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' REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

U.S. CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION

This case is about whether Plaintiff has a judicially enforceable right under treaties or the Indian Self Determination and Education Assistance Act ("ISDEAA") to demand its preferred level of federal funding to operate the Bureau of Indian Affairs' ("BIA's") law enforcement and criminal investigations programs on the Pine Ridge Reservation. As Defendants demonstrated in their motion to dismiss, the answer to that question, as matter of law, is no.

In an effort to forestall dismissal, Plaintiff miscasts treaty language that stands in the way of its proposed interpretation and asks this Court to make unreasonable inferences about what the treaties require. Plaintiff's opposition also improperly, and repeatedly, seeks to amend its Amended Complaint by asserting new factual allegations and new legal claims about the amount of funds BIA is currently providing to Plaintiff under the terms of its ISDEAA contract. But neither of these attempts undermine Defendants' conclusive showings that: (1) Plaintiff has failed to show that any language in the 1825, 1851, and 1868 Treaties cited in Plaintiff's Amended Complaint create a specific, judicially-enforceable trust duty to provide a particular level of, or funding for, law enforcement on Pine Ridge; (2) the Office of Justice Services ("OJS") properly declined Plaintiff's ISDEAA proposals to increase fundings for its Law Enforcement and Criminal Investigation contract and the Tribe's proposals to establish new programs on the Reservation; and (3) Plaintiff fails to state a claim for relief under the Administrative Procedure Act ("APA"). Finally, Plaintiff's opposition insists that the Court convert Defendants' motion to dismiss into one for summary judgment and demands discovery into a host of unnecessary matters. But the precedent is clear that this Court can resolve all of Plaintiff's claims as a matter of law.

This Court should grant Defendants' motion to dismiss Plaintiff's Amended Complaint.

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF TRUST

Defendants' motion to dismiss demonstrated that Plaintiff failed to meet its burden of "'identify[ing] a substantive source of law that establishes specific fiduciary or other duties'" in the 1825, 1851, and 1868 treaties relied on in its Amended Complaint. Mem. Op. & Order Granting Defs.' Mot. for Sum. J. & Denying Pl.'s & Intervenor's Pl.'s Mots. for Sum. J., at 37, 40, *Cheyenne River Sioux Tribe v. Jewell*, No. 3:15-cv-3018-KES (D.S.D. Sept. 28, 2018), ECF No. 108 ("*Cheyenne River Sioux Tribe*") (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*")); *accord United States v. Navajo Nation*, 556 U.S. 287, 296, 302 (2009) ("*Navajo II*").

A. 1825 Treaty

Plaintiff's opposition fails to make any argument in response to Defendants' showing that Article 5 of the 1825 Treaty, 7 Stat. 252, lacks a specific rights-creating, duty-imposing obligation to provide, or provide funding for, law enforcement officers on the Pine Ridge Indian Reservation, let alone at Plaintiff's preferred level. Defendants demonstrated that, although Article 5 of the Treaty can reasonably be read to contemplate an extension of legal jurisdiction over certain non-Indian offenders on the Tribes' lands, the United States' agreement to punish wrongdoers is contingent upon *Tribal Chiefs apprehending and producing* the alleged offenders to the federal government, thereby clearly placing the "arrest" obligation on the Tribal Chiefs. *See* Defs.' Combined Opp'n to Pl.'s Mot. for a Prelim. Inj. & Mem. in Supp. of their Mot. to Dismiss Pl.'s Am. Compl. at 31-33, ECF No. 35 ("Defs.' Mem."); Pl.'s Br. in Resp. to Defs.' Mot. to Dismiss & Reply to Defs.' Resp. to Pl.'s Mot. for a Prelim. Inj., ECF No. 43 ("Pl.'s Opp'n."). On that basis, this Court should dismiss Plaintiff's trust claims based on the 1825 Treaty.

B. 1851 Treaty

Defendants' opening brief demonstrated that the broad grant of general protection set forth in Article 3 of the 1851 Treaty, 11 Stat. 749, 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. *See* Defs.' Mem. at 33–34. Rather, 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 [courts] have no way of measuring whether the government is in compliance, unless [they] look to other generally applicable statutes or regulations." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 155 (D.D.C. 2017) (holding that the 1851 Treaty does not establish specific fiduciary duties for the United States), *aff'd*, 985 F.3d 1032 (D.C. Cir. 2021)..[1]

Plaintiff's opposition relies on the canons of Indian construction to assert that the United States' express duty to protect the tribes against depredations by non-Indians gives rise to a judicially enforceable duty to provide law enforcement for all crimes and misdemeanors, including those committed by Indians. Pl.'s Opp'n at 24–25 (citing *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1023 (8th Cir. 2021)) (citations omitted). But this Court is bound by the text of the 1851 Treaty itself, *see Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985), and cannot "ignore plain language that, viewed in historical context and given a 'fair appraisal,' ... clearly runs counter to a tribe's later claims." *Id*. (citation omitted).

[1] At the time of the 1851 Treaty, Indians living on tribal lands were not considered citizens of the United States, *see, e.g., Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (citing U.S. Const. amend 14, § 2), which Congress changed in 1924. *See* Indian Citizenship Act, Pub. L. No. 68–175 (June 2, 1924), 43 Stat. 253, codified as amended at 8 U.S.C. § 1401(b).

Plaintiff would have this Court interpret the 1851 Treaty as a surrender of sovereignty over the Tribe's internal affairs. Such a surrender of rights is clearly counter to the intent of the tribes at the time they signed the treaty, *Minnesota 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"), and has never been recognized by any court, *see, e.g., United States v. Wheeler*, 435 U.S. 313, 318, 322–23 (1978) (recognizing each tribe's inherent power "to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions"), *superseded on other grounds by stat.*; *United States v. Lara*, 541 U.S. 193, 199 (2004) (recognizing each tribe's inherent power to also prosecute non-member Indians); *see also United States v. Cooley*, 141 S. Ct. 1638, 1644 (2021) (recognizing tribes' retained authority to detain non-Indian people suspected of committing a crime).

Nor can Plaintiff's proffered reading be squared with the Supreme Court's holding in *Ex parte Crow Dog*, 109 U.S. 556 (1883). In *Crow Dog*, the Court expressly recognized the inherent retention of authority by the Brule Sioux Band of the Sioux Nation, a signatory to the 1851 Treaty, over Indian offenders. *See id*. at 568 (recognizing the tribe's right to preserve "the maintenance of order and peace among their own members by the administration of their own laws and customs."). Quite simply, the Court could not have reached this conclusion if Plaintiff's reading of the 1851 Treaty were correct.

Plaintiff also attempts to distinguish *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), on the grounds that the court ultimately held that Article 3 of the 1851 Treaty protects the tribes against depredations committed on tribal lands, not lands held outside of reservation boundaries. *See* Pl.'s Opp'n at 25 (quoting *Gros Ventre Tribe*, 469 F.3d at 813). But that additional holding does not limit or undermine the court's conclusion that the treaty "merely recognize[s] a general or limited trust obligation to protect the Indians against depredations" and

that this was "an obligation for which we have no way of measuring whether the government is in compliance, unless we look to other generally applicable statutes or regulations." *Gros Ventre Tribe*, 469 F.3d at 812. Nor does Plaintiff even acknowledge the court's conclusion in *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 155. *See* Pl.'s Opp'n at 25. Plaintiff's trust claims arising from the 1851 Treaty fail as a matter of law.

