants respond that OJS did not decline the 638 contract for a "non-regulatory" reason.
 4 Rather, declining a contract proposal because the "amount of funds proposed . . . is in excess of the
 5 applicable funding level for the contract" is one of the five permissible reasons specified under the
 6 ISDEAA. 25 U.S.C. § 450f(a)(2). While that was the stated reason, the Court finds that the actual reason
 7 was the policy to deny funding to P.L. 280 states. In other words, Plaintiff's application was dead on
 8 arrival and not provided proper review. The Court notes that Plaintiff is challenging neither the
 9 declination itself nor Defendants' stated reason for it, but rather the underlying policy—i.e., the reason
 10 why the "applicable funding level" is zero. Defendants further claim that unlike *Ramah*, because the
 11 agency has unreviewable discretion to decide how to allocate its law enforcement dollars, its decision
 12 not to allocate funds does not impose a regulatory or non-regulatory requirement in violation of Section
 13 450k. Again, however, the Court is not directing Defendants to allocate funds, so their discretion to do
 14 so is not affected. Further, as discussed below under subsection E., the ISDEAA does not provide
 15 Defendants the broad unreviewable discretion that they claim.

16 The Court therefore agrees with the Plaintiff that Defendants' unwritten policy violates Section
 17 450k of the ISDEAA.² As in *Ramah*, if viewed as a regulation, it would violate Section 450k(a)(2)
 18 because it was never subjected to the APA's notice and comments procedure. Since it has not been
 19 promulgated (and cannot be because it is outside of the sixteen delineated areas), it must be deemed a
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21 ² Although Defendants dispute the existence of the unwritten policy, the Court finds there is no
 22 genuine dispute as to this fact because the administrative record supports that there is an unwritten
 23 policy denying law enforcement funding to P.L. 280 states. *See, e.g.:*

- 24 • AR at 305 (Recommended Decision of BIA's Designated Representative, stating that
 25 "the fundamental issue here . . . is the BIA-OJS' policy to exclude Tribes in California
 26 and other P.L. 280 states from ever getting any 638 funds to provide law enforcement
 27 services in their communities");
- 28 • AR at 164 (Transcript of Los Coyotes Informal Conference, noting that "this has been
 sort of an internal policy that has been in place . . . since 1953");
- AR at 253 (Informal Hearing for similar Hopland tribe proceeding, stating that "it's my
 understanding . . . that the funds that we specifically request for law enforcement are
 funds for those tribes that are not subject to [P.L. 280]");
- AR at 359 (BIA's 1987 proposed rule attempting to amend the regulations to exclude
 P.L. 280 tribes from receiving BIA law enforcement funding, in order "to ensure a
 consistent [BIA] policy on such funding requests").

1 nonregulatory requirement, in violation of Section 450k(a)(1). Accordingly, the Court grants Plaintiff's
2 Motion for Summary Judgment on this claim, and denies the Defendants' Cross Motion for Summary
3 Judgment on this claim.

4 **B. The APA**

5 Plaintiff next asserts that Defendants' policy violates the APA on two separate grounds: (1) it
6 violates the APA's rulemaking provisions, and (2) it is arbitrarily applied in violation of the APA.

7 **I. APA Rulemaking Provisions**

8 The APA requires federal agencies to promulgate agency rules by providing notice of the rule in
9 the Federal Register and allowing for public comment and participation. 5 U.S.C. § 553(b). Plaintiff
10 argues that a policy automatically denying tribes law enforcement funding solely on their geographical
11 location is a substantive rule that significantly affects tribes in P.L. 280 states. It therefore is subject to
12 the APA but has not been properly promulgated, making it invalid. Plaintiff relies on *Morton v. Ruiz*, 415
13 U.S. 199 (1974), in which the U.S. Supreme Court found that the BIA's manual with regard to general
14 assistance to Indians violated the APA. The Court explained that while the BIA may have had the
15 authority to establish eligibility rules, the rules must follow APA procedures. *Id.* at 232 ("No matter how
16 rational or consistent with congressional intent a particular decision might be, the determination of
17 eligibility cannot be made on an *ad hoc* basis by the dispenser of the funds.").

