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 **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO TRANSFER**

FACTUAL BACKGROUND

The Department of the Interior (hereinafter "DOI") is in the process of reorganizing the Bureau of Indian Education (hereinafter "BIE"). BIE is a subsidiary agency of DOI and is responsible for providing education to American Indian children residing on or near Indian reservations. 25 U.S.C. § 2000. Among its many congressionally mandated duties DOI is required to facilitate tribal control over matters involving the education of tribal members. 25 U.S.C. § 2011(a). To that end DOI is required to periodically engage in substantive and meaningful "consultation" with Indian tribes, including the Cheyenne River Sioux Tribe (hereinafter "CRST"). 25 U.S.C. § 2011(b).

In 2005 DOI, acting through the BIE, undertook a nationwide restructuring of Indian education, which ten Indian tribes and tribally-controlled schools opposed. *See* Complaint, ECF Doc. 1, *Yankton Sioux Tribe v. Kempthorne*, Case No. 4:06-cv-4091-KES (D. S.D.). In addition CRST, tribes and schools located within the jurisdiction of the Federal District Court for the District of South Dakota – Southern Division were also parties to the suit, resulting in suit being

filed in that court on December 22, 2005. *Id.* On July 14, 2006 Judge Karen Schreier issued a preliminary injunction enjoining Defendants from effectuating the proposed BIE restructuring. ECF Doc. 45, *Yankton Sioux Tribe v. Kempthorne*, Case No. 4:06-cv-4091-KES (D. S.D.). Parties to the suit entered into a Settlement Agreement on July 18, 2007. Ex. 1 to Compl.

The terms of the 2007 Settlement Agreement require BIE to maintain the six (6) existing Education Line Offices (hereinafter "ELOs") located in North and South Dakota. *Id.* at ¶ 2. Additionally, the 2007 Settlement Agreement also requires BIE to hire and maintain a staff of at least three employees at each of the six ELOs during the remainder of 2007 and to attempt to increase the total Dakota area staff to twenty-four (24). *Id.* at ¶ 4 - ¶ 5. After the Settlement Agreement was entered into by the parties Judge Schreier entered a Stipulated Final Judgment dismissing the action and retaining jurisdiction to enforce the terms of the Settlement Agreement. ECF Doc. 73, *Yankton Sioux Tribe v. Kempthorne*, Case No. 4:06-cv-4091-KES (D. S.D.).

In 2013 DOI formed the American Indian Education Study Group (hereinafter "Study Group"). Ex. 18 to Compl. After a series of six (6) listening sessions the Study Group issued a final report regarding Indian education. Ex. 9 to Compl. at 1; Ex. 23 to Compl. at 5; Ex. 16 to Compl. Based on the final report proffered by the Study Committee BIE subsequently decided to restructure the twenty-two (22) existing ELOs into fifteen (15) Educational Resource Centers (hereinafter (ERCs"), including four (4) ERCs in North and South Dakota. Ex. 29 to Compl. at 2 and 8. Beyond merely changing the name of the six (6) current ELOs, BIE's renewed attempt at restructuring would reduce the number of offices in the Dakotas by two (2), in contravention of the 2007 Settlement Agreement. Defendants now argue that the 2007 Settlement Agreement only applies to BIE's 2005 attempt to restructure. Defs. Mem. in Supp. of Mot. to Dismiss, 8; ¶2.

On October 2, 2015 CRST filed suit to prevent such restructuring. In its Complaint CRST asserts four distinct legal claims: (1) that BIE failed to substantively and meaningfully consult with tribes regarding the proposed reorganization (Count I); (2) that BIE's restructuring plan is arbitrary and capricious and otherwise in violation of the Administrative Procedure Act ("APA") (Count II); (3) that BIE is in breach of its trust responsibility and the Fort Laramie Treaty of 1868 (Count III); and (4) BIE is in substantial breach of the Settlement Agreement which was made between the parties in 2007 regarding BIE restructuring (Count IV). In addition, CRST is also currently participating in a multi-tribal effort opposing BIE's renewed effort to restructure in Judge Schreier's court located in the Southern Division.