C. 1868 Treaty

Defendants' opening brief demonstrated that neither the "bad men" clauses in Article 1 of the 1868 Treaty, 15 Stat. 635, nor the responsibilities of the Indian agent in Articles 1 and 5 established a trust duty to provide any particular level of law enforcement services or funding on Pine Ridge. *See* Defs.' Mem. at 34–37. Plaintiff's response, *see* Pl.'s Opp'n at 17–18, 26, resorts to selective quotations and the unreasonable use of ellipses to support its claims. *Compare id*. *with*, *e.g*., *Newhard v. Phila. Bethlehem & New England R.R. Co*., No. 96-cv-4411, 1997 WL 688823, at *1, *11 (E.D. Pa. Oct. 15, 1997) ("Although PBNE's selective reading of the trial transcript and creative use of ellipses allow it to make a colorable claim on the surface of its motion, even a cursory reading of the complete record compels the conclusion that a new trial is unwarranted"), *aff'd*, 175 F.3d 1011 (3d Cir. 1999). In doing so, Plaintiff attempts to manufacture an obligation to provide comprehensive law enforcement services that is not supported by any reasonable reading of the text. *See Or. Dep't of Fish & Wildlife*, 473 U.S. at 774 (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); *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."). Nor does Plaintiff even attempt to reconcile its claims with *Ex parte Crow Dog*, 109 U.S. at 567–68 (expressly holding that the bad men clauses of the 1868 Treaty did not apply to a "wrong committed by one Indian upon the person of another of the same tribe," and also recognizing 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."). *See* Pl.'s Opp'n *passim*.

Additionally, Plaintiff never addresses the *Crow Dog* Court's holding 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," *Ex Parte Crow Dog*, 109 U.S. at 568; *see also United States v. Consol. Wounded Knee Cases*, 389 F. Supp. 235, 242 (D. Neb. 1975) ("What the Sioux principally and naturally were interested in at the time of the signing of the treaty, as far as it touched government, was leaving undiminished of their authority to punish their own. They accomplished this, at least as to crimes committed against other members of their own tribe."), *aff'd sub nom. United States v. Dodge*, 538 F.2d 770 (8th Cir. 1976). Plaintiff's treaty claims collapse in the face of these holdings.

Plaintiff's additional contention that Article 1 does not place the burden on the tribes to produce proof to the Indian agent, *see* Pl.'s Opp'n at 26, is entirely undermined by *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005) ("the treaty imposes *an obligation on the tribe* to 'deliver up the wrong-doer to the United States'"), and runs against the more generally-accepted

interpretation of the bad men clauses. *See* Note, *A Bad Man is Hard to Find*, 127 Harv. L. Rev. 2521, 2528 (June 2014) ("It is generally accepted that the purpose of both the 'bad men among the whites' and 'bad men among the Indians' clauses was to establish a lasting peace, where wrongs on both sides were to be resolved through 'intergovernmental cooperation' by way of 'extradition and compensation,' rather than through private vengeance.") (citations omitted). Thus, Plaintiff's contention that the United States assumed the obligation to provide comprehensive law enforcement in Article 1 is not sustainable under any reasonable reading of the complete text.

Plaintiff's use of cherry-picked quotations and misleading ellipses to characterize the United States' obligation in Article 5 of the 1868 Treaty is likewise undermined by a complete reading of the text.[2] *See Cheyenne River Sioux Tribe, supra*, at 44 (all "[t]he Tribes can argue is that the [Article 5 of the] Treaty requires the United States Government to have a physical presence on the reservation."). Quite simply, Article 5 cannot be reasonably read to require the United States to investigate "complaints" among members of the same Tribe, let alone provide a particular level of law enforcement services or funding. *See* 1868 Treaty, art. 5.

Moreover, Defendants showed that, where commitments of personnel and funding were contemplated in the 1868 Treaty, the parties expressly identified them. Defs.' Mem. at 36–37. Plaintiff's response is to again rely on the use of selective quotations and creative ellipses of the first bad men clause in Article 1. *See* Pl.'s Opp'n at 29. A more complete reading of this clause shows that the obligation of the United States to arrest the offender arises when a "bad m[a]n among the whites, or among other people subject to the authority of the United States, …

[2] Plaintiff inaccurately contends that Defendants argued that Article 5 only applies to civil disputes. *Compare* Pl.'s Opp'n at 27 *with* Defs.' Mem. at 36 (noting only that the Indian agent's duties *also* "include investigating non-criminal matters").

commit[s] any wrong upon … Indians." 1868 Treaty, art. 1. Nor can any corresponding obligation of the United States to arrest Indian offenders be found in the text of the second bad men clause, and this Court should not now create a general obligation to arrest all Indian offenders regardless of their victims' Indian status. *See id.*; *see Or. Dep't of Fish & Wildlife*, 473 U.S. at 774; *NW. Bands of Shoshone Indians*, 324 U.S. at 353; *The Amiable Isabella*, 19 U.S. at 22.[3] Quite simply, none of the allegations in Plaintiff's Amended Complaint could reasonably be construed as alleging that the United States is failing to provide sufficient resources to address wrongs committed solely by "bad men among the whites …" Am. Compl, ECF No. 24, *passim*. Accordingly, Plaintiff's trust claims arising from the 1868 Treaty must be dismissed.

D. Plaintiff's Arguments Concerning Subsequent Appropriations Are Unavailing

Defendants' opening brief demonstrated that appropriations acts in the years after the 1868 Treaty did not contain language indicating that funding for Indian police was to fulfill treaty obligations. *See* Defs.' Mem. at 39–40. In response, Plaintiff mischaracterizes Defendants' arguments and attempts to reframe the allegations in its Amended Complaint to advance new arguments, including an argument that the Indian canon of construction require that appropriations acts be liberally construed in favor of Plaintiff. *See* Pl.'s Opp'n at 29–30. Plaintiff, however, fails to identify any language in the appropriations acts that could reasonably be read as ambiguous and therefore entitled to such a construction, *see id.*, nor could it reasonably do so. *See Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (when statutory language is "plain and unambiguous," it should be applied "according to its terms."); *see also South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities

[3] Similarly, the United States' obligation to try and punish offenders under the law of the United States is not at issue in this case, as Plaintiff makes no allegation that the United States has failed to carry out such prosecutions. *See* Am. Compl. *passim*.

that do not exist; nor does it permit disregard of the clearly expressed intent of Congress."). Regardless, appropriations acts are not statutes enacted to regulate or benefit Indian tribes, and therefore any ambiguities that might exist would not be subject to the Indian canons of construction.

Contrary to the allegations in its Amended Complaint (which alleged that the relevant appropriations acts funded Indian police in fulfillment of specific treaty provisions, *see* Am. Compl. ¶¶ 42, 44), Plaintiff now claims that "[i]t matters not that Congress chose to appropriate funds in a single line item to fulfill its obligations to more than one Tribe and/or under more than one treaty, or to fulfill both treaty obligations and non-treaty purposes." Pl's Opp'n. at 29. Plaintiff cannot amend its complaint in a brief in opposition to Defendants' motion to dismiss. *See Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989). In any event, Plaintiff fails to offer any legal or factual support for this new assertion. *See* Pl.'s Opp'n at 29–30. This Court should thus disregard Plaintiff's conclusory assertion and should dismiss this claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (vague and conclusory allegations not entitled to a presumption of trust); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (plaintiff must plead facts with enough specificity "to raise a right to relief above the speculative level.").