18 In response, Defendants argue that their denial did not require notice and comment. The APA
19 contains an exemption for a "general statement of policy," which is not subject to the notice and
20 comment requirement. 5 U.S.C. § 553(b)(A). Defendants rely on *Lincoln v. Vigil*, 508 U.S. 182, 197
21 (1993), which held that the Indian Health Service's discontinuance of the Indian Children's Program was
22 a general statement of policy, not subject to notice and comment, because it was a "statement[] issued by
23 an agency to advise the public prospectively of the manner in which the agency proposes to exercise a
24 discretionary power." The Court further held: "Whatever else may be considered a 'general statemen[t]
25 of policy,' the term surely includes an announcement like the one before us, that an agency will
26 discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation." *Id.*; *see also*
27 *Serrato v. Clark*, 486 F.3d 560, 569 (9th Cir. 2007). Defendants assert that similarly, its discretionary
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1 decision about how to allocate funds for law enforcement services among the tribes did not require notice
2 and comment.

3 The Court does not agree with Defendants' assertion that this is a "general statement of policy"
4 exempted from the APA's requirements. This same issue was addressed in *Ramah*, which, unlike *Lincoln*
5 and *Serrato*, dealt specifically with the ISDEEA. In *Ramah*, the defendant similarly argued that the
6 policy qualified as a "general statement of policy" and thus fell outside the scope of both Section 450k
7 and the APA's notice and comment procedures. However, the court rejected the argument, since it hinges
8 on an agency's exercise of discretionary power, and the court had already determined that the ISDEEA
9 limited the Secretary's discretionary power: "[W]e have already determined that the allocation of
10 insufficient CSF did not fall within the scope of the Secretary's limited discretionary powers, and ipso
11 facto that the Notice of that allocation plan *cannot constitute a general statement of policy.*" *Ramah*, 87
12 F.3d at 1350 (emphasis added). Similarly, the Court finds that Defendants' unwritten policy cannot
13 constitute a "general statement of policy," due to Defendants' limited discretionary powers under the
14 ISDEEA. Defendants have consequently violated the APA by failing to follow the notice and comment
15 procedures.³

16 Accordingly, the Court grants Plaintiff's Motion for Summary Judgment on this claim, and denies
17 the Defendants' Cross Motion for Summary Judgment on this claim.

18 **2. Defendants' Arbitrary Application of the Policy**

19 Plaintiff claims that Defendants have arbitrarily applied the policy in further violation of the
20 APA. OJS attached to its declination a list of tribes that have received 638 contracts for law enforcement.
21 The list contained three California tribes that straddle the border with Nevada and Arizona (which are not

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23 ³As an additional argument, Plaintiff notes that Defendants' previous attempt at APA compliance
24 further undercuts their current position on the APA's notice and comment requirement. The Court
25 agrees. In 1987, the BIA attempted to promulgate a regulation that would have formalized its current
26 policy of not funding tribes in P.L. 280 states. The proposed regulation was never finalized. Plaintiff
27 points to a December 21, 1987 House Conference Report that expressly repudiated the proposed
28 regulation. It directed the BIA to continue providing funding for law enforcement programs on the basis
of demonstrated need and stated that "no tribe shall be denied funding for a law and order program
solely on the basis of [P.L. 280]." (See PMJS at p. 10; AR at 362.)

27 Defendants respond that the 1987 proposed regulation is irrelevant, since it was never finalized
28 and thus never became legally binding upon the agency. However, even if it does not provide binding
legal support, the Court believes it provides factual support for Plaintiff's argument. Its very existence
indicates that Defendants had previously determined the policy was subject to the APA rulemaking
process.

1 P.L. 280 states). At the informal hearing, OJS acknowledged that the funding provided to these tribes was
2 in no way restricted to the portion of the reservations outside of California. Therefore, at least three tribes
3 with portions of their reservations in California receive law enforcement funding through a 638 contract.
4 Further, the list contained several tribes in other P.L. 280 states (Minnesota, Wisconsin, and Florida) that
5 were rewarded 638 contracts for law enforcement. (PMSJ at p. 11.) According to Plaintiffs, it makes no
6 rational sense that some California tribes and tribes in other P.L. 280 states receive law enforcement
7 funding while Plaintiff cannot—clearly demonstrating the arbitrary application of Defendants’ policy in
8 violation of the APA.⁴ The Court agrees. Defendants have provided no reasonable explanation for why
9 some tribes in P.L. 280 states receive law enforcement funding, while others do not. The Court therefore
10 finds that the Defendants have violated the APA by their arbitrary application of the policy.