STANDARD OF REVIEW

The Court has subject matter jurisdiction over all of CRST's claims. CRST presented the Court with four (4) counts in its Complaint, each of which states a legally cognizable claim for which the Court may provide relief. Defendants have moved to dismiss pursuant to Fed. R. Civ. Pr. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Motions brought pursuant to Rule 12(b)(1) may challenge a complaint on its face or on its factual truthfulness. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). When reviewing such 12(b)(1) motions the Court may consider matters outside of the Complaint. *Osborn v. United States of America*, 918 F.2d 724, 728-29 (8th Cir. 1990).

In order to survive Defendant's Rule 12(b)(6) motion CRST's Complaint merely needs to "…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)). When considering a Rule 12(b)(6) motion the Court must accept as true all of the factual allegations contained in CRST's Complaint, "no matter how skeptical the court may be." *Id.* at 1959.

I. THE ENTIRE ACTION SHOULD BE TRANSFERRED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA – SOUTHERN DIVISION.

CRST agrees with the Defendants to the extent that the Court should transfer this action to United States District Court for the District of South Dakota – Southern Division. Although CRST's Complaint in the instant matter includes four legally distinct claims and unique facts to the issues presently being litigated before Judge Schreier's Southern Division Court, there is some relationship between the two actions. Defendants ask the Court to **alternatively** grant transfer pursuant to 28 U.S.C. §1404(a). However, 28 U.S.C. § 1404(a) is an inappropriate statute to grant transfer. Specifically, 28 U.S.C. § 1404(a) is usually used to grant inter-district transfers and applies a heightened standard of analysis. Instead, CRST asks the Court to **first** consider CRST's Motion to Transfer pursuant to 28 U.S.C. § 1404(b), which is the statute governing intra-district transfers, and only reach the merits of Defendants' motion to dismiss should the Court decline to grant CRST's 1404(b) Motion to Transfer.

Motions for intra-district transfers pursuant to 28 U.S.C. § 1404(b) are discretionary transfers subject to the same analysis under 28 U.S.C. § 1404(a) but are judged by a less rigorous standard. *Cottier v. Schaeffer*, Civ. No. 11-5026-JLV, 2011 WL 3502491 at 1 (D.S.D. Aug. 10, 2011) (citing *Edwards v. Sanyo Mfg. Corp.*, No. 3:05CV00293 – WRW. 2007 WL 641412 at 1 (E.D.Ark. Feb. 27, 2007); *see also Johnson v. Burlington-Northern Inc.*, 480 F.Supp. 259, 260 (D.Mo.1979) (noting that 1404(b) intra-district transfers are subject to fewer guidelines than transfers under § 1404(a)). An analysis pursuant to 28 U.S.C. § 1404(a) requires the Court to consider (1) the convenience of the parties, (2) the convenience of witnesses, and (3) the interests of justice. *Terra Int'l Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 691 (8th Cir.1997). In addition, the Court may also consider other "relevant factors." *Id.* For the purposes of this memo the first

two factors will be analyzed together as they are closely related. Applying a 1404(b) analysis reveals that the Court should grant CRST's Motion for Transfer and Defendants' alternative request for transfer to the Southern Division.

A. Transfer of the entire action would be the most convenient outcome for the parties and for witnesses.

Transferring the entire action to the Federal District Court for the District of South Dakota – Southern Division is the most convenient option for both the Defendants and CRST. When evaluating the two convenience factors in a transfer analysis Courts should consider: (1) convenience of the parties, (2) convenience of the witnesses, (3) the accessibility of records and documents, (4) the location where the conduct complained of occurred, and (5) the applicability of each forum state's substantive law. *Terra Int'l.*, 119 F.3d at 696; *Crabb v. Godaddy.com, Inc.*, No. 07-CV-4040 2010 WL 5890625 at 2 (W.D.Ark. Mar. 29, 2010). Since the last factor does not apply to the instant matter it will be omitted.

1. Transfer is convenient for the parties.

Both the Defendants and CRST are already parties to ongoing litigation regarding issues related to BIE's attempt to restructure in Judge Schreier's court in the Southern Division. As Defendants aptly point out in their motion to dismiss, the issue of convenience has already been fully briefed in the Southern Division's ongoing court action. Defs. Mem. in Supp. of Mot. to Dismiss, 17. CRST agrees that litigating these interrelated yet distinct claims is inconvenient for both the Defendants and for CRST. Indeed it appears as though there is no dispute between the parties that the convenience of parties factor weighs in favor of transfer.

