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

CHEYENNE RIVER SIOUX TRIBE, Plaintiff, v. SALLY JEWELL, Secretary of Interior, et al., Defendants.	)	Case No. 3:15-cv-3018-RAL

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The Department of Interior ("DOI") has proposed reorganizing the Bureau of Indian Education ("BIE") in order to improve Indian education. Plaintiff Cheyenne River Sioux Tribe ("CRST" or "the Tribe") has sued, seeking, among other things, a permanent injunction to block this proposed restructuring. The Tribe asserts four claims as the basis for their requested relief: (1) CRST alleges that BIE failed to meet its obligation to consult with tribes regarding the proposed reorganization (Count I); (2) it alleges that the plan is arbitrary and capricious under the Administrative Procedure Act ("APA") (Count II); (3) it alleges that BIE breached its trust responsibility and the Fort Laramie Treaty of 1868 (Count III); and (4) it alleges that BIE violated the Settlement Agreement that the parties reached in a previous lawsuit (Count IV).

CRST's Complaint should be dismissed. This Court lacks jurisdiction over the alleged breach of the Settlement Agreement claim and, in any event, the Tribe is currently litigating this issue in a parallel action and is therefore improperly bringing a duplicative claim that should be dismissed under Eighth Circuit precedent. Moreover, all claims relating to proposed reorganization are not ripe at this juncture because the proposed reorganization is not final. The proposal still needs the approval of the Senate Appropriations Committee before it can become final. *See infra* at 7. Ripeness considerations aside, CRST's claims fail. First, BIE has complied with its obligation to consult with CRST and other tribes and CRST identifies no legal defect that occurred during this process. Second, CRST's APA claim fails for at least three reasons: it misidentifies the justification for the proposed reorganization, there is no "agency action," and the proposed restructuring is committed the agency's discretion. Third, the

Tribe's vague treaty and trust claims fail to state a claim upon which relief can be granted.

Accordingly, Defendants' Motion to Dismiss should be granted.

BACKGROUND

BIE is a component of DOI under the supervision of the Assistant Secretary - Indian Affairs. It is responsible for providing a school system, on or near Indian reservations, for the education of Indian children. 25 U.S.C. § 2000. Congress has legislated extensively in this area, providing guidance to DOI in fulfilling this mandate. *See* 25 U.S.C. §§ 2000-2021, 2501-2511. Included in that legislation is the obligation "to facilitate Indian control of Indian affairs in all matters relat[ed] to education." 25 U.S.C. § 2011(a). That goal is to be effectuated by the requirement for regular and periodic "consultation" between DOI officials and tribes in the form of "open discussion and joint deliberation of all options with respect to potential issues or changes" in Indian education programs. 25 U.S.C. § 2011(b).

The BIE supports educational programs and residential facilities for American Indian students from federally recognized tribes at 183 elementary and secondary schools and dormitories located on 64 tribal reservations. Ex. 13 to Compl. at 1.[1] Of these, the BIE directly operates 57 schools and dormitories, while the remaining 126 schools and dormitories are operated by 64 tribes that are supported by grants or contracts with the DOI. Ex. 23 at 5.

I. Proposed Reorganization

[1] CRST attached 30 exhibits to its Complaint that may be reviewed in assessing a motion to dismiss. *See, e.g., Whitney v. Guys, Inc.*, 700 F.3d 1118, 1128 (8th Cir. 2012) (noting that exhibits attached to complaint may be used in assessing plausibility of claims). For ease of reference and consistency, Defendants hereafter cite the Tribe's exhibits as "Ex."

In September 2013, Secretary of the Interior Sally Jewell and Secretary of Education Arne Duncan appointed the American Indian Education Study Group ("Study Group") to diagnose the educational challenges in BIE-funded schools, one of the lowest performing set of schools in the country, Ex. 18 at 1, and recommend strategies for reform to ensure that all students attending BIE-funded schools receive a world-class education. Ex. 19 at 4. The Study Group obtained a firsthand perspective of the issues by visiting schools and conducting six listening sessions with tribal leaders, Indian educators, parents, school boards and others across the county. Ex. 9 at 1; Ex. 23 at 5. Based on this input, the Study Group prepared a draft report that became the subject of four tribal consultation sessions in April and May 2014. Ex. 9 at 1-2.

On June 13, 2014, the Study Group incorporated feedback it received into its final report: *Blueprint for Reform*. Ex. 16 at 2. The report identified five areas for reform:

• Effective Teachers and Principals: Identifying, recruiting, retaining and empowering diverse, highly effective teachers and principals to maximize students' achievement.

• Agile Organizational Environment: Developing a responsive organization that provides resources, direction and services to tribes so they can help their students attain high levels of achievement.

• Educational Self-Determination for Tribal Nations: Building the capacity of tribes to operate high-performing schools and shape what students are learning about their tribes, language and culture in schools.

• Comprehensive Supports through Partnerships: Fostering parental, community and other organizational partnerships to provide the academic, emotional and social supports students need in order to be ready to learn.

• Budget Aligned to Capacity Building: Developing a budget that is aligned to and supports BIE's new mission of tribal capacity building and exchanging best practices.

See id. at 2-3, 13-25.

Based on the Study Group's recommendations, Secretary Jewell issued Secretarial Order 3334 proposing changes in BIE organization to improve BIE operational support to schools. *See* Compl. ¶ 46; Exs. 17 & 18. The proposed changes included: (1) realignment of the Associate Deputy Directors, (2) establishment of the Office of Sovereignty in Indian Education, and (3) establishment of Educational Resource Centers ("ERC") with School Improvement Teams. Ex. 17 at 2.

The first change proposes to realign the current offices of the Associate Deputy Directors ("ADDs") from regional organization—ADD East, ADD West and ADD Navajo—to a more functional organization composed of ADD – Tribally Controlled Schools (which will oversee and support 95 tribally controlled schools), ADD – BIE-Operated Schools (which will oversee 23 BIE-operated schools), and ADD – Navajo (which will remain the same and will oversee 65 BIE-operated and tribally-controlled schools in the Navajo area). Ex. 29 at 2. The ADDs will address the unique needs of tribally operated schools and BIE-operated schools. *Id.* This proposed realignment will clarify roles and responsibilities and improve service delivery by aligning management of BIE services with the school governance structures. *Id.* It recognizes the differences in oversight and operational needs for various schools and enables the field structure to be more responsive. *Id.*

The second change proposes the establishment of an Office of Sovereignty in Indian Education reporting directly to the BIE Director. *Id.* at 4. This office will be a central point within the organization for tribal relations regarding Indian education. *Id.* It will assist tribes in such areas as: support in the operation of tribally controlled schools,

support culturally-responsive curricula, integration of Native languages, and expanding partnerships with tribal colleges and universities and tribes. Ex. 20 at 17.

The third change proposes transforming the 22 existing Education Line Offices ("ELO") into 15 ERCs, three facility support centers, three technical assistance centers, and one National Johnson O'Malley Center. Ex. 29 at 2. The ERCs would be more specialized and would serve either BIE-operated schools or tribally-controlled schools. *See* Ex. 29 at 8. They will have School Solutions Teams to provide customized support to meet the unique needs of individual schools. *Id.* The teams will ensure that principals and teachers have the resources and support needed to operate high achieving schools. *Id.* The ERCs will have expertise matrixed from other parts of the organization, including school operations, to make a variety of technical skills available in the field. *Id.* ERCs will also assist schools in such areas as curriculum and instruction, intervention strategies, professional development, and tribal capacity building. *Id.*

If the proposed reorganization is adopted, there will be four ERCs in the Dakotas: one for the BIE-operated schools and three for the tribally-controlled schools. Ex. 29 at 8. The Turtle Mountain ELO, which is located in Belcourt, North Dakota, will be the ERC for the eight BIE-operated schools in the Dakotas. Ex. 29 at 7-8. The ERCs for the tribally-controlled schools will be located in Kyle, South Dakota (serving 12 schools), Bismarck, North Dakota (serving 9 schools) and Flandreau, South Dakota (serving 12 schools). Ex. 29 at 8. While none of the ELOs in the Dakotas other than the Turtle Mountain ELO will become an ERC, the offices will not be closed under the proposed plan. The Pine Ridge ELO would become a Facility Support Center with School Administrator Support that will continue to house maintenance and operational services

for schools. Ex. 29 at 3, 7-8. The Standing Rock ELO, the Crow Creek/Lower Brule ELO and the Rosebud ELO will become Technical Assistance Centers from which tribes will manage their former ELOs under Indian Self-Determination and Education Assistance Act contracts. 25 U.S.C. § 450g; Ex. 29 at 3. The Cheyenne River ELO will become a Facility Support Center serving the local BIE-funded schools. Ex. 29 at 8.