11 Accordingly, the Court grants Plaintiff’s Motion for Summary Judgment on this claim, and denies
12 the Defendants’ Cross Motion for Summary Judgment as to this claim.

13 C. Equal Protection

14 Plaintiff claims Defendants’ policy violates its tribal members’ constitutional right to equal
15 protection of the law, since it disproportionately denies California tribes law enforcement funding.
16 Plaintiff relies on *Rincon Band of Mission Indians v. Califano*, 464 F. Supp. 934 (N.D. Cal. 1979),
17 affirmed by 618 F.2d 569 (9th Cir. 1980). At issue in *Rincon* was whether an Indian Health Services
18 (“IHS”) policy disproportionately denied California Indians health care funding by excluding certain
19 program expansion funds. In holding the IHS funding policy unconstitutional, the court found no rational
20 basis for underfunding California.

21 Here, Plaintiff asserts, California tribes and their members are once again being denied funding
22 that other tribes in the United States receive. Plaintiff again cites to the 2002 report (*see supra* n. 4)
23 regarding funding disparities between California and other states. For example, in 1995 California tribes
24 were receiving less than 1% of Defendants’ \$80,440,000 allocation for law enforcement. (PMSJ at p. 14.)

26 ⁴ In addition, according to the designated representative’s recommended decision, “In 1990, the
27 BIA provided the San Diego and Riverside County Sheriffs Departments with 638 contract funds in
28 order for them to provide greater law enforcement to Tribes in those counties.” (*See AR* at 313.)
Further, Plaintiff points to a 2002 report by UCLA law professors Carole Goldberg and Duane
Champagne, which documents that tribes in P.L. 280 states other than California (including Wisconsin
and Oregon) are receiving BIA funds for law enforcement. (PMSJ at p. 12.)

1 These funding percentages are as low as the percentages in *Rincon*, which the court found unconstitu-
2 tional. Plaintiff contends that there is no rational basis for Defendants' declination, and Defendants'
3 policy has thus denied its members the equal protection of the law.

4 Defendants respond that Plaintiff's claim is subject to rational basis scrutiny, which is "highly
5 deferential," since all government programs conferring monetary benefits come with a "strong presump-
6 tion of constitutionality." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976). Defendants claim it is well
7 settled that the government has broad discretion to allocate funds for programs such as law enforcement
8 among the 565 federally recognized tribes around the country without violating equal protection rights.
9 *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

10 Defendants further argue that Plaintiff ignores the "fundamental fact" that tribes in P.L. 280 states
11 are not the same as tribes in non-P.L. 280 states, and so Plaintiff cannot show an equal protection
12 violation. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that equal protection only applies to
13 "persons who are in all relevant respects alike"). Specifically, Defendants contend that tribes in P.L. 280
14 states have the benefit of state criminal jurisdiction on tribal lands for crimes committed by Native
15 Americans, while tribes in non-P.L. 280 states do not.

16 It appears there are two separate equal protection issues, relating to (1) P.L. 280 states vs. non-
17 P.L. 280 states, and (2) P.L. 280 states vs. other P.L. 280 states. With regard to the former, the Court is
18 not convinced by Plaintiff's argument that there is no rational basis for excluding P.L. 280 states from
19 funding eligibility. As Defendants note, the standard for rational basis scrutiny is high, and the benefit of
20 state criminal jurisdiction (however illusory it may be) would seem to distinguish the two groups. There
21 was no such distinction in *Rincon*. Plaintiff has therefore not provided sufficient evidence of the
22 commonality of tribes in P.L. 280 and non-P.L. 280 states to sustain an equal protection claim.

23 However, Plaintiff's argument is stronger that the disparate treatment of tribes *within* P.L. 280
24 states constitutes an equal protection violation, since those tribes are similarly situated by virtue of being
25 in P.L. 280 states. (As noted above, certain tribes in California and other P.L. 280 states have received
26 638 contracts for law enforcement funding.) There is no longer the distinction of state jurisdiction, and
27 Defendants have not provided evidence of any rational basis for providing law enforcement funds to
28 some tribes in P.L. 280 states, but not others. The Court therefore concludes that through their differing

1 treatment of tribes within P.L. 280 states, Defendants have violated Plaintiff's right to equal protection of
2 the law. Accordingly, the Court grants Plaintiff's Motion for Summary Judgment on this claim, and
3 denies the Defendants' Cross Motion for Summary Judgment as to this claim.