2. Transfer is convenient for potential witnesses.

Defendants and CRST similarly agree that it would be more convenient for witnesses to transfer to the Southern Division. Defendants and CRST are already parties to the separate

litigation pending before Judge Schreier's court. Due to the interrelated nature of the claims in that action and the instant matter, there will likely be a degree of overlap when it comes to the witnesses proffered by each party. Once again Defendants and CRST are in agreement that the convenience of witnesses factor weighs in favor of granting a transfer. *See Id.*

3. Records and documents may be more accessible in the Southern Division.

Defendants do not address the records and documents factor in their motion to dismiss. Nonetheless this factor likewise seems to weigh in favor of transfer. As stated earlier the particular claims presented to the Court in CRST's Complaint share a degree of relation to the issues presented before Judge Schreier's court. It may be that many of the records and documents being used in that litigation would be helpful in disposing the claims at issue in the instant matter. Transferring makes sense as it may make some of the documents in the Southern District case more readily obtainable to the parties in this action.

4. The location of conduct factor is neutral.

The location of conduct could reasonably construed as either Washington D.C., where DOI headquarters is located, or throughout all of South Dakota, where current ELOs will be restructured. In either instance the location of conduct factor is neutral; neither weighing in favor of nor weighing against transfer. Nonetheless, the combined weight of the convenience factors decisively weighs in favor of transfer to Judge Schreier in the Federal District Court for the District of South Dakota – Southern Division.

B. Transfer of the entire action would be in the best interests of justice.

Granting transfer of the entire action is in the best interests of justice. When evaluating whether a 28 U.S.C. § 1404(b) transfer is in the interests of justice the Court should consider: (1) judicial economy, (2) the Plaintiff's choice of forum, (3) the comparative costs to the parties in

each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law. *Terra Int'l.*, 119 F.3d at 696; *Great America Leasing Corp. v. Avery Air Conditioning/Heating & A-ABACA Services, Inc.*, No. 11-CV-66-LRR 2012 WL 443586 at 8 (N.D. Iowa. Feb. 10, 2012); *High Plains Const., Inc. v. Gay,* 831 F.Supp.2d 1089 (S.D. Iowa Dec. 21, 2011). Since factors 5, 6, and 7 do not apply to the instant matter they will be omitted.

1. It is judicially efficient to transfer the entire action to the Southern Division.

CRST's claims are not duplicative; however, they share some relationship with the issues being litigated before the Federal District Court for the District of South Dakota – Southern Division. Due to the peripheral commonality of the issues in these separate actions it makes sense to have one court examine and rule on all of the issues. Of course this fact alone does mean that the Southern District is more favorable than this Court. However, as Defendants highlight in their motion to dismiss, Judge Schreier has presided over the other issues since their inception in 2005. Defs. Mem. in Supp. of Mot. to Dismiss, 18. As such, Judge Schreier's familiarity with the related issues weighs strongly in favor of transferring the instant action to her court.

2. CRST believes that it was required to initially file its Complaint with this Court but would prefer to litigate its claims before Judge Schreier.

Though the issues in *Yankton Sioux Tribe* are similar to the claims pleaded in CRST's Complaint, they are nonetheless distinct and have a slightly differing factual background. Whereas in *Yankton Sioux Tribe* CRST was but one party among many, some of whom resided within the Southern Division, in the instant action CRST is the only Plaintiff. CRST is of the opinion that it was required to initially file its complaint with this Court. However, for the sake of efficiency CRST would prefer to litigate before the court in the Southern Division. Meaning

the in-fact forum of choice of the Plaintiff in the instant issue is the Southern Division, which weighs the second factor in favor of transfer.