In developing the reorganization plan, BIE consulted with tribes and tribal schools at each stage. The Study Group began with six listening sessions focused on improving Indian education with tribal leaders, Indian educators and others. Ex. 9 at 1, Ex. 11 at 7. Based on this input, the Study Group identified a draft framework for reform. Ex. 9 at 1. BIE then invited interested parties to attend consultation sessions held across the nation or submit written comments. *See* Ex. 8 at 1-2. The Study Group then released its *Blueprint for Reform* and DOI issued Secretarial Order 3334. Defendants then held twelve regional or individual consultations on the reorganization proposal, including an individual session with CRST on February 19, 2015. Ex. 28 at 1; The Bureau of Indian Education Proposed Reorganization, Tribal Consultation Report 2015, ("Tribal Consultation Report"), at 4, *available at* http://www.bie.edu/cs/groups/xbie/documents/document/idc1-031687.pdf. Defendants then mailed tribes the reorganization proposal, explained the rationale behind it, and invited tribes to another round of consultation. Ex. 23. Defendants held six additional formal consultations, including one in Rapid City, South Dakota that CRST attended. Ex. 28 at 1; Tribal Consultation Report at 4. During this period, BIE also posted information regarding the reorganization on its website, Ex. 29 at 1, and invited tribes and their members and schools to submit written comments. *See* Ex. 23 at 14. The BIE received 19

submissions, including a comment from CRST on May 15, 2015. Ex. 28 at 1; Tribal Consultation Report at 5.

Before BIE's reorganization proposal can become final, the guidelines accompanying the FY2014 and FY 2015 Appropriation Acts require that it be submitted to the House and Senate Appropriations Committees for approval. *See* 160 Cong. Rec. at H971; 160 Cong. Rec. at H9759. Specifically, the guidelines require reprogramming proposals, including "proposed reorganizations, especially those of significant national or regional importance," to be submitted in writing to both the House and Senate Appropriations Committees prior to their implementation. *See* 160 Cong. Rec. at H971; 160 Cong. Rec. at H9759. "Any change to the organization table presented in the budget justification" is subject to this requirement. *Id.* The Committees may then express their approval or disapproval of the proposal. *Id.*

The DOI is in the midst of this procedure. It submitted its proposed reprogramming request to the Appropriations Committees by letter dated September 15, 2015, Ex. 29, but those committees asked for additional information and an unspecified amount of time to review the request. Forrest Decl. ¶ 6. On November 13, 2015, DOI provided the committees with the requested information. *Id.* On December 18, 2015, the House Committee on Appropriations approved the reprogramming request conditional on the approval of the Senate and a list of other conditions. *Id.* The Senate Committee has not yet responded. *Id.* Congress may therefore approve or disapprove of the proposal at any time, or request changes or additional information. *See id.* ¶¶ 5-6

II. *Yankton Sioux Tribe et al. v. Kempthorne et al.*

CRST is currently involved in another lawsuit filed in this district against Defendants, *Yankton Sioux Tribe et al. v. Kempthorne et al.*, case no. 4:06-cv-4091-KES (D.S.D.). That action began on May 23, 2006, when CRST and ten other Indian tribes or tribally-controlled schools in the Dakotas filed a complaint challenging a nationwide restructuring plan announced by the BIE on December 22, 2005. *See* ECF Doc. 1 in case no. 4:06-cv-4091-KES. On July 14, 2006, Judge Karen Schreier issued a preliminary injunction enjoining Defendants from carrying out the proposed restructuring plan. ECF Doc. 45 in case no. 4:06-cv-4091-KES.

In July 2007, the parties entered into a Settlement Agreement. Ex. 1. The Settlement Agreement applied only to the then "ongoing restructuring of [BIE] programs," as announced in December 2005. *Id.* ¶ 1. Under the Settlement Agreement, the BIE agreed, as part of its 2005 restructuring plan, to maintain the six existing ELOs in the Dakotas, *id.* ¶ 2, and the plaintiffs agreed to drop their objections to the balance of the restructuring plan and dismiss this action with prejudice. *Id.* ¶ 13. The BIE also agreed to hire and maintain a staff of at least three employees at each of the six ELOs during FY 2007, *id.* ¶ 4; expressed its "intention" to increase the total Dakota-area staff to 24 in the future, "[s]ubject to the availability of sufficient appropriations in BIE's 'Education Management' appropriation," *id.* ¶ 5; and stated its "intention," "subject to the availability of sufficient appropriations," that under the 2005 reorganization plan each Dakota-area ELO has "a staff of at least three employees" in the future, *id.* The Agreement provided that "[i]n the event that BIE determines that it has not received sufficient appropriations to provide the staffing levels identified in paragraph 5 for any year after Fiscal Year 2007, it will provide plaintiffs with a letter explaining the basis for

that determination, signed by the Director of BIE." *Id.* ¶ 6. The Agreement further stated that "[a]ny such determination by the BIE that it has not received sufficient appropriations. . . shall be in the sole and unreviewable discretion of the BIE and shall not be subject to challenge or judicial enforcement in any court." *Id.*

In addition to limiting its terms expressly to the then-ongoing restructuring, the Settlement Agreement acknowledged that BIE would be permitted to make changes to its management and personnel in the future notwithstanding the terms of the Agreement:

> Nothing in this agreement shall preclude or bar the [BIE] from making any changes in its guidelines, management, personnel assignments, staffing levels or organizational structure, that were adopted or affected by this agreement (including but not limited to changes in the staffing of [ELOs]), so long as such changes are implemented in compliance with all applicable legal obligations, including the obligation to engage in consultation with affected tribes.

Id. ¶ 10.

On July 26, 2007, Judge Schreier entered a Stipulated Final Judgment dismissing the action with prejudice. ECF Doc. 73 in case no. 4:06-cv-4091-KES. The Stipulated Final Judgment stated that "the Court shall retain jurisdiction over claims for enforcement of the Settlement Agreement." *Id.*

On July 23, 2015, five *Yankton Sioux Tribe* plaintiffs moved that Court to enforce the Settlement Agreement, arguing that "Defendants have repeatedly and continuously violated the Settlement Agreement." ECF Doc. 78 in case no. 4:06-cv-4091-KES. CRST "notifi[ied] th[at] Court that it is participating in th[at] motion" and "fully supports" it. ECF No. 86 at 1 in case no. 4:06-cv-4091-KES. That motion is fully briefed and awaiting decision.