E. Neither the Snyder Act, the Indian Law Enforcement Reform Act, the Tribal Law and Order Act, nor the ISDEAA Reaffirm a Trust Obligation to Plaintiff

Defendants' opening brief established that neither the Snyder Act, the Indian Law Enforcement Reform Act ("ILERA"), the Tribal Law and Order Act ("TLOA"), nor the ISDEAA reaffirm or establish a trust duty that the United States owes to Plaintiff to provide a particular level of law enforcement services or funding. *See* Defs.' Mem. at 38–41. In response, Plaintiff cites *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018 (8th Cir. 2021), for the proposition that the Snyder Act, the ILERA, and the TLOA reinforce the government's obligation to provide law enforcement. *See* Pl.'s Opp'n at 31. As Defendants have already demonstrated, *Rosebud Sioux* is

distinguishable. *See* Defs.' Mem. at 44.

In *Rosebud Sioux*, the tribe demonstrated the existence of express treaty language 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," which, when coupled with appropriations expressly made pursuant to the treaty, created a specific duty under the treaty. *See Rosebud Sioux Tribe*, 9 F.4th at 1024. In contrast, OST cannot point to any treaty language that creates a specific trust duty to provide all law enforcement services to the Tribe, nor were any subsequent appropriations for law enforcement expressly made pursuant to any treaty obligation. *Cf. id*. at 1025 (holding that the Snyder Act and the Indian Health Care Improvement Act ("IHCIA") "merely reinforced a prior existing duty" that "was consistently reinforced by the conduct of the Government decades before the adoption of the Snyder Act and IHCIA").

In the absence of any treaty obligation or subsequent express appropriations, the Snyder Act's broad language cannot reasonably be construed as "contain[ing] sufficient trust-creating language on which to base a judicially enforceable duty." *Quechan Tribe of Ft. Yuma Indian Reservation v. United States*, 599 F. App'x 698, 699 (9th Cir. 2015); *see also Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1100 (8th Cir. 1989) (Snyder Act imposes a "duty of fairness when dealing with Indians"); *Lower Brule Sioux Tribe v. Haaland*, No. 3:21-cv-3018-RAL, 2022 WL 4131194, at *12 (D.S.D. Sept. 12, 2022) (Snyder Act does not "'establish[] [a] specific fiduciary or other dut[y]'") (citation omitted); *see also Yankton Sioux Tribe s. U.S. Dep't of Health & Human Servs*., 533 F.3d 634, 644 (8th Cir. 2008); *Cheyenne River Sioux Tribe, supra*, at 40.

Defendants' opening brief also established that the ILERA, the TLOA, and the ISDEAA reflect the United States' general trust relationship with the tribes, not a specific judicially enforceable trust duty owed to a particular tribe. *See* Defs.' Mem. at 41–43. Plaintiff simply

refuses to acknowledge this critical distinction. *See* Pl.'s Opp'n at 31–32. Plaintiff also appears to misapprehend the distinction between the ILERA's express grant of statutory authority to OJS to enforce federal law in Indian country, *see, e.g.*, 25 U.S.C. § 2802, S. Rep. No. 101–167, at 5 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 712, 713 ("the Committee found that many of the problems of law enforcement programs in Indian country resulted from the lack of clear statutory authority for the law enforcement functions of the Bureau of Indian Affairs on Indian reservations and in Indian country"), and a judicially enforceable trust obligation to provide any particular level of law enforcement services or funding to Plaintiff. *See* Pl.'s Opp'n at 32.

Plaintiff additionally contends that there is a presumption against implicit abrogation of treaty rights, *see id*. at 32 (citing *United States v. Dion*, 476 U.S. 734, 738–39 (1886), which is true, but irrelevant to the present dispute, since Plaintiff has failed to identify any trust duty arising under any treaty to provide Plaintiff with any particular level of law enforcement services or funding. *See* Defs.' Mem. at 26–44.

Finally, Plaintiff attempts to distinguish *Lincoln v. Vigil*, 508 U.S. 182 (1993), on the grounds that the *Lincoln* plaintiffs did not assert treaty obligations as the basis for their claim. *See* Pl.'s Opp'n at 32. But *Lincoln* expressly addressed the difference between "money appropriated to fulfill treaty obligations, to which [a] trust relationship attaches, and 'gratuitous appropriations'" provided via a lump-sum appropriation and, while acknowledging the existence of a general trust relationship between the United States and the tribes, and expressly held that "[w]hatever the contours of that relationship, though, it could not limit the [IHS]'s discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide." *Lincoln*, 508 U.S. at 194–95 (citing *Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908); *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986)); *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).

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

Defendants' opening brief demonstrated that the United States has not taken exclusive control of law enforcement at Pine Ridge and that, in the absence of Plaintiff's ability to show that the United States has assumed exclusive control, Plaintiff cannot show a trust duty or breach of that trust duty. *See* Defs.' Mem. at 28–30. Plaintiff responds by attempting to distinguish controlling Supreme Court and Eighth Circuit precedent and a decision by this Court, claiming that treaties can establish trust duties without a trust corpus, and claiming that the requirement of a trust corpus was rejected in *Rosebud Sioux Tribe*. *See* Pl.'s Opp'n at 20–23.[4] Each attempt fails.

First, control by the United States is a required element for a breach of trust claim. *See Ashley v. U.S. Dep't of the Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) ("For a duty to exist, there must be something akin to "'elaborate provisions ... [that] give the Federal government full responsibility to manage Indian resources for the benefit of the Indians.'") (quoting *Navajo I*, 537 U.S. at 506; *Cheyenne River Sioux Tribe, supra*, at 38. Indeed, the Supreme Court's decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"), clearly illustrate the necessity of control by the United States as a required element for a breach of trust claim. In *Mitchell I*, the Court held that General Allotment Act did not "impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee" because the Act left the Indian allottee with the responsibility to

[4] Plaintiff additionally asserts that the United States retains a pre-existing trust responsibility even if a tribe enters into an ISDEAA contract to take over management of a trust resource. *See* Pl.'s Opp'n at 23 (citing S. Rep. No. 100–274, at 25 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2620, 2644, 2657; 25 U.S.C. § 5332). This general assertion is not relevant and does not advance Plaintiff's claims.

manage the land. 445 U.S. at 542–43. In *Mitchell II*, by contrast, the Court found that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)." 463 U.S. at 225. Critically, the element of control retained by allottees in *Mitchell I* is essentially the same as that in the 1868 Treaty, which leaves in place the responsibility of the signatory tribes to exercise criminal jurisdiction over their members. *See* 1868 Treaty arts. 1, 8; *Ex parte Crow Dog*, 109 U.S. at 568. Plaintiff's breach of trust claim thus fails on this ground alone.