4 **D. Federal Trust Responsibilities**

5 Finally, Plaintiff argues that Defendants' policy violates the trust relationship between the federal
6 government and tribes. *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983). Determining whether the
7 federal government owes a tribe specific trust obligations requires looking to the legal authorities that are
8 claimed to have created the specific trust relationship. Here, Plaintiff looks to the Snyder Act, the
9 ISDEAA, the Indian Law Enforcement Reform Act ("ILERA"), and the Tribal Law and Order Act of
10 2010 ("TLOA"):

- 11 • The Snyder Act provides that the BIA will direct, supervise, and expend funds for the
12 benefit (including law enforcement) of the Indians. 25 U.S.C. § 13.
- 13 • Both the ISDEAA and its implementing regulations recognize the federal government's
14 trust responsibility to ensure that tribes are given the opportunity to contract for the
15 administration of federal programs and services to make them less dependent on the
16 federal government and enhance tribal self determination. *See* 25 C.F.R. § 900.4(b).
- 17 • Defendants' authority and responsibility to provide law enforcement services are man-
18 dated under the ILERA, which provides that the "Secretary, acting through the Bureau,
19 shall be responsible for providing, or for assisting in the provision of law enforcement
20 services in Indian country." 25 U.S.C. § 2802.
- 21 • Section 202 of the TLOA reaffirms the congressional and presidential commitment to law
22 enforcement in Indian Country.

23 Plaintiff concludes that from these federal statutes and regulations, Defendants have defined their
24 legal and trust obligation to provide law enforcement services and support to the Plaintiff in its efforts to
25 make its community safe. According to Plaintiff, denying the 638 contract violates Defendants'
26 responsibility for law enforcement on Plaintiff's reservation.

27 Defendants respond that the Indian trust doctrine does not give rise to any duty on the part of the
28 United States beyond complying with generally applicable statutes and regulations. *Gros Ventre Tribe v.*

1 *United States*, 469 F.3d 801, 810 (9th Cir. 2006). The trust relationship between the United States and
2 Indian tribes is insufficient to create legal obligations by the United States for a particular tribe. *See*
3 *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 921, 927-28 (9th Cir. 2008). When a tribe sues the
4 government for equitable relief, it must identify a substantive source of law that establishes *specific*
5 *fiduciary or other duties*, and allege that the Government has failed faithfully to perform those duties.
6 *See Gros Ventre Tribe.*, 469 F.3d at 812. According to Defendants, the statutes and regulations cited by
7 Plaintiff contain general statements but do not confer the required specific duty on Defendants.

8 The Court agrees with Defendants and does not find that the requisite duty emanates from the
9 statutes and regulations proffered by the Plaintiff. Without a specific duty, there can be no violation of
10 the trust doctrine. Plaintiff's Motion for Summary Judgment is therefore denied on this claim, and
11 Defendants' Cross Motion for Summary Judgment is granted as to this claim.

12 **E. Defendants' Argument Regarding the Court's Jurisdiction Over APA Claims**

13 Defendants claim their decision not to provide funding for law enforcement services to the tribe is
14 not susceptible to judicial review under the APA because the decision is "committed to agency discretion
15 by law." 5 U.S.C. § 701(a)(2). They rely on *Lincoln* for the proposition that an agency decision about
16 how to allocate funds from a lump-sum appropriation is the most common and relevant example of an
17 administrative decision committed to agency discretion and thus precluded from judicial review. *Lincoln*,
18 508 U.S. at 192. *Lincoln* involved a challenge to IHS's decision to discontinue the Indian Children's
19 Program, which the Supreme Court concluded was a decision about how to allocate funds from a lump-
20 sum appropriation and was therefore committed to agency discretion and precluded from judicial review.
21 *Id.* at 193-94. The Court held that "the very point of a lump-sum appropriation is to give an agency the
22 capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the
23 most effective or desirable way." *Id.* at 192.

24 Defendants further claim that federal courts have consistently recognized that an agency's
25 decision as to how to allocate scarce funding resources is "committed to agency discretion by law" and
26 therefore unreviewable under the APA so long as the allocated funding is otherwise spent on permissible
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1 statutory objectives.⁵ Defendants conclude that the appropriation provision at the heart of Plaintiff's
2 challenge is subject to the same analysis.