III. The Current Lawsuit

On October 2, 2015, CRST brought this action seeking, among other things, a permanent injunction to stop BIE's proposed restructuring. In addition to once again asserting that Defendants breached the *Yankton Sioux Tribe* Settlement Agreement (Count IV), CRST alleges that Defendants did not meaningfully consult with tribes regarding the proposed reorganization (Count I), that the plan is arbitrary and capricious (Count II), and that Defendants breached their fiduciary obligations as well as the Fort Laramie Treaty of 1868 (Count III).[2]

STANDARD OF REVIEW

CRST's action should be dismissed because the Court lacks subject matter jurisdiction over the claims, Fed. R. Civ. P. 12(b)(1), and the Tribe fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(1) may challenge the complaint either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir. 1993). To survive a motion under Rule 12(b)(6), the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Court must accept as true all factual allegations in the complaint, that tenet is "inapplicable to legal conclusions. Threadbare recitals of the elements of a

[2] CRST makes vague references to other numerous statutes or other provisions in its Complaint outside of these counts. For example, its prayer for relief cites statutes not mentioned in the counts of the Complaint. CRST has not properly plead a claim concerning such statutes or provisions. *See Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) ("Although Rule 8(a)(3) of the civil rules requires that a complaint contain 'a demand for judgment for the relief the pleader seeks,' the demand is not itself a part of the plaintiff's claim."); *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp. L.L.C.*, 635 F.3d 1106, 1108 (8th Cir. 2011) ("The sufficiency of a pleading is tested by the Rule 8(a)(2) statement of the claim for relief and the demand for judgment is not considered part of the claim for that purpose, as numerous cases have held.").

cause of action, supported by mere conclusory statements, do not suffice." *Id.* "While courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned.'" *Dittmer Properties, L.P. v. FDIC*, 708 F.3d 1011, 1021 (8th Cir. 2013) (citation omitted).

I. THE BREACH OF SETTLEMENT AGREEMENT CLAIM SHOULD BE DISMISSED

In the fourth count of the Complaint, CRST asserts that Defendants breached the Settlement Agreement in *Yankton Sioux* Tribe—an issue that is currently being litigated in that case. This Court lacks jurisdiction to adjudicate a dispute about a settlement agreement entered in another case and, in any event, the claim is improper because it is duplicative and should be dismissed.

A. This Court Lacks Jurisdiction to Resolve CRST's Claim

It is a well-settled principle of constitutional law that federal courts are courts of limited jurisdiction, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and that jurisdiction is dependent upon a waiver of sovereign immunity, *see United States v. Mitchell*, 463 U.S. 206, 212 (1983) (the United States' consent to be sued is a prerequisite for jurisdiction). The plaintiff bears the burden of showing both a waiver of sovereign immunity and a grant of subject matter jurisdiction. *See V S Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

CRST fails to carry this burden. It alleges that the "Settlement Agreement . . . is a contract, the material breach of which is in direct violation of fundamental principles of

contract law," and requests "specific[] performan[ance]" of the "contractual duties." Compl. ¶¶ 94, 101. But the Tribe fails to identify a waiver of sovereign immunity for such a claim. To the extent that CRST relies on the Tucker Act, *see V S Ltd. P'ship*, 235 F.3d at 1112 ("This being a contract action brought against the United States, our analysis must begin with the Tucker Act."), the Eighth Circuit has recognized that the Act vests exclusive jurisdiction in the Court of Federal Claims and largely limits the available relief to money damages, *id.*[3] Indeed, the Tucker Act "does not waive the United States' sovereign immunity and create subject matter jurisdiction in another court for . . . claim[s] to an alternate form of relief." *Id.* at 1112; *see also Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1082 (10th Cir. 2006) (holding unavailable "declaratory or injunctive relief . . . in the form of specific performance").

Not surprisingly, every case CRST cites as authority for its breach-of-contract claim hails from the Federal Circuit. *See* Compl. ¶ 94. The Little Tucker Act does provide jurisdiction in district courts for contract claims against the United States if the relief requested is less than $10,000 but CRST asserts that "[d]amages are inadequate" in this case. Compl. ¶ 100. In any event, as this Court has recognized, "[w]hen district court jurisdiction is based on the Little Tucker Act, a district court may grant damages but not equitable relief." *See, e.g.*, *Middlebrooks v. United States*, 8 F. Supp. 3d 1169, 1174 n.6 (D.S.D. 2014).

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[3] The Indian Tucker Act is identical to the Tucker Act, except that it specifies Indian tribes as eligible claimants. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 n.3 (9th Cir. 2005).

"The Tucker Act does authorize the Federal Court of Claims to award equitable relief in some circumstances. For instance, it may order re-employment, *see* 28 U.S.C. § 1491(a)(2) & (b)(2), and may award equitable relief in suits objecting to contract solicitations, *see National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed.Cir.1998)." *V S Ltd. P'ship*, 235 F.3d at 1112 n.3.

Because CRST has not identified a waiver of sovereign immunity that would permit the relief they seek—and Defendants know of none—this Court should dismiss this claim. *See V S Ltd. P'ship* 235 F.3d at 1112 (dismissing claim for equitable relief); *Miami Tribe of Okla. v. United States*, 198 F. App'x 686, 691 (10th Cir. 2006) (dismissing breach of contract claim for specific performance despite "the special, fiducial relationship that exists between the Tribe and the federal government").

These defects are not cured by CRST's allegation that "the Court retains jurisdiction over *Yankton Sioux Tribe, et al. v. Kempthorne, et al.*, Civ. # 06-4091KES to enforce compliance with the terms and conditions" of the Settlement Agreement. Compl. ¶ 12. This Court has not issued an order of dismissal retaining jurisdiction over the Settlement Agreement or incorporating its terms. Rather, the *Yankton Sioux Tribe* Court entered the stipulated final judgment that "retain[ed] jurisdiction over claims for enforcement of the Settlement Agreement." ECF Doc. 73 in case no. 4:06-cv-4091-KES. *See Miener By & Through Miener v. Mo. Dep't of Mental Health*, 62 F.3d 1126, 1127 (8th Cir. 1995) (holding courts have ancillary jurisdiction when "the parties' obligation to comply with the terms of the settlement agreement [is] made part of the order of dismissal" because a breach of the settlement agreement results in a violation of the district court's judgment). The parties to the Settlement Agreement understand this—they moved that Court to enforce the Settlement Agreement, expressly stating that "[t]he District Court, Judge Karen E. Schreier, specifically retained jurisdiction over claims for enforcement of the Settlement Agreement." ECF Doc. 79 in case no. 4:06-cv-4091-KES. And that litigation is ongoing. CRST's argument here that this Court too "retain[ed]" jurisdiction over the agreement is not supported by the record, law, or logic.

B. Plaintiff's Claim is Duplicative and Should Be Dismissed

Even if jurisdiction exists, CRST's claim should be dismissed because it violates the Eighth Circuit's long-recognized principle of avoiding duplicative litigation. "[A] plaintiff should not be allowed to litigate the same issue at the same time in more than one federal court." *Blakley v. Schlumberger Tech. Corp.*, 648 F.3d 921, 932 (8th Cir. 2011) (citation omitted). Thus, the Eighth Circuit has articulated a "prudential limitation on the exercise of federal jurisdiction" that does not allow plaintiffs to "pursue multiple federal suits against the same party involving the same controversy at the same times." *Mo. Ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 953-54 (8th Cir. 2001); *see also Brewer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) ("Although no precise rule has evolved with regard to the handling of instances where identical issues are raised in cases pending in different federal courts, the general principle is to avoid duplicative litigation."). A district court may dismiss a claim or action under Federal Rule of Civil Procedure 12(b)(6) if it is duplicative of another action. *See Blakley*, 648 F.3d 921 at 932 (affirming dismissal of duplicative claims); *Free Conferencing Corp. v. Sancom, Inc.*, No. CIV. 10-4113-KES, 2011 WL 1486199, at *3 (D.S.D. Apr. 19, 2011) (collecting cases).