Second, none of the cases cited by Plaintiff support the notion that Plaintiff may pursue a breach of trust claim in the absence of a trust corpus. *See* Pl.'s Opp'n at 21–22. In *Washington State Department of Licensing v. Cougar Den, Inc*., 139 S. Ct. 1000 (2019), the Court held that the state's fuel tax impaired the tribe's treaty-based right to travel outside their reservation. *See id*. at 1010. Nowhere did the tribe allege or the Court hold or otherwise consider the claim that this was a breach of trust. *See id. passim*. Likewise, *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018), concerned whether the United States could bring suit as a trustee on behalf of the tribes, *see id*. at 967, but nowhere did the parties or the court discuss or issue a ruling concerning an alleged breach of trust, let alone a ruling about a trust corpus. *See id. passim*. Further, in *Jones v. United States*, 846 F.3d 1343 (Fed. Cir. 2017), the court held only that the plaintiff's breach of trust claim "collapse[d]" into the plaintiff's bad men claim, and that the plaintiff's trust claim would be cumulative. *Id*. at 1364. In the present dispute, Plaintiff only maintains a breach of trust claim, *see* Am. Compl. ¶¶ 131–41 (Count I), so *Cougar Den*, *Washington*, and *Jones* are of no help.

Third, *Rosebud Sioux* does not advance Plaintiff's contention. In *Rosebud Sioux*, the

court found that the tribe did not need to identify a trust corpus to maintain its claims because "[t]he [t]ribe's case does not rely on Indian trust law doctrine." *Rosebud Sioux Tribe*, 9 F.4th. at 1023. The court held that the tribe's claim was instead based on the 1868 Treaty, the trust relationship between the Government and the Tribe, and the statutory scheme underlying the alleged duty to provide healthcare. *See id*. Nowhere did the court discuss the notion of exclusive control. *See id. passim*. Unlike the present dispute, moreover, the tribe was not alleging a breach of trust, nor did the court find one. *See id*. at 1022. Instead, the tribe sought and obtained declaratory relief concerning the existence of a duty to provide competent physician-led health care. *See id*. at 1022–23, 1025–26.

II. PLAINTIFF HAS ABANDONED ITS CLAIM THAT THE UNITED STATES HAS A TRUST DUTY TO PROVIDE AN ACCOUNTING

Plaintiff fails to advance any argument in response to Defendants' showing that the United States does not have a trust duty to provide an accounting of BIA's allocation of funds from a lump sum appropriation among the tribes. S*ee* Defs.' Mem. at 45–46. Pl.'s Opp'n *passim*.

This Court should thus dismiss Plaintiff's accounting claim.

III. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE INDIAN SELF DETERMINATION AND EDUCATION ASSISTANCE ACT

Defendants' opening brief demonstrated that Plaintiff failed to state a claim for relief on its challenge to OJS's partial declinations of its ISDEAA proposals because OJS's partial declinations properly relied on one or more criteria under which the agency may decline, or partially decline, an ISDEAA proposal. *See* Defs.' Mem. at 51–54 (citing 25 U.S.C. § 5321(a)(2)(D), (E)).

A. OJS Had a Valid Basis for Declining the Tribe's Proposals for Increased Funding

Defendants have shown that, as a matter of law, OJS properly declined the portion of Plaintiff's proposals that sought increased funding beyond the Secretarial amount of funds

allocated for law enforcement on Pine Ridge. *See* Defs.' Mem. at 47–49. In response, Plaintiff contends that OJS did not articulate any basis to determine whether the declinations met the requirements of 25 U.S.C. § 5321(a)(2) and its accompanying regulation, 25 C.F.R. § 900.29. *See* Pl.'s Opp'n at 33, 37. But the agency letters filed with Plaintiff's Complaint show that the agency properly explained that OST's proposals requested a budget of $9,628,345 for its Law Enforcement program and $2,211,159 for its Criminal Investigation program, while the Secretarial amounts for the programs were, respectively, $4,026,171 and $1,327,781. *See* Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: OST Law Enforcement Proposal (Jan. 28, 2022), ECF No. 5-1 ("OJS Response to LE Proposal"); Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: Criminal Investigation Proposal (Jan. 28, 2022), ECF No. 5-2 ("OJS Response to CI Proposal"). OJS thus informed the Tribe that its Law Enforcement proposal appeared to be improperly seeking an increase of approximately $3,196,553 beyond the Secretarial amount and that its Criminal Investigations proposal appears to be seeking an increase of $310,592.24 beyond the Secretarial amount. *See* OJS Response to LE Proposal at 1, OJS Response to CI Proposal, at 1. OJS also identified several other substantive and technical problems with OST's proposals, suggested corrections for each, and offered assistance with revising the proposals. *See* OJS Response to LE Proposal at 2-3, OJS Response to CI Proposal, at 2-3. OST did not respond to either letter or otherwise request assistance from OJS, *see* Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: LE Proposal (Mar. 30, 2022) at 1, ECF No. 24-1 ("OJS LE Partial Declination"); Ltr. fr. Acting SAC Tino Lopez to OST Pres. Kevin Killer re: CI Proposal (Mar. 30, 2022) at 1, ECF No. 24-2 ("OJS CI Partial Declination"), opting instead to raise their concerns with the White House and senior Departmental officials. *See* Am. Compl. ¶¶ 116–17. OJS thus timely 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 OJS was partially approving each proposal up to the amounts that OJS would have otherwise provided to operate the program, *i.e.*, the Secretarial amounts. *See* OJS LE Partial Declination at 1; OJS CI Partial Declination at 1. That is a sufficient declination under the ISDEAA, s*ee Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1035 (9th Cir. 2013), and therefore a sufficient basis for this Court to resolve *all* of Plaintiff's ISDEAA claims.

Plaintiff additionally contends that the Indian canons of construction require this Court to conduct a de novo review of OJS's declinations. *See* Pl.'s Opp'n at 34. But this is irrelevant to the question of whether Plaintiff has failed to state a claim for relief as a matter of law. *See Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989); *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). Indeed, courts have dismissed tribal ISDEAA claims on motions to dismiss. *See, e.g., San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932, 935–41 (D. Ariz. 2020) (granting the government's motion to dismiss the plaintiff's ISDEAA declination challenge), *rev'd on other grounds*, 53 F.4th 1236 (9th Cir. 2022).

Nor is there any basis for Plaintiff's contention that Defendants' motion to dismiss relies on facts beyond the pleadings and should therefore be converted into a motion for summary judgment. *See* Pl.'s Opp'n at 13. To the contrary, in ruling on Defendants' motion to dismiss, this Court may rely on Plaintiff's non-conclusory factual allegations in its Amended Complaint and may also "consider documents attached to the complaint and matters of public and administrative record referenced in the complaint." *Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 990 (8th Cir. 2007).[5] In any event, Plaintiff's Amended Complaint acknowledges that the Tribe

[5] To be clear, Defendants submitted the Declaration of Richard Glenn Melville in support of its opposition to Plaintiff's motion for preliminary injunction. *See* Decl. of Richard Glenn Melville, ECF No. 36 ("Melville Decl."). But Defendants have not relied, and this Court need not rely, on the Melville Declaration for any of the arguments offered in support of Defendants' *(cont'd)*

sought "increases" in funding, *see* Am. Compl. ¶ 110, and the agency correspondence attached to, or referenced in, Plaintiff's Amended Complaint shows that OJS properly declined in part the proposed increases pursuant to 25 U.S.C. § 5321(a)(2)(D), *see* OJS LE Partial Declination; OJS CI Partial Declination. Thus, this Court may proceed to rule on Defendant's motion "to eliminate actions which," like that brought by Plaintiff, "are fatally flawed in their legal premises and deigned to fail, thereby sparing [Defendants] the burden[s] of unnecessary pretrial and trial activity." *Young*, 244 F.3d at 627.