3. It is cost efficient to transfer the entire action to the Southern Division.

Presently both the Defendants and CRST are financing two distinct yet interrelated legal actions in differing South Dakota Divisions. By granting a transfer pursuant to 1404(b) each party can avoid duplicative litigation costs. Indeed Defendants seems to agree with CRST on this point as well. *See* Defs. Mem. in Supp. of Mot. to Dismiss, 17 (reasoning that litigating twice is costly). As such this factor too weighs in favor of granting transfer.

4. Ability to enforce a judgment factor is neutral.

Both this Court and Judge Schreier's Court in the Southern Division are equally capable of enforcing their own judgments. Defendants do not assert otherwise, nor does CRST. Accordingly this factor is neutral. However, it is readily apparent that the bulk of the other interest of justice factors weigh strongly in favor of transferring the entire action to the Federal District Court for the District of South Dakota – Southern Division. As such the Court should grant 1404(b) transfer to the Southern Division.

II. THE BREACH OF SETTLEMENT CLAIM SHOULD NOT BE DISMISSED.

Defendants argue that the Court should dismiss CRST's Settlement Agreement claim pursuant to Fed. R. Civ. Pr. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Specifically, Defendants claim that (1) the Court lacks subject matter jurisdiction because DOI is immune from CRST's suit and (2) the Court should dismiss because CRST's Settlement Agreement claim is duplicative. These arguments are not persuasive and the Court should reject Defendants' motion to dismiss.

A. The Court has subject matter jurisdiction to resolve CRST's breach of Settlement Agreement claim.

CRST has asked the Court for injunctive and/or declaratory relief enjoining the United States from closing the six (6) Dakota ELOs and reducing the staff at each office. Compl. at 26-27, ¶ 95. In addition, CRST has also asked that the Court grant a Writ of Mandamus keeping each of the Dakota ELOs open and fully staffed. *Id.* at 27-28, ¶ 98. In support of its requests for relief CRST alleges that the BIE's restructuring would violate "…25 U.S.C. § 44-46; 25 U.S.C. § 2014; 25 C.F.R. § 38.13 **and** the explicit terms of the Settlement Agreement" *Id.* at 27, ¶ 97 (emphasis added).

Defendants are correct that waiver of sovereign immunity is a jurisdictional prerequisite for suits against the United States. *Winnebago Tribe of Nebraska v. Babbitt*, 915 F.Supp. 157 (D.S.D.1996) (citing *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Essentially, CRST's prayer for relief regarding its Settlement Agreement claim merely seeks to compel DOI's officers to perform ministerial duties that are owed to the CRST. Sovereign immunity does not apply in "…suits for specific relief against officers of the [United States] which are not suits against the sovereign." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). This is precisely what CRST alleges against the Defendants. The restructuring at issue in this matter was initiated by Secretary Jewell, Assistant Secretary Washburn, and Director Charles Rossel. CRST alleges that the closing of Dakota ELOs and reduction in ELO staff without substantive and meaningful consultation is a violation of the terms of the 2007 Settlement Agreement and beyond the scope of their authority. If it is established that the restructuring is indeed beyond the scope of their authority, sovereign immunity would not bar CRST's claims for relief regarding its Settlement Agreement claim.

Also, this district has previously stated that sovereign immunity does not bar claims which are not "affirmative" in nature but instead merely order government officers to cease

unauthorized actions. *Winnebago*, 915 F.Supp. at 163-64 (citing *Coomes v. Adkinson*, 414 F.Supp. 975, 982 (D.S.D.1976). The issue in Winnebago is strikingly similar to the instant matter. In that case the Winnebago Tribe filed suit against the Secretary of Interior and asked the court for permanent injunctive relief and a writ of mandamus enjoining DOI from implementing a hiring freeze prior to substantive and meaningful consultation. *Id.* at 160-61. The Court agreed and held that the relief that was sought by the Winnebago Tribe did not, in any way, affect the sovereign power of the United States, and as such, sovereign immunity did not bar the tribe from obtaining its requested relief. *Id.* at 164. The relief sought by CRST in the instant matter is substantively no different than the relief sought in *Winnebago*. Should the Court ultimately grant CRST the relief that it seeks the sovereign power of the United States would likewise be unaffected.