The "crucial inquiry" in determining whether proceedings are duplicative is whether "substantial overlap" exists between the parties and issues litigated. *Nat'l Indem. Co. v. Transatlantic Reinsurance Co.*, 13 F. Supp. 3d 992, 998 (D. Neb. 2014) (collecting cases); *see also Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 (8th Cir. 2011) ("[T]he district court has the authority to refuse to hear this case if it raises issues that substantially duplicate those raised by a case pending in another court."); *Free Conferencing Corp.*, 2011 WL 1486199, at *3 (examining whether "substantial

similarity" exists). The two actions need not be completely identical, *Nat'l Indemnity Co.*, 13 F. Supp. 3d at 998, and district courts enjoy wide latitude in determining if one action is duplicative of another, *Free Conferencing Corp.*, 2011 WL 1486199, at *3 (citing *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993)). This Court has found that a substantial similarity "occurs when there is a substantial likelihood that the [first] proceeding will fully dispose of the claims presented in the' second proceedings." *Free Conferencing Corp.*, 2011 WL 1486199, at *3 (*quoting Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009)).

CRST's claim here substantially—if not completely—overlaps the pending Motion to Enforce in *Yankton Sioux Tribe*. The "focal point" in that action is the alleged "minimum required ELO staff and offices in the Dakotas under the Settlement Agreement." ECF No. 94 at 3-4 in case no. 4:06-cv-4091-KES. It further argued that Defendants breached paragraph six of the Settlement Agreement by not providing prior written notice of the drop in staffing levels. ECF No. 79 at 4-5 in case no. 4:06-cv-4091-KES. Yet weeks after notifying that court of its "full[] support[]" and "participat[ion]" in that motion, ECF No. 86 at 1 in case no. 4:06-cv-4091-KES, CRST brought this separate lawsuit pressing *identical* allegations—that "[t]he number of ELO positions dropped from twenty-four to sixteen without any prior written notification by the Defendants as required by the Settlement Agreement." Compl. ¶ 94. And CRST alleges that the restructuring and renaming of the ELOs into ERCs is "[i]n direct violation of the *Yankton* Settlement Agreement." *Compare* Compl. ¶¶ 49, 97, *with* ECF No. 94 at 3 in case no. 4:06-cv-4091-KES ("Plaintiffs . . . are not specifically seeking relief pertaining to the current structuring effort itself, *except* to the extent the newest incarnation of the BIE's

restructuring . . . *violate* the Settlement Agreement and Stipulated Final Judgment."). *Yankton Sioux Tribe* will resolve all of CRST's claims related to the purported breach of the Settlement Agreement, and the Tribe's duplicative claim here should be dismissed. *See Blakley*, 648 F.3d at 932 ("[D]ismissal of duplicative claims comports with our long-standing 'general principle' of 'avoid[ing] duplicative litigation.'") (citation omitted); *Free Conferencing Corp.*, 2011 WL 1486199, at *4 (dismissing action where plaintiff brought same claim and could obtain full relief in another case); *Kuepers Constr., Inc. v. State Auto Ins. Co.*, No. 15-449 ADM/LIB, 2015 WL 4247153, at *10 (D. Minn. July 13, 2015) (same).

Dismissing CRST's claim "giv[es] regard to wise judicial administration" for several reasons. *See Brewer*, 837 F.2d at 804. First, it conserves judicial resources by preventing two judges from addressing the same claim. *See Mo. ex rel. Nixon*, 259 F.3d at 950-51, 954 (observing that "federal courts strongly oppose such duplication for it promotes wasteful use of scarce judicial resources" and that "[t]he policy against duplicative litigation is motivated largely by economic concerns."). Second, leaving this issue for *Yankton Sioux Tribe* promotes the "comprehensive disposition of litigation," *see Nat'l Indemnity Co.*, 13 F. Supp. 3d at 998, by avoiding any danger of inconsistent outcomes and preventing needless preclusion arguments that may arise. Third, the issue has been fully briefed in *Yankton Sioux Tribe* and is currently awaiting decision. *See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 21-22 (1983) (relative progress of the two actions is a relevant factor to consider in deciding whether to dismiss

duplicative action); *Ritchie*, 849 F. Sup. 2d at 891-92 (deferring to case where summary judgment ruling was pending).[4]

Should this Court disagree and find dismissal inappropriate, it should transfer the claim to the District of South Dakota – Southern Division so that it can be consolidated with *Yankton Sioux Tribe*.[5] A transfer motion under 28 U.S.C. § 1404(a) "requires the court to consider the convenience of the parties, the convenience of the witnesses, the interests of justice, and any other relevant factors when comparing alternative venues." *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 696 (8th Cir. 1997). Regarding convenience, this issue is fully briefed in *Yankton Sioux Tribe* and a parallel claim in this Court would inconvenience the parties and any necessary witnesses. The interests of justice also show a transfer is appropriate because it serves judicial economy, the plaintiff chose the Southern Division twice before, it will be costly to litigate the issue once more, the ability to enforce a judgment may be hindered by inconsistent outcomes, and the

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[4] Indeed, the claims and parties are so similar that this count may be barred by the rule against claim splitting, a part of the doctrine of res judicata. *Davis v. Sun Oil Co.*, 148 F.3d 606, 613 (6th Cir. 1998) (per curiam) (discussing claim splitting as a "facet of the res judicata doctrine"). That rule requires a plaintiff "to assert all of its causes of action arising from a common set of facts in one lawsuit." *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011). The allegations here arise from the "same nucleus of operative facts" as *Yankton Sioux Tribe*.

Moreover, "the principles which animate [the first-filed rule] apply with equal force to a situation like that presented here, where [Plaintiff] filed the same claim in successive, but separate, lawsuits before this Court." *Hayes v. Walsh*, No. 3:11-CV-0168, 2013 WL 2285365, at *7 (M.D. Pa. May 23, 2013).

The appropriate action for CRST is to join the motion in *Yankton Sioux Tribe*, not to submit this duplicative claim.

[5] Because § 1404(a) authorizes only the transfer of an entire action, "district courts first must sever the action under Rule 21 before effectuating the transfer." *Arnold v. DIRECTV, LLC*, No. 4:10-CV-352-JAR, 2015 WL 1821088, at *3 (E.D. Mo. Apr. 21, 2015) (citation omitted). Severance under Rule 21 is left to the Court's discretion "and in exercising that discretion, courts typically consider the same general factors underlying the § 1404(a) analysis," *id.*, and thus only one analysis is needed, *see Valspar Corp. v. E.I. DuPont de Nemours & Co.*, 15 F. Supp. 3d 928, 932 (D. Minn. 2014).

Settlement Agreement stems from *Yankton Sioux Tribe*, a case that Judge Schreier has presided over since its inception. *See Terra Int'l, Inc.*, 119 F.3d at 696.[6]

II. CRST'S CLAIMS RELATING TO THE REORGANIZATION ARE NOT RIPE FOR REVIEW

CRST's attempt to stop BIE's proposed restructuring is grounded on four separate legal arguments: (1) BIE did not consult with Tribes, Compl. ¶¶ 78-84, (2) the plan is "arbitrary and capricious" in violation of the APA, *id.* ¶¶ 85-86, (3) BIE breached treaty provisions and its trust responsibilities, *id.* ¶¶ 87-90, and (4) the plan violates the Settlement Agreement, *id.* ¶¶ 49, 91-94, 97. However, because CRST's challenges are directed at a proposed reorganization that it not yet final, they are premature and therefore not ripe for review. "The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitation and also from the prudential considerations for refusing to exercise jurisdiction." *Nebraska Pub. Power Dist. v. MidAmerica Energy Co.*, 234 F.3d 1032, 1037 (8th Cir. 2000). The "basic rationale" for the ripeness requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

[6] As the pleadings in *Yankton Sioux Tribe* demonstrate, Defendants maintain that this breach of Settlement Agreement claim has no merit. *See generally* Docket in case no. 4:06-cv-4091-KES. To the extent this claim remains before this Court, Defendants maintain that the Settlement Agreement's terms do not prevent the proposed restructuring. *See* ECF Doc. 84 at 19-20 in case no. 4:06-cv-4091-KES.