Plaintiff also asserts a new, entirely conclusory claim in its opposition to Defendants' motion to dismiss that OJS has not, in fact, paid to the Tribe the amount of funds that OJS would use to operate the Law Enforcement and Criminal Investigation Programs on Pine Ridge. *Compare* Pl.'s Opp'n at 36 *with* Am. Compl. *passim*. Once again, Plaintiff cannot amend its complaint in a brief in opposition to Defendants' motion to dismiss. *See Morgan Distrib. Co.*, 868 F.2d at 995; *Midland Farms, LLC v. USDA*, 35 F. Supp.3d 1056, 1066 (D.S.D. 2014) (citing *Thomas v. United Steelworkers Local 1938*, 743 F.3d 1134, 1140 (8th Cir. 2014)). Second, Plaintiff filed with its Complaint BIA correspondence sent in response to the Tribe's ISDEAA proposals to increase funding for its Law Enforcement and Criminal Investigation programs. *See* OJS Response to LE Proposal; OJS Response to CI Proposal. Those letters identify the Secretarial amount for BIA's Law Enforcement and Criminal Investigation programs on Pine

---

motion to dismiss.

That said, in the event that any of Plaintiff's ISDEAA claims survive Defendant's motion to dismiss, this Court may properly consider the Melville Declaration to better understand the background of the dispute between the parties, or to clarify or "illuminate[]" the subject matter of the original record. *See, e.g., Clifford v. Peña,* 77 F.3d 1414, 1418 (D.C. Cir. 1996) ("[T]here is nothing improper in receiving declarations that 'merely illuminate reasons obscured but implicit in the administrative record.'") (citation omitted); *see also, e.g., Yale-New Haven Hosp. v. Leavitt,* 470 F.3d 71, 82 (2d Cir. 2006); *The Bunker Hill Co. v. EPA,* 572 F.2d 1286, 1292 (9th Cir. 1977).

Ridge. *See id.*[6] Plaintiff cannot now assert in conclusory fashion, with no factual allegations in support, *see* Pl.'s Opp'n at 36; Am. Compl. *passim*, that BIA has not in fact provided the Tribe with the amount of funds OJS would use to operate those programs on Pine Ridge, *see also* Pl.'s Opp'n at 39–40 (asserting that its ISDEAA contract is "underfunded"). *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. In contrast with Plaintiff's new conclusory assertions, Plaintiff's Amended Complaint contains allegations about why Plaintiff would prefer that OJS *increase* the amount provided to the Tribe. *See, e.g.*, Am. Compl. ¶¶ 92 (citing the loss of DOJ funding), 121 (citing the high number of 911 calls and large amounts of violent and drug crimes, and also citing Plaintiff's interpretation of the 1825, 1851, and 1868 Treaties), 123 (citing OJS's staffing goal of 2.8 officers per 1,000 residents). At bottom, for purposes of resolving Defendant's motion to dismiss, this Court need not decide issues raised in Plaintiff's opposition, *see* Pl.'s Opp'n at 35–37, about whether, for example, it would be "difficult" for OJS to reassume operation of these programs on Pine Ridge funded only by the Secretarial amount, whether the Standing Rock Reservation is identical to Pine Ridge, or federal funding for law enforcement in Indian County is sufficient to meet the need, *see, e.g., Los Coyotes*, 729 F.3d at 1030–31. All it need determine is whether, as a matter of law, OJS properly declined, in part, the Tribe's proposals.[7]

---

[6] Pursuant to Fed. R. Evid. 201(b)(2), this Court may also take judicial notice of OJS's funding allocation for public safety and justice for OST, *i.e.*, the Secretarial amount, that is set out in the BIA's Budget Justification, *see* U.S. Dep't of the Interior, BIA Budget Justifications & Performance Info., FY 2023, App'x 5-1, at 479, https://perma.cc/B755-WD2V. *See, e.g.*, *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (public records and government documents are generally considered not to be subject to reasonable dispute).

[7] This Court should disregard Plaintiff's unsupported claim that OJS failed to negotiate in good faith. *See* Pl.'s Opp'n at 33, 39 (citing 25 U.S.C. § 5321(f)); Am. Compl. ¶¶ 181–83, 209–11. Plaintiff's legal conclusions have no accompanying factual allegations that would support its claim. *See Am. Compl. passim*. And they are expressly contradicted by the agency letters filed with Plaintiff's original complaint, *see* OJS Response to LE Proposal, at 2 (offering assistance to OST); OJS Response to CI Proposal, at 2; *see also* OJS LE Partial Declination, at 1 (noting that OJS did not receive a request for technical assistance); OJS CI Partial Declination, and by Plaintiff's own admission that it chose not to engage on any of these contracting issues with OJS but to instead press its larger concerns with the White House and the Secretary of Interior, *see*

(cont'd)

This Court should also reject Plaintiff's attempt to distinguish *Los Coyotes* on the grounds that OJS did not operate a law enforcement program on that reservation or that that tribe did not have a treaty. *See* Pl.'s Opp'n at 37. Those are distinctions without a difference. Indeed, contrary to Plaintiff's contention, *Los Coyotes* explained that "if the BIA spends $500,000 on law enforcement on a reservation, the [agency] can decline a contract request if the tribe asks for $700,000 to take over law enforcement on the reservation. In that scenario, the Tribe would be entitled to a contract for $500,000." *Los Coyotes*, 729 F.3d at 1035.

Plaintiff's attempt to distinguish *Lincoln v. Vigil*, 508 U.S. 182, *see* Pl.'s Opp'n at 37, is also undermined by *Los Coyotes*, 729 F.3d at 1038 ("The BIA's funding decisions are therefore unreviewable acts of agency discretion"), and *Quechan Tribe of Ft. Yuma Indian Reservation*, 599 Fed. App'x at 699 (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). The fact remains that the amount of funds that OJS allocates to Pine Ridge from its annual lump sum appropriations for law enforcement purposes is committed to agency discretion and remains unreviewable by a court. *Lincoln*, 508 U.S. at 194–95; *Los Coyotes*, 729 F.3d at 1038.

Am. Compl. ¶¶ 116–17.

Likewise, Plaintiff's reference to 25 U.S.C. § 5324(c), *see* Pl.'s Opp'n at 39, is inapposite. Section 5324 simply allows a contracting tribe to choose the term of the ISDEAA contract, *see* 25 U.S.C. § 5324(c)(1), and, when a tribe elects to enter into a multi-year contract, allows the tribe to continue to renegotiate on an annual basis the agreed-on funding amounts to account for things like increased costs, *see id.* § 5324(c)(2). But nothing in this section overrides the permissible bases on which the agency may decline or partially decline a tribe's ISDEAA proposal, *compare id. with* 25 U.S.C. § 5321(a)(2), including the basis that the amount of funds proposed under the contract is in excess of the applicable funding level of the contract, *see id.* § 5321(a)(2)(D).