3 Plaintiff responds that contrary to Defendants' claims, the APA creates a strong presumption of
4 judicial review of agency actions, and that the Supreme Court has found that lack of judicial review is a
5 "very narrow exception" applicable only in "rare instances." *Citizens to Preserve Overton Park, Inc. v.*
6 *Volpe*, 401 U.S. 402, 410 (1971); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Abbott Laboratories v.*
7 *Gardner*, 387 U.S. 136 (1967).

8 Plaintiff claims *Ramah* governs, not *Lincoln*. *Ramah* explicitly addresses why *Lincoln* is
9 inapplicable. As here, the defendants in *Ramah* raised *Lincoln* to prevent the court from reviewing the
10 BIA's allocation of an insufficient lump-sum appropriation to cover plaintiff's contract support services
11 under a 638 contract. However, the *Ramah* court rejected the *Lincoln* defense, finding that the "key to
12 any determination of reviewability is congressional intent," and that "we begin with the strong presump-
13 tion that Congress intends judicial review of administrative act." *Ramah*, 87 F.3d at 1343. The court
14 found that there was nothing in the text or history of the ISDEAA or in prior case law to support a
15 conclusion that the ISDEAA committed allocation of funds to agency discretion. It also found that
16 Congress has clearly expressed in the ISDEAA both its intent to tightly circumscribe the Secretary's
17 discretion, and also to make available judicial review of all agency actions (citing 25 U.S.C. 450k(a),
18 450m-1(a)). The *Ramah* court found that the ISDEAA "reveals that ***not only did Congress not intend to***
19 ***commit allocation decisions to agency discretion, it intended quite the opposite; Congress left the***
20 ***Secretary with as little discretion as feasible.***" 87 F.3d at 1334 (emphasis added). Plaintiff concludes that
21 in light of *Ramah*, the strong presumption in favor of judicial review, the clear mandate from the
22 ISDEAA, and congressional intent, Defendants' argument regarding jurisdiction is without merit.

24 ⁵*See, e.g., Serrato*, 486 F.3d at 568-69 (prioritizing funds for BOP programs within statutory
25 appropriations mandate was not reviewable); *Collins v. United States*, 564 F.3d 833, 839 (7th Cir. 2009)
26 ("The prioritization of demands for government money is quintessentially a discretionary function."); *St.*
27 *Tammany Parish v. FEMA*, 556 F.3d 307, 325 (5th Cir. 2009) ("Eligibility determinations, the
28 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."); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) ("The 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.").

1 The Court agrees that *Ramah* appears to be directly on point. Unlike the cases Defendants cite,
2 *Ramah* deals specifically with the ISDEAA. The Court therefore concludes that it retains jurisdiction to
3 review Plaintiff's APA claims. While agencies may sometimes have discretion to allocate funds from a
4 lump-sum appropriation, *Ramah* makes clear that it is not so under the ISDEAA, since Congress intended
5 to limit the Secretary's discretionary power. The Court therefore rejects Defendants' claim that they have
6 unreviewable discretion to allocate these funds. Regardless, as noted above, this case is not about the
7 allocation of funds, but rather the *eligibility* to be considered for a 638 contract in the first place. Any
8 concerns Defendants may have regarding their ability to allocate funds are thus unfounded. The Court
9 therefore denies Defendants' Cross Motion for Summary Judgment as to this claim.

10 **IV.**

11 **CONCLUSION**

12 For the reasons discussed above, the Court hereby enjoins Defendants from denying Plaintiff's
13 638 contract solely on the basis of California's status as a P.L. 280 state. The Court finds that Defen-
14 dants' unwritten policy of denying law enforcement funding to tribes in P.L. 280 states violates the
15 ISDEAA, the Administrative Procedures Act, and Plaintiff's right to equal protection of the law. The
16 Court therefore **GRANTS** in part and **DENIES** in part Plaintiff's Motion for Summary Judgment, and
17 **GRANTS** in part and **DENIES** in part Defendants' Cross Motion for Summary Judgment.

18
19 IT IS SO ORDERED.

20
21 DATED: October 28, 2011

22 
23 Hon. Anthony J. Battaglia
24 U.S. District Judge