Here CRST fails to meet either the constitutional or prudential requirements for ripeness. CRST cannot meet the constitutional requirement because they cannot demonstrate an actual "case" or "controversy" as required by Article III. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). As explained *supra* at 7, the proposed reorganization is not final. It still must be approved by the Senate Appropriation Committee. *See* 160 Cong. Rec. at H971; 160 Cong. Rec. at H9759.

For the same reasons, Plaintiffs' claim does not meet the prudential requirements for standing. Courts apply a familiar two-part test to determine whether a claim is ripe for review: (1) the claim "must be fit for judicial resolution" and (2) plaintiffs "must experience hardship if the court withheld consideration of the case's merits." *Missouri Soybean Ass'n v. U.S. E.P.A.,* 289 F.3d 510, 512 (8th Cir. 2002).

CRST's challenges to BIE's proposed reorganization fails to meet either prong of the ripeness test. With respect to the first factor, "fitness," the courts consider whether the issue presented is "purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (citation omitted); *accord Nebraska Pub. Power Dist.*, 234 F.2d at 1038. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). *See, e.g., KCCP Trust v. City of N. Kan. City*, 432 F.3d 897, 890 (8th Cir. 2005) (challenge to proposed plan for fiber-optic network not ripe where City Council had not voted to approve the plan).

In this case, the proposed reorganization is not final. Indeed, it remains contingent on approval by the Senate Appropriations Committee. Forrest Decl. ¶ 6.[7] Although the proposal has been submitted to Congress, it is currently under review. *Id.* Congress may, at any time, approve, disapprove, or request changes. *Id.* Thus, CRST's challenges to the reorganization are not currently fit for judicial resolution. The finalization and implementation of the proposed reorganization may not occur as anticipated, if it ever occurs at all. *See Texas*, 523 U.S. at 300.

CRST also cannot show any hardship from withholding judicial review of their challenges to the proposal. In determining whether a plaintiff will suffer any hardship in deferring relief, courts consider "the availability of judicial review at a later stage if the feared result does in fact materialize." *Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 236-37 (D.C. Cir. 1988). If the proposed reorganization is finalized, CRST may raise their challenges to the reorganization at that time.

Thus, CRST's claims challenging the reorganization are not ripe because CRST cannot demonstrate that such a challenge is fit for judicial review or that it would suffer any immediate harm during the period for congressional review.

CRST's allegations that the BIE already began restructuring in August 2014 do not remedy these jurisprudential deficiencies. CRST argues that Secretarial Order 3334 "implemented key recommendations contained in the Blueprint for Reform" including the "immediate[] . . . reorganization of the BIE." Compl. ¶¶ 46-47, 76. But elsewhere in its Complaint CRST acknowledges that the reorganization is "proposed" and that it is

[7] Defendants offer this declaration for the Court to consider only in determining whether it has jurisdiction. In resolving jurisdictional allegations, "the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute." *Titus*, 4 F.3d at 593.

only "about to be implemented." Compl. ¶ 86; *see also id.* ¶¶ 1, 3, 74. Nor could it be otherwise, as the guidelines accompanying the FY 2014 and FY 2015 Appropriation Acts require Congressional approval , *see supra* at 7, and DOI has indicated that it will not proceed with the reorganization if Congress so indicates, Ex. 29 at 1, 6. After BIE's initial submission of the proposal, Congress asked for an indefinite amount of additional time to review the plan. Forrest Decl ¶ 6. Although the House Appropriations Committee has given its approval subject to certain conditions, the Senate Appropriations Committee has not yet approved it. *Id.*[8]

Thus, as acknowledged by CRST, the reorganization plan has only been "proposed." Accordingly, CRST's claims are not ripe for resolution and should be dismissed.

III. CRST FAILS TO STATE A CLAIM

Even if the Court determines that it has jurisdiction, CRST's claims must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because the Tribe fails to state a claim upon which relief can be granted. As an initial matter, Defendants are aware of no private right of action that exists under the multiple statutes and provisions cited in

[8] CRST's reliance on a DOI news release covering the Secretarial Order does not disturb this conclusion—the release simply states that Secretary Jewell "announced a *plan* to transform" the BIE. Ex. 18 at 1 (emphasis added).

CRST also maintains that a July 16, 2015 letter from DOI "acknowledge[s] that implementation of the Blueprint is in its 'final steps.'" Compl. ¶ 64. The letter discusses "*proposed* changes to the BIE" based on the *Blueprint for Reform* and tribal consultations. Ex. 28 at 1 (emphasis added). The letter then explains that the "BIE has now completed tribal consultations on the Blueprint for Reform and received input from tribes impacted by the reorganization. The [DOI] *is in the process of obtaining Congressional approval* on the final steps of the reorganization." Ex. 28 at 1-2 (emphasis added).

the first and third counts of Plaintiff's Complaint. Plaintiff does not identify any source of authority in these counts to cure that defect.

A. CRST Has Failed To Plead a Consultation Claim Upon Which Relief Could be Granted

CRST asserts that Defendants violated 25 U.S.C. § 2011(a) for allegedly failing to consult with Indian tribes in matters relating to education. The statute provides that:

> interested parties (including tribes and school officials) shall be given an opportunity –
>
> (i) to present issues . . that will be considered for future action by the Secretary; and
> (ii) to participate and discuss the options presented, or to present alternatives, with the views and concerns of the interested parties given effect unless the Secretary determines, from information available from or presented by the interested parties during one or more of the discussions and deliberations, that there is a substantial reason for another course of action.

25 U.S.C. § 2011(b)(2)(B).[9]

CRST's Complaint fails to state a plausible claim of inadequate consultation. The Tribe alleges that it "was forced to present its views and alternatives . . . a paltry nine days before" reorganization began in August 2014, an apparent reference to Secretarial Order 3334's Phase 1 implementation date. Compl. ¶ 82. But there is no minimum number of days prior to action that is required by the statute. And in any event, the July 22, 2014 consultation session that CRST acknowledges is more than a year before BIE submitted its proposal to Congress for approval. And during the interim, CRST had no fewer than two consultation sessions—a one-on-one consultation session in February

[9] The Tribe also cites the definition of "consultation" from the Defendants' Indian Affairs Manual and alleges that this was violated, but it does not state *how* this policy was violated. Instead, it conclusorily states that the "'consultation/listening meetings' held by the Defendants on May 3, 2012, November 14, 2013, March 28, 2014, and April 22, 2015 did not comport with the Defendants' own policy regarding government-to-government consultation." Compl. ¶ 75.

2015 and a regional consultation session in April 2015—and an additional opportunity to submit written comments. *See infra* at 25.

As reflected in the nearly 400 pages of exhibits that are attached to the Complaint, BIE has engaged in extensive consultation with tribes across the country regarding the proposed reorganization, including the tribes in the Dakotas and with CRST in particular. This consultation has occurred at each stage of the reorganization's development and well in advance of implementing the restructuring.

The proposed reorganization was based on the recommendations of the Study Group appointed in September 2013. *See* Compl. ¶ 46; Ex. 18 at 1.[10] On November 5,

[10] CRST appears to allege that consultation was inadequate in part because of actions taken prior to September 2013. *See* Compl. ¶¶ 23-33. But the Study Group that launched the process for the current proposed restructuring was not appointed until September 2013. The pre-September 2013 communications that CRST references therefore do not implicate the current proposed reorganization. Rather, they concern the organization of the Office of Assistant Secretary – Indian Affairs and BIA and BIE's efforts to consolidate and streamline operations in FY 2013 "following news of anticipated budget cuts to all Indian Affairs organizations set to occur in FY 2013." Ex. 7 at 2. These past budgetary constraints play no role in the current proposed restructuring; Defendants repeatedly informed CRST the proposed restructuring is "budget neutral." *E.g.*, Compl. ¶ 55. As DOI's Budget Justification shows, the budget reductions BIE faced have since reversed course. *Compare* Ex. 4 at 2, 11 (reflecting decreasing budget), *with*, DOI Budget Justifications & Performance Information, Fiscal Year 2015 – Indian Affairs (Greenbook), IA-BIE-1, https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2015/upload/FY2015_IA_Greenbook.pdf (reflecting growing budget from 2013 to 2014), *and Budget Justifications & Performance Information*, Fiscal Year 2016 – Indian Affairs (Greenbook), DOI, IA-BIE-1, https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_IA_Greenbook.pdf (same, from 2014 to 2015).
Indeed, The Study Group focused on "how to facilitate tribal sovereignty in American Indian education and how to improve educational outcomes for students attending BIE-funded schools." Ex. 9 at 1; Ex. 18 at 2. *Compare* Consultation Notice, 77 Fed. Reg. 14561-02 (March 12, 2012) (providing notice of consultation regarding BIA and BIE streamlining plans to meet budgetary constraints), with Consultation Notice,79 Fed. Reg. 17177 (March 27, 2014) (soliciting consultation "to review and provide feedback on the draft actionable recommendations prepared by the [Study Group]").