B. OJS Had a Valid Basis for Declining the Tribe's Proposals to Contract for a School Resource Officer Program from OJS on Pine Ridge and to Take Over a Portion of OJS's Nationwide, Murdered and Missing Indigenous Persons, Internal Affairs, and Drug Enforcement Programs

Defendants demonstrated that OJS had a valid basis for declining Plaintiff's proposals to contract for a School Resource Officer ("SRO") function from OJS on Pine Ridge. *See* Defs.' Mem. at 46–51. Defendants also demonstrated that OJS had a valid basis for declining Plaintiff's proposal to take over portions of OJS's Missing and Murdered Unit ("MMU"), Division of Drug Enforcement ("DDE"), and Internal Affairs ("IA") programs operated at the national level for the benefit of all federally recognized tribes.

Plaintiff responds by noting that OJS operates SRO programs for other tribes, *see* Pl.'s Opp'n at 39. That is irrelevant under the ISDEAA. In *Los Coyotes*, 729 F.3d at 1035, the tribe was seeking to create a law enforcement program on its reservation. *See id*. at 1031. The court recognized that other tribes had law enforcement programs. *See id*. Nevertheless, the court held that "[r]ather than attempting to transfer a program from the control of the BIA to the Tribe, the Tribe here is attempting to use the ISDA 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." *Id*. at 1035.[8]

Plaintiff additionally asserts that Defendants did not cite 25 U.S.C. § 5325(a)(2)(D) as a basis for partially declining the Tribe's proposals. *See* Pl.'s Opp'n at 41–42. But Plaintiff's ISDEAA proposals did not identify the amount of funds they were seeking for the SRO, MMU, IA, and DDE functions, *see* OST Law Enforcement ("LE") ISDEAA Proposal, at 51, ECF No. 36-4; OST Criminal Investigation ("CI") ISDEAA Proposal, at 47, ECF No. 36-5, an issue that

[8] To be clear, nothing prevents Plaintiff from employing SROs within its existing Law Enforcement program right now, using its Secretarial amount, *see* 25 U.S.C. § 5325(o), or to use funding from tribal sources, or other sources to pay for the position, *see, e.g., infra*, at 29 n.18.

OJS identified in letters to the Tribe, *see* OJS Response to CI Proposal, at 1 (noting that "there does not appear to be a specific funding amount associated directly with this new requested function"); *id*. at 2 (noting that "[t]here was no amount of funding and no function to transfer to the Tribe."); OJS Response to LE Proposal (same). But OST took no action to clarify its proposals. *See* OJS LE Partial Declination, at 1 ("To date, … OJS has not received a response from the Tribe"); OJS CI Partial Declination, at 1 (same). Thus, to the extent that OST's LE and CI proposals were seeking *funding* to perform the SRO, MMU, IA, and DDE functions on Pine Ridge, OJS partially declined OST's proposals pursuant to 25 U.S.C. § 5321(a)(2)(D) because the Tribe was seeking funds in excess of the Secretarial amount the Law Enforcement and Criminal Investigation programs. *See* OJS LE Partial Declination, at 1; OJS CI Partial Declination, at 1.

OJS *additionally* declined OST's Law Enforcement and Criminal Investigation proposals to contract for an SRO program from OJS and to transfer a portion of OJS's nationwide MMU, IA, and DDE programs to the Tribe pursuant to § 5321(a)(2)(E) because OST was proposing to "includes activities that cannot lawfully be carried out by the contractor[.]" OJS LE Partial Declination, at 2 (emphasis omitted), OJS CI Partial Declination, at 2.[9]

Plaintiff challenges Defendants' further explanations for the partial declinations that Defendants provided in their combined brief in support of their motion to dismiss, on the grounds that those additional explanations run outside the four corners of the partial declination letters. *See* Pl.'s Opp'n at 41–47. As a preliminary matter, this Court need not resolve this issue

[9] Plaintiff's opposition appears to concede that, at most, its total tribal share of the MMI, IA, and DDE functions would be $53,658, *see* Pl.'s Opp'n at 44 n.12, but never explains how it could perform those functions on such a limited budget nor acknowledges that the ISDEAA expressly allows the agency to decline a proposal in light of the effect that such a reduction would have on BIA's ability to continue to perform those functions for all other tribes, *see* 25 U.S.C. § 5324(i); *id*. § 5325(b), discussed *infra*, at 22.

because it can dismiss Plaintiff's ISDEAA claims solely on the basis of 25 U.S.C. § 5321(a)(2)(D). In any event, Plaintiff's challenge is without merit: although OJS cannot announce new bases for declining OST's proposals in subsequent briefing before this Court, the agency's decision letters are "not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning." *Local 814, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976). Thus, this Court may consider any "further" or "amplified" articulation of the agency's original rationales set out in Defendants' court briefs. *Id.*; *see also San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 713–14 (9th Cir. 2012). Thus, it is perfectly reasonable for Defendants to offer further explanation for OJS's declination on the grounds of § 5321(a)(2)(D) that where, as here, a tribe seeks to divide an existing program serving tribes nationwide, the BIA must "ensure that services [continue to be] provided to the tribes not served" by the tribe's proposal. 25 U.S.C. § 5324(i)(1). Further, it is reasonable to further explain that 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), but instead 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).[10] As a result, if the agency does not have sufficient funds to simultaneously award a proposed contract and maintain services for all non-contracting tribes, it can properly decline the

[10] Plaintiff's assertion, *see* Pl.'s Opp'n at 44–45, that OJS failed to engage in tribal consultation about "redesign" of the MMI, IA, and DDE programs with other affected tribes is inapposite because OJS properly declined those parts of Plaintiff's proposals. OJS would only need to engage in consultation about a "redesign" of the nationwide programs if it were approving these portions of Plaintiff's proposal. *See* 25 U.S.C. § 5324(i).

proposal. *See N. Arapaho Tribe*, 2017 WL 2728408, at *7.[11]

IV. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF UNDER THE ADMINISTRATIVE PROCEDURE ACT

Defendants' opening brief established that Plaintiff has failed to state a claim for relief under the APA, 5 U.S.C. § 701 *et seq*. First, Defendants demonstrated that Plaintiff cannot obtain judicial review of the amount of funds BIA allocates to OST for law enforcement programs on Pine Ridge because 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* Defs.' Mem. at 52–54.

Plaintiff responds by attempting to distinguish *Lincoln v. Vigil*, *supra*, and *Webster v. Doe,* 486 U.S. 592 (1988). *See* Pl.'s Opp'n at 47–50. Plaintiff's attempt is expressly undermined by *Los Coyotes*, 729 F.3d at 1038 ("The BIA's funding decisions are therefore unreviewable acts of agency discretion"), and *Quechan Tribe of Ft. Yuma Indian Reservation v. United States*, 599 Fed. App'x at 699 (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), as well as a host of other circuit court decisions reaching the same

---

[11] Finally, Plaintiff seeks to rebut the principle that remand, rather than automatic approval, is the proper remedy for an inadequately justified agency decision. *See* Defs.' Mem. at 51 n.24; Pl.'s Mem. at 42. However, none of the decisions Plaintiff cites awarded such relief in response to a motion to dismiss. Indeed, two of the four courts resolved motions for summary judgment and were thus issuing a judgment on the merits. *See Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 545 (D.D.C. 2014); *Shoshone-Bannock Tribes*, 988 F. Supp. at 1333.

In the other two decisions cited by Plaintiff, *Navajo Health Found'n–Sage Mem'l Hosp. v. Burwell*, 100 F. Supp. 3d 1122, 1247 (D.N.M. 2015) (Browning, J.) ("*Sage Mem'l Hosp.*"); *Ft. Defiance Indian Hosp. Bd. v. Becerra*, No. 22-cv-98, -- F. Supp. 3d ---, 2022 WL 1690040 (D.N.M. May 26, 2022) (Browning, J.) ("*Ft. Defiance*"), the court did not deem the contracts approved but instead granted in part the plaintiff's motions for preliminary injunction and required the defendants to pay additional costs during the pendency of the cases. *See Sage Mem'l Hosp.,*100 F. Supp. 3d at 1166, 1190; *Ft. Defiance*, 2022 WL 1690040 at *51, 60. Defendants have already set out the reasons that Plaintiff's motion for a preliminary injunction in this case should be denied. S*ee generally* Defs.' Mem.

conclusion.[12]

Nor does *Yankton Sioux Tribe v. U.S. Department of Health and Human Services*, 869 F. Supp. 760 (D.S.D. 1994), advance Plaintiff's cause. In *Yankton*, plaintiff challenged IHS's decision to discontinue inpatient and emergency medical services at an IHS health care facility on the tribe's reservation. *See id*. at 761. The court held that IHS could not discontinue these services because Congress has expressly appropriated funds for the construction of the facility, because 25 U.S.C. § 1631(b) prohibited such a discontinuation absent notice to Congress at least a year in advance; and because 25 U.S.C. § 1631(c) required IHS to consult with the tribe before any such closure. *See id*. at 765–66. As a result, the court found that *Lincoln* was inapplicable because these statutes expressly circumscribed the agency's discretion. *Id*. at 765.

In contrast with *Yankton*, the ISDEAA provides no limit on how BIA must allocate funds from its lump sum appropriation among the tribes. *See Los Coyotes*, 729 F.3d at 1038. Instead, all the ISDEAA requires, on entering into or renewing a contract, is for BIA to transfer to the contracting tribe the amount of funds that the agency would have otherwise provided to operate the program. *See* 25 U.S.C. § 5325(a)(1).[13]

Defendants' opening brief also established that Plaintiff has failed to state a claim for

---

[12] *See, e.g.*, *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 ex rel. Davis 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) (citation omitted).

[13] Plaintiff's citation to legislative history of the ISDEAA's 1988 Amendments and *Shoshone-Bannock Tribes of the Ft. Hall Reservation v. Shalala*, 988 F. Supp. 1306, is inapposite, as those amendments and that case concern sections of the ISDEAA not at issue in this case. *See* Pub. L. No. 100–472, Tit. II, § 205 (Oct. 5, 1988), 102 Stat. 2285, 2292, codified at 25 U.S.C. § 5325(a)(2)–(3).

relief under Section 706(1) of the APA because Plaintiff failed to identify any treaty, statute, or regulation requiring OJS to calculate service population in any particular way or otherwise apply any particular staffing requirements, and therefore could not show that OJS failed to take a discrete action that the agency was *required to take*. *See* Defs.' Mem. at 55–55 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004); *New Holy v. U.S. Dept. of Interior*, No. 19-cv-5066, 2020 WL 3542251, at *4 (D.S.D. June 30, 2020)).

Plaintiff responds by advancing yet another new claim, not raised anywhere in its Amended Complaint, that BIA failed to demonstrate that it is currently providing the Tribe with the same amount of funds that it would use to provide law enforcement services on Pine Ridge, *i.e.*, the Secretarial amount required under the ISDEAA. *Compare* Pl.'s Opp'n at 50–51 *with* Am. Compl *passim*.[14] It bears repeating that Plaintiff cannot amend its complaint in a brief in opposition to Defendants' motion to dismiss. *See Morgan Distrib. Co.*, 868 F.2d at 995. Additionally, as noted above, Plaintiff's new claim is entirely rebutted by BIA correspondence filed with its Amended Complaint and by the BIA's FY 2023 Budget Justifications. *See supra*, at 17–18 & n.6.

Finally, Plaintiff cites *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F. Supp. 2d 1059 (D.S.D. 2007) and *Shoshone-Bannock Tribes*, 988 F. Supp. 1306, for the proposition that courts

[14] To be clear, Plaintiff's citation to ¶¶ 91–95 of its Amended Complaint are irrelevant to this new claim, as those paragraphs only allege that in 1999, the tribe chose, as part of the Tribal Priority Allocation process, to reprogram BIA funds originally allocated for law enforcement programs at Pine Ridge away from that function and towards other BIA programs also operated at Pine Pidge. *See* Am. Compl. ¶¶ 91–95. Neither these paragraphs nor any others make any allegation that if BIA were to reassume providing direct law enforcement services at Pine Ridge, it would do so with a greater amount of funds than those provided to the Tribe via its ISDEAA contract. *See id*. *passim*. The Tribe also ignores the fact that, as result of BIA repeatedly allocating to OST additional funds identified by Congress as new funding for law enforcement from numerous successive annual appropriations, Plaintiff currently receives the *third largest amount of law enforcement funding* of any federally-recognized tribe in the United States. *See* U.S. Dep't of the Interior, BIA Budget Justifications & Performance Info., FY 2023, App'x 5-1, *supra*, at 479 *et seq*.

may grant extraordinary relief not available under a contract declination action brought under the ISDEAA. *See* Pl.'s Opp'n at 51. Neither case supports Plaintiff's contention. In *Cheyenne River Tribe*, the plaintiff challenged the BIA's declination under the ISDEAA, not the APA. *See* 496 F. Supp. 2d at 1060. The court found that the BIA had failed to comply with the ISDEAA's declination criteria and thus deemed the tribe's ISDEAA proposal approved; it did not provide relief not otherwise available under the ISDEAA. *See id*. at 1068–69. In *Shoshone-Bannock Tribes*, the plaintiff challenged IHS's declination of the tribe's proposal under the ISDEAA. *See* 988 F. Supp. at 1309. The court found that because the record on whether there were additional funds available to pay the tribe's CSC was inadequate, it would hold a hearing to permit the parties to fully develop the record. *See id*. at 1333. Thus, neither case advances Plaintiff's contention. Plaintiff thus fails to state a claim for relief under § 706(1) of the APA.

V. THIS COURT SHOULD RESOLVE PLAINTIFF'S CLAIMS ON DEFENDANTS' MOTION TO DISMISS

A. This Court Need Not Convert Defendants' Motion to Dismiss into a Summary Judgement Motion

Defendants have demonstrated that Plaintiff's claims should be dismissed for failure to state a claim. *See generally* Defs.' Mem. In response, Plaintiff claims that Defendants rely on facts outside the pleadings and that Defendants' motion should be converted to one for summary judgment. *See* Pl.'s Opp'n at 13. Plaintiff misapprehends the purpose of Defendants' Rule 12 motion. "[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burdens of unnecessary pretrial and trial activity." *Young*, 244 F.3d at 627. In evaluating Defendants' motion to dismiss, moreover, this Court not only should consider the well-pleaded factual allegations in Plaintiff's Amended Complaint but should also "consider documents attached to the complaint and matters of public and administrative record referenced in the complaint." *Great Plains Tr. Co.*, 492 F.3d

at 990.[15] Defendants' combined brief in support of their motion to dismiss was also an opposition to Plaintiff's motion for a preliminary injunction, and thus included the Melville Declaration. *See generally* Defs.' Mem.; Melville Decl. This Court need not rely on the Melville Declaration to resolve Defendants' motion. Thus, this Court need not consider whether to convert Defendants' motion to dismiss into a motion for summary judgment to resolve Plaintiff's claims.