2013, Assistant Secretary - Indian Affairs Kevin K. Washburn sent a letter to tribal leaders announcing the Study Group and inviting tribes to listening sessions. *See* Compl. ¶ 35. The Study Group held six listening sessions with tribal leaders, Indian educators and others on improving Indian education for BIE to develop draft actionable recommendations. Ex. 9, Ex. 11 at 7. As a part of the listening sessions, the Study Group visited BIE-funded schools and held discussions with principals and other interested parties. Ex. 11 at 7; Ex. 8 at 3. These outreach activities included visits to groups in the Dakotas. *See* Ex. 11 at 7. Moreover, the BIE provided a dedicated email account for submission of written comments, where it received nearly 150 comments. *See* Ex. 11 at 7.

In response to the comments received, the Study Group developed a draft framework for reform. Ex. 8 at 1. This draft report was then the subject of four tribal consultations sessions in April and May of 2014, including a session in Oglala, South Dakota attended by CRST. Ex. 8 at 1; Compl. ¶ 41. The BIE provided notice of the tribal consultations by sending letters to tribal leaders, issuing a Federal Register notice and providing information on its website. *Id.* at 2; 79 Fed. Reg. 17177 (Mar. 27, 2014). BIE also solicited written comments. Ex. 8 at 2; 79 Fed. Reg. 17177 (Mar. 27, 2014). Overall, the Study Group met with nearly 400 individuals and received nearly 200 comments that helped it prepare a draft framework for educational reform. Ex. 23 at 4; Ex. 11 at 7.

On June 13, 2014, the Study Group incorporated the feedback it received from tribal leaders and others into the final *Blueprint for Reform*, which was made available for public view on BIE's website. Ex. 16 at 2; Ex. 19 at 15. Based on the Study Group's recommendations, Secretary Jewell issued Secretarial Order 3334 proposing a restructuring of the BIE to improve schools. *See* Exs. 17 & 18; *see also* Compl. ¶ 46. The

BIE provided information regarding the proposed reorganization by sending letters to tribal leaders and posting information on its website. *See* Compl. ¶ 52; Ex. 19.

BIE then held twelve regional or individual tribal consultations to discuss the proposed reorganization. Tribal Consultation Report at 4-5. This included a one-on-one consultation meeting with CRST on February 19, 2015. Ex. 28 at 1.

Defendants then mailed tribes the proposed reorganization, explained the rationale behind it, and invited tribes to another round of consultation. Ex. 23. Defendants held six additional formal consultations, including one in Rapid City, South Dakota that CRST attended. Ex. 28 at 1; Tribal Consultation Report at 4. During this period, the BIE also posted information regarding the reorganization on its website, Ex. 29 at 1, and invited tribes and their members and schools to submit written comments. *See* Ex. 23 at 14. The BIE received 19 submissions, including a comment from CRST on May 15, 2015. Ex. 28 at 1; Tribal Consultation Report at 5. At each of these sessions, the BIE presented information regarding the reorganization, listened to comments and engaged in discussions with tribal leaders and educators. Ex. 23 at 3.

In sum, Indian tribes, school officials and other interested parties were given the opportunity to discuss the options presented and offer alternatives at each step of the process. BIE listened to the views expressed during the consultation sessions and meetings and made changes to the proposed reorganization based on comments that it received. Indeed, the consultation process led to several specific changes in the Dakotas. For example, BIE specifically took into account and incorporated CRST's request that an administrator position remain at the Pine Ridge ELO. In light of this request, the BIE modified its reorganization plans and made the Pine Ridge ELO an Administrative

School Support Center with an Education Program Administrator. *See* Ex. 28 at 1. BIE also modified its proposal and moved a proposed ERC from Rapid City to Kyle, South Dakota in response to comments it received. *See* Tribal Consultation Report at 3; Ex. 25 at 9.

CRST argues that this extensive and thorough consultation process was somehow not enough. It alleges several purported requirements for meaningful consultation that have no basis in any law and are either unnecessary or impractical. In effect, CRST proposes transforming consultation into an insurmountable obstacle forestalling any reorganization to improve the education for Indian children. *Cf. Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) ("That is not to say the [OIEP] must obey those who are consulted or that the [OIEP] must accept their advice.").

First, the Tribe argues that the BIE has not acknowledged or responded to its recommendations on the proposed restructuring, pointing to three exhibits that allegedly went unaddressed. Compl. ¶ 74. The Tribe apparently reads the BIE's consultation obligations to require piecemeal correspondence in which the BIE must contemporaneously respond to every comment it receives. But neither 25 U.S.C. § 2011 nor anything else mandates such an implausible requirement. The BIE held consultation sessions nationwide, met with hundreds of people, and responded to comments at every stage of this process. *E.g.*, Ex. 23 at 3 (reserving time for questions, answers, and discussions with participants); Ex. 11 at 2 (noting that the draft *Blueprint for Reform* is based on listening sessions); Ex. 16 at 37-52 (listing illustrative comments received); Tribal Consultation Report (summarizing and responding to comments received).

Even if consultation required more, CRST has not stated a plausible claim for inadequate consultation by pointing to these three exhibits it purportedly submitted to BIE. Exhibit 5, a "Draft . . . position statement" dated May 2, 2012, concerns the BIE's efforts to streamline during sequestration, not the current proposed restructuring. *See supra* footnote 10. Exhibit 12 is a two-page document articulating broad objectives such as "adequate funding" and "daily access to technology." Ex. 12 at 2. And Exhibit 14 responds to the BIE's Strategic Plan 2014-2018, which even CRST apparently acknowledges is not directly related to the proposed restructuring. *See* Compl. ¶ 42 ("It is unclear to Plaintiff how or whether this document relates to the Defendants' other restructuring documents.). *After* all these documents were allegedly submitted, CRST attended an individual tribal consultation with BIE on February 19, 2015 and a regional consultation on April 22, 2015. Ex. 28 at 1. And CRST sent a letter to BIE regarding the reorganization to which BIE responded. *See* Exs. 27 & 28. Despite all of this, CRST fails to identify what views, alternatives, or concerns went unaddressed by the BIE. Its conclusory allegation that it received "[n]o response" to these exhibits—without even alleging what specific comments went unaddressed—cannot state a plausible claim that Defendants did not meaningfully consult with tribes.[11]

[11] Along the same lines, CRST alleges that it submitted comments at the April 22, 2015 consultation, and that "[n]o response was ever received from Defendants to [its] requests for additional information about the restructuring." Compl. ¶ 62. But only a couple of weeks later, the Tribe submitted a request for information inquiring about the same general information. Ex. 27. DOI responded to this request, Ex. 28, and the Tribe does not state how this response failed to address its original concerns.

CRST's argument is curious because BIE specifically modified its reorganization plans by locating an Education Program Administrator at Pine Ridge to accommodate a request by the Tribe. Ex. 28 at 1.

Next, CRST asserts that it did not receive meaningful consultation because it did not have "essential budgetary information or staffing information." *See, e.g.*, Compl. ¶¶ 38, 55-56. CRST offers no authority for the position that meaningful consultation demands that every tribe be given all budgetary information that it deems to be "essential"—an amorphous metric apparently left to CRST's discretion. In any event, CRST appears to refer to its need to know funding sources for the restructuring, *e.g.*, Compl. ¶¶ 45, 56, 61, theorizing that "we do not know . . . if the funds being used for the new positions are funds that could otherwise be used directly for classroom purposes rather than administrative positions," *id.* ¶ 61. But CRST *did* receive this information—DOI's July 16, 2015 letter informs the Tribe that the reorganization is budget neutral and that "[t]he funding source for all administrative and management positions is BIE Education Management, BIE Education Program Enhancements, and Department of Education funds." Ex. 28 at 2.[12] Moreover, the transcript from the April 22, 2015 consultation session confirms that the source of the funding was discussed and made known. Transcript at 17-19, 33-35, 72, 224-25, *available at* http://www.bie.edu/cs/groups/xbie/documents/document/idc1-031493.pdf (last visited Dec. 17, 2015). In any event, the Tribe's concern stemming from this allegation became moot—the letter DOI submitted to Congress seeking approval of the proposed reorganization expressly states that the "BIE is not proposing changes to the budget

[12]CRST criticizes this letter for stating that "plans are still being vetted and finalized" and that "[d]uring the Department's deliberative process, this information is not publicly available." Ex. 28 at 3. But this was in response to the Tribe's request for details on reallocation of funds at the "*line item*" level. Ex. 27 at 2. The Tribe knew which general pool of funds would be used for reprogramming and it cannot seriously fault the BIE for its inability to disclose granular details while the Bureau is in the midst of developing the plan.

structure or the allocation of appropriated funds." Ex. 29 at 1.[13] Tellingly, the Tribe does not allege that reorganization funds could have been used for classroom purposes.

A third requirement CRST proposes for consultation is that BIE provide "empirical data" to show how the proposed plan benefits Indian children. Compl. ¶¶ 39, 45, 56, 64, 73. Once more, no actual statutory or regulatory authority imposes such a requirement. Moreover, this allegation overlooks the fact that the proposed reorganization was designed to improve BIE schools and is based on an extensive consultation process with tribes and tribal educators. *See* Ex. 29 at 1; *see also, e.g.*, Ex. 16 at 17 (explanation by the Study Group that School Solutions Teams "can be effective in assisting schools in their improvement efforts by making available data-supported best practice models in such areas as school management and climate, professional development, curriculum, and instruction") & *id.* at 18 ("Supporting the efforts of tribal Nations to govern their own schools will also lead to improved student achievement" because "tribes: (1) understand the needs of their communities better than the Federal Government does; and (2) are more likely to be held accountable for results by local communities.").

And last, CRST would require BIE to produce transcripts from the listening and consultation sessions so that it could verify that the reorganization is based on comments received. Compl. ¶¶ 37, 70. Again, no authority establishes such a requirement, let alone establishes that a failure to provide such information requires revocation of the proposed

[13] To the extent it relies on *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 785 (D.S.D. 2006), that case is inapposite here. That Court found that "plaintiffs can likely show that [the Office of Indian Education] informed them that the proposal would not divert funds away from schools, and later requested reprogramming of [Indian School Equalization Program (ISEP)] funds and Early Childhood Development funds budgeted for Indian schools, which does divert funds away from [the] schools." *Id.* Here, CRST has not alleged that restructuring involves diverting funds away from schools or that any similar conflicting information about that fact was provided.

restructuring. In any event, BIE made transcripts of the six national tribal consultations in April and May of 2015 accessible to the public, as well as the transcripts from the Study Group's four consultations in April and May of 2014. *See* BIE Tribal Consultations, http://www.bie.edu/consultation/index.htm. Moreover, BIE published comments received throughout this process. *See, e.g.*, Ex. 11 at 26-30, Ex. 16 at 37-52 (listing illustrative comments received). And BIE made available to the public a Tribal Consultation Report summarizing its consultations and outlining tribal concerns and recommendations, BIE responses, and actions taken after the consultation to address specific tribal issues. Ex. 29 at 1; *see also* Tribal Consultation Report. Despite having access to all of this information, CRST declines to allege that the proposed reorganization is not based on the feedback it received.[14] This silence is telling; the BIE meaningfully consulted with tribes and school officials in compliance with its actual legal obligations.

In sum, CRST's claim for failure to consult has no basis in law and should be dismissed for failure to state a claim upon which relief can be granted.

B. CRST's APA Claim Fails as a Matter of Law

CRST also alleges that the restructuring violates the APA. As plaintiff, the burden rests with CRST "to prove that the agency's action was arbitrary and capricious." *S. Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005). Plaintiff fails to carry this burden, however, as it asserts, without justification or explanation, that "the plan to continue with the restructuring plan is arbitrary, capricious and in violation of federal law" because "the reorganization plan that has been published and is about to

[14] Although CRST alleges that it opposed aspects of the restructuring, Compl. ¶¶ 47, 50-51, "[c]onsultation is not the same as obeying those who are consulted," *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1987).

implemented" does not further the alleged rationale for the reprogramming—"budgetary constraints." Compl. ¶ 86. "Budgetary constraints" is *not* the rationale underlying the reorganization.[15] As BIE indicated, "[t]he proposed changes have two primary objectives: 1) strengthen BIE's capability to address school operating needs; and, 2) provide greater oversight and improved service delivery to bureau operated and tribally controlled schools." Ex. 29 at 1. The April 2013 letter relied on by CRST for a different purpose concerns the agency's attempts to streamline operations during sequestration, *see supra* footnote 10, and was sent five months before Secretary Jewell appointed the Study Group in September 2013—which launched the current restructuring efforts—with the acknowledged purpose "to review and provide feedback on ways to improve Indian Education." *See* Compl. ¶ 34. Simply put, "budgetary constraints" has nothing to do with the proposed restructuring.

Even overlooking the Tribe's conclusory and demonstrably false allegations, the proposed restructuring under the APA does not constitute "agency action," let alone final agency action,[16] under the APA. The APA only authorizes judicial review of "agency action," 5 U.S.C. § 702, which is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent. . ." 5 U.S.C. § 551(13). Agencies can engage in a wide range of conduct that does not rise to the level of "agency action" for APA review purposes. In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), a

[15] This allegation is hard to reconcile with CRST's repeated acknowledgement that the BIE informed the Tribe that the reorganization is "budget neutral." *See* Compl. ¶¶ 55, 61, 64, 88.

[16] As the discussion regarding ripeness reveals, *see supra* at 18-21, CRST also cannot allege facts showing a final agency action. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quoting *Port of Boston Mar. Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The agency has not taken final steps, due to lack of congressional approval, to implement the proposed reorganization plan. *See supra* at 18-21.

unanimous Supreme Court analyzed the nature of "agency action" under the APA and stressed that the five specific actions listed ("rule, order, license, sanction [and] relief") all "involve circumscribed, discrete agency actions," *id.* at 62, and consequently, "agency action" would not include a broad challenge on the manner in which an agency implements its programs, *id.* at 64. Consequently, the Court concluded that challenges to "[g]eneral deficiencies in [agency] compliance . . . lack the specificity requisite for agency action." *Id.* at 66. Similarly, in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990), the Court held that the Bureau of Land Management's (BLM) "land withdrawal review program," (which the Court described as "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans"), was a type of conduct that was far too vague and sweeping to be properly challenged as "agency action" under the APA.