B. Discovery is Unnecessary to Resolve Plaintiff's Claims

Contrary to Plaintiff's contention, *see* Pl.'s Opp'n at 15, discovery is unnecessary to resolve Plaintiff's claims. Plaintiff asserts that it needs discovery to resolve "critical and essential … determinations of fact upon which the Defendant[s'] motion to dismiss relies." *Id*. As the briefs on Defendant's motion make clear, the parties' arguments are predominantly legal ones, and any factual representations properly offered by the parties were alleged in Plaintiff's Amended Complaint or are references to government documents that are either publicly available or now before the Court and not subject to reasonable dispute.[16]

Nonetheless, Plaintiff insists that it needs discovery on a whole host of matters, including, for example, Director Melville's estimate that the BIA would operate a direct services program

---

[15] *See also, e.g.*, *Tobey v. Chibucos*, 890 F.3d 634, 648 (7th Cir. 2018) (court may rely "on documents that are critical to the complaint and referred to in it as well as information properly subject to judicial notice" to resolve Rule 12(b)(6) motion); *EEOC v. St. Francis Xavier Parochial Sch*., 117 F.3d 621, 624 (D.C. Cir. 1997) (court may consider "matters of which [the court] may take judicial notice" and matters of public record to resolve Rule 12(b)(6) motion); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (court may rely on "official public records" and "documents central to plaintiffs' claim" to resolve Rule 12(b)(6) motion.); *In re Domestic Airline Travel Antitrust Litig*., 221 F. Supp. 3d 46, 54 (D.D.C. 2016) (to resolve Rule 12(b)(6) motion "court may consider 'the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint,' or 'documents upon which the plaintiff's complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss'") (quoting *Ward v. D.C. Dep't of Youth Rehab. Servs*., 768 F. Supp. 2d 117, 119 (D.D.C. 2011)).

[16] As noted above, Defendants offered the Melville Declaration primarily in response to Plaintiff's motion for a preliminary injunction. *See supra*, at 17 n.5. However, in the event the Court denies Defendants' motion to dismiss, it may also consider the Melville Declaration for contextual purposes of providing background information or clarifying otherwise potentially obscure information familiar to the parties but potentially not to the public. *See id*.

on Pine Ridge with 41 officers; the BIA's budget (which is publicly available, *see, e.g.*, FY 2023 Interior Budget in Brief, Bureau of Indian Affairs, https://perma.cc/Z8SJ-HP2M; *see also generally* U.S. Dep't of the Interior, BIA Budget Justifications & Performance Info., FY 2023, *supra*), the "actual federal process" used to develop the Tribe's law enforcement budget; the data used to prepare the BIA's inflation calculation; and the service population that Defendants would use if they were operating the law enforcement program. *See* Pl.'s Opp'n at 15–17. But none of this information is necessary to resolve any of Plaintiff's treaty claims, nor will it assist the Court or the parties in interpreting the treaties and statutes that Plaintiff cites as support for the United States' alleged duty to provide all, or Plaintiff's preferred level of, law enforcement on the Pine Ridge Reservation. That analysis raises questions of law, not fact. Nor is discovery necessary to resolve Plaintiff's ISDEAA claims because at this stage of the litigation, they rise or fall on the legality of the declination criteria set out in OJS's partial declination letters.[17] Accordingly, this Court can and should resolve Plaintiff's claims on Defendants' motion to dismiss.

VI. PLAINTIFF MAY STILL BE ELIGIBLE FOR ADDITIONAL FUNDING

Although it is immaterial to deciding this motion to dismiss, Defendants would be remiss in not responding to at least some of Plaintiff's publicly-filed misstatements about the BIA's lease program operated pursuant to 25 U.S.C. § 5324(*l*) ("the § 105(*l*) program"). *See* Pl's. Opp'n at 8. The § 105(*l*) program provides tribes reasonable compensation for the allowable costs associated with operating federal programs under ISDEAA contracts in those facilities. *See* 25

[17] Nor, for the reasons set forth above, *see supra*, at 17–18, 25, is discovery necessary to resolve Plaintiff's claim that OJS is supposedly not providing to the Tribe the amount of funds that it would use to operate the law enforcement program on Pine Ridge, as that new assertion is beyond the scope of Plaintiff's Amended Complaint. This Court can disregard the Declaration of Charles Addington, ECF No. 47, for this same reason.

Similarly, Plaintiff's request for discovery into OJS's methodology for allocating amounts from its annual lump appropriations for law enforcement will not assist the Court with resolving this case because the agency's allocation is committed to agency discretion, *see supra*, at 18–19, 22–23.

C.F.R. Part 900, subpart H. Contrary to Plaintiff's misapprehensions, *see* Pl.'s Opp'n at 8, tribes entering into a § 105(*l*) lease do not lose all federal funding for operations, repair, and maintenance costs. To the contrary, those costs are eligible for reimbursement under the program. *See* 25 C.F.R. Part 900, subpart H. With more money in hand, moreover, an eligible tribe is free to redesign its existing programs operating under ISDEAA contracts to better serve the needs of the tribe. *See* 25 U.S.C. § 5325(o). Defendants welcome the opportunity to clear up any misperceptions more fully with Plaintiff and once again invite the Tribe to meet with the BIA for technical assistance on this and all other BIA programs.[18]

CONCLUSION

This Court should grant Defendants' motion to dismiss.

[18] Defendants further note that OST has received at least $214,394,602 in direct payments and grants under the American Rescue Plan Act of 2021 ("ARPA"), Pub. L. No. 117-2 (2021), 135 Stat. 4, and at least $58,092,567 in direct payment and grants under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136 (2020), 134 Stat. 281. *See, e.g.,* Search Results for Oglala Sioux Tribe, Direct Payments Tab, usaspending.gov, https://perma.cc/8DDT-KEKE. Other tribes have permissibly used ARPA and CARES Act funds to assist with their law enforcement programs. BIA would also be happy to provide technical assistance to OST about eligible uses of its unspent ARPA or CARES Act funds.

Dated: January 19, 2023

Respectfully submitted,

ALISON RAMSDELL
United States Attorney

s/ Aron Hogden
ARON HOGDEN
U.S. Attorney's Office
P.O. Box 2638
Sioux Falls, SD 57101
(605) 357-2342
aron.hogden@usdoj.gov

Of Counsel:
FEMILA N. ERVIN
DONDRAE N. MAIDEN
ELIZABETH A. HARVEY
KRISTEN D. KOKINOS
Office of the Solicitor
U.S. DEPARTMENT OF THE INTERIOR

BRIAN M. BOYTON
Principal Deputy Assistant Attorney General

BRAD P. ROSENBERG
Assistant Branch Director
JAMES D. TODD, JR.
HILARIE E. SNYDER
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
Ben Franklin Station
P.O. Box 883
Washington, DC 20044
james.todd@usdoj.gov
hilarie.snyder@usdoj.gov

Attorneys for Defendants