The BIE's restructuring proposal is essentially a major management reorganization which, under these precedents, is simply not the type of concrete agency action that can be reviewed under the APA. *Norton* explains the reasons why such review is inconsistent with the proper role of Court's under the APA:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved–which would mean that it would ultimately become the task of the supervising court, rather than the agency to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

542 U.S. at 66-67.

Other courts have required that the agency conduct in question have clear, and binding, effect on the public before it can be challenged as "agency action" under the

APA. If the agency has "announced no rule of law, imposed no obligation, determined no right or liability and fixed no legal relationship," then it has not engaged in "agency action" for purposes of APA review. *Boyd v. Browner*, 897 F.Supp. 590, 593 (D.D.C. 1995); *see also Biodiversity Assocs. v. U.S. Forest Serv.*, 226 F. Supp. 2d 1270, 1314 (D. Wyo. 2002). Here, the proposed restructuring has not affected the right of Indian children to an education, the liability of the BIE to provide funds to grant schools, or the legal rights of affected Indian tribes. Rather BIE has merely altered the way in which it will carry out its pre-existing responsibilities in the administration of these programs, through the reassignment of staff and a change of BIE organization structure. Simply providing new guidance to BIE staff in how they are to carry out their responsibilities and interact with the members of the Indian educational community does not affect existing rights and obligations and consequently is not "agency action." *See Nat'l Ornament & Elec. Light Christmas Ass'n v. CPSC*, 526 F.2d 1368, 1373 (2d Cir. 1975) (instruction to staff on how to conduct themselves in interactions with retailers is not agency action).

Moreover, even if the proposed restructuring were viewed as an "agency action" as defined by the APA, it is not subject to judicial review. The Supreme Court has read the APA as embodying a "basic presumption of judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). However, the Supreme Court has made clear that, under 5 U.S.C. § 701(a)(2), agency action is not subject to judicial review "'to the extent that'" such action "'is committed to agency discretion by law.'" *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993). *Lincoln* is particularly relevant to demonstrating why this restructuring proposal is not subject to judicial review.

In *Lincoln*, the Supreme Court reasoned that the allocation of funds from a lump-sum appropriation is an "administrative decision traditionally regarded as committed to agency discretion." *Id.* at 192. "[A]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives," the APA gives the courts "no leave to intrude." *Id.* at 193. Where Congress appropriates lump-sum amounts without restricting statutorily what can be done with the funds, a clear inference arises that Congress does not intend to impose legally binding restrictions. *Id.* at 192. Thus, even if BIE's restructuring constitutes agency action in the first place, to determine whether the BIE's decision to conduct this restructuring of its management and administrative oversight functions is judicially reviewable under the APA, this Court must additionally look to the statutory authority governing the BIE's oversight and management of Indian educational programs. If no standard exists against to judge the agency's exercise of discretion in structuring its management plan, this Court lacks jurisdiction to review the plaintiffs' claim and must reject their challenge to the reasonableness of the restructuring. *Id.* at 192-93.

Like the plaintiff in *Lincoln*, CRST here seeks to dictate the BIE's allocation of lump-sum appropriations for the administration and oversight of Indian education programs, as well as staffing assignments and the location of offices. Statutes address Indian education in varying degrees of detail, such as restricting how and where funds can be expended, as well as the degree of consultation required before making changes in Indian school programs. *See e.g.*, 25 U.S.C. § 2005(f); *see also Yankton Sioux Tribe*, 442 F. Supp. 2d at 783 (reviewing consultation argument as APA claim). But none of them limits how the BIE can oversee the operation of these programs, or, more to the point,

where the BIE can locate offices and assign staff.[17] In sum, defendant is not aware of any applicable provision of Title 25 that creates a legally binding obligation to operate any particular ELO, or provides a court with any judicially manageable standard for determining whether BIE's decision to adopt a particular organizational structure of offices and staff can be ruled arbitrary and capricious. Therefore, BIE's decision to restructure is committed to its discretion by law, 5 U.S.C. § 701(a)(2), and therefore not subject to judicial review.

C. CRST's Vague Trust and Treaty Allegations Fail to State a Claim Upon Which Relief Can Be Granted

CRST alleges in conclusory fashion that Defendants "failed to provide any Tribe with the actual costs of restructuring, or the source of funds for the proposed restructuring," and therefore "violated [their] fiduciary trust obligations . . . to account for the use of Program funds." Compl. ¶¶ 88-89. As discussed above, CRST was informed that the restructuring is "budget neutral" and was given information about the sources of the funds. *See supra* at 28. In any event, although "[t]here is a general trust relationship between the United States and the Indian People[,] . . . that relationship alone does not suffice to impose an actionable fiduciary duty on the United States." *Ashley v. U.S. Dep't of Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (citation omitted). "[T]o establish a trust duty, the plaintiff[] 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Sisseton-Wahpeton Oyate v. Dep't of State*, 659 F. Supp. 2d 1071, 1083 (D.S.D. 2009) (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)). CRST

[17] DOI has general restructuring authority under the Restructuring Plan of 1950, 64 Stat. 1262.

fails to identify a substantive source of law establishing the alleged fiduciary duty or offer any factual allegations showing that it was violated.

CRST's string cite of statutes that it cursorily alleges were violated cannot revive its claim. *See* Compl. ¶ 89; *see Iqbal*, 556 U.S. at 678 (holding that Rule 8's pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). These statutes do not impose a duty on Defendants to reveal the "actual costs" or "source of funds for the proposed restructuring." *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011) ("The trust obligations of the United States to Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law."). Indeed, these statutes appear irrelevant to the dispute here. For example, 25 U.S.C. § 2005(f) provides that funds for the construction, operation, repair, and maintenance of facilities cannot be used to pay for administrative costs. But CRST has not alleged that Defendants used these funds in violation of that mandate. *See Yankton Sioux Tribe*, 442 F. Supp. 2d at 786. At bottom, "[t]he Tribe's vague allegation that the government violated its federal trust responsibility is not sufficient to state a claim." *Yankton Sioux Tribe v. U.S. Dep't of Health & Human Servs.*, 533 F.3d 634, 644 (8th Cir. 2008).

Nor has Plaintiffs pleaded a plausible violation of the Fort Laramie Treaty of 1868. As a threshold matter, CRST has not shown a waiver of sovereign immunity for this claim in this Court. *E.g.*, *Skokomish Indian Tribe*, 410 F.3d at 511 (transferring breach of treaty claim to Court of Federal Claims). In any event, CRST has not alleged a plausible violation of this treaty. It asserts that BIE's plan to create an Office of

Sovereignty and Indian Education and to support schools—instead of operating them—violates Article VII. Compl. ¶¶ 50-51. These assertions have no basis in the treaty's text, which simply states that "a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished." Fort Laramie Treaty of 1868 ("Treaty"), April 29, 1868, 15 Stat. 635. *See Garreaux v. United States*, 77 Fed. Cl. 726, 737 (2007) ("Although it is true that the Court is to construe treaties liberally, resolving ambiguities in favor of the Indians, the Court cannot rewrite or expand treaties beyond their clear terms to remedy a claimed injustice."). Moreover, if the proposed reorganization is implemented, BIE will continue to fund, support, and operate schools. The reprogramming is designed to *strengthen* education, not abandon it.

The Tribe also alleges that Defendants will breach the treaty because there will be no "local office" responsible for educational services. Compl. ¶ 90. This ignores the proposed reorganization's call for four ERCs and five support centers in the Dakotas. In any event, the treaty never mentions such a "local office." Although the Tribe appears to rely on Article V, that provision does not discuss education and instead states that "United States agrees that the agent for said Indians shall in the future make his home at the agency-building" and will "keep an office open . . . for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented." Treaty, April 29, 1868, 15 Stat. 635. The BIA has such an office open in South Dakota. Bureau of Indian Affairs, http://www.indianaffairs.gov/WhoWeAre/RegionalOffices/GreatPlains/index.htm (last visited Dec. 17, 2015).

CONCLUSION

For all the reasons stated above, this action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6).

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Respectfully submitted,

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