Even if the Court were to rule that CRST's Settlement Agreement claim is not confined to constraining DOI officers from wrongful conduct and that the relief sought would affect the sovereign power of the United States, the Court should still dismiss Defendants' motion because sovereign immunity is waived by the Administrative Procedures Act (hereinafter "APA"). *See* 5 U.S.C. §§ 701-706. Plaintiffs who suffer a legal wrong because of an agency action are entitled to judicial review. 5 U.S.C. § 702. The APA acts as a broad waiver of sovereign immunity in cases which challenge an agency's action. *Black Hills Institute of Geological Research v. South Dakota School of Mines and Tech.*, 12 F.3d 737, 740 (8th Cir.1993). In addition, the Eighth Circuit construes § 702 waivers as not being limited to suits brought under the APA. *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir.1988). As such, the Court should construe the APA as a clear and unambiguous waiver any immunity that may have been enjoyed by DOI regarding CRST's Settlement Agreement claim.

B. CRST's breach of settlement claim is not duplicative.

Count IV of CRST's Complaint is not duplicative. Although Count IV is interrelated to the enforcement action pending before Judge Schreier's Court, the two claims nonetheless rely on separate and distinct legal theories. Moreover, Defendants' argument relies on the Eighth Circuit's holding in *Blakley v. Schlumberger Technology*. Generally the holding in *Blakely* asserts that plaintiffs "should not be" allowed "to litigate **the same issue** at the **same time in more than one federal court**." *Blakley v. Schlumberger Technology Corp.*, 648 F.3d 921, 932 (8th Cir. 2011). Defendants' argument that *Blakely* and cases like it prohibit the Court from entertaining Count IV of CRST's Complaint fails because (1) the issue before Judge Schreier's Court and the claim at issue in the instant matter are not the same and (2) the Settlement Claim at issue in the instant matter need not be litigated at the same time in a different court than the Southern Division.

1. Count IV is a distinct cause of action from the related Settlement Agreement issue being litigated in the Southern District.

The matter before the Southern District is materially distinct from Count IV in CRST's Complaint. Instead of being an agreement to dismiss litigation between the parties involved in *Yankton v. Kempthorne et al.*, for which the Southern Division expressly retained jurisdiction to enforce, Count IV relies on a breach of contract theory. To be sure the two theories are interrelated to the extent that they rely on the same and/or similar factual circumstances. Nonetheless, they are predicated on entirely dissimilar legal theories. They are not, as was the case in *Blakely*, identical causes of action brought at the same time in two separate courts.

2. Count IV of CRST's Complaint need not be litigated in this Court at the same time as the related claim is being litigated in the Southern Division.

As illustrated at great length above, CRST would prefer to litigate all four counts contained in its Complaint before Judge Schreier in the Southern Division. The practical effect that granting CRST's Motion for Transfer pursuant to 28 U.S.C. § 1404(b) would be to eliminate entirely the Defendants' objection that Count IV is a duplicative claim being litigated in two federal courts at the same time. If anything the Defendants' duplicative litigation argument contained in their motion to dismiss should substantially reinforce the merits of CRST's Motion for Transfer.

III. THE CASE IS RIPE FOR JUDICIAL REVIEW

Defendants contend that this case should be dismissed on ripeness grounds because their reorganization of the BIE is only "proposed" and "planned" at this point, and because the plan is not yet final until it has been approved by the Senate Appropriations Committee. It is clear that the Defendants are saying one thing and doing another with regard to this "proposed" organization, however, and for that reason Plaintiff can show that this case is ripe for review.

Defendants correctly cite the legal rule for determining whether a claim is 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 rationale for the ripeness requirement is "to prevent 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 and 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)). In essence, the test for this Court is whether (1) the instant claim is fit

for judicial resolution, and (2) plaintiffs will experience hardship if the court withholds consideration of the case's merits. *Missouri Soybean Ass'n v. U.S. E.P.A.*, 289 F.3d 510, 512 (8th Cir. 2002).

In the related case pending in the Southern Division of the U.S. District Court for the District of South Dakota, *Yankton Sioux Tribe, et al., v. Kempthorne, et al., supra*, the attached Affidavits, Exhibit #1, were submitted by Dr. Cherie Farlee, Education Director for the Cheyenne River Sioux Tribe, as well as by other employees of Tribal educational offices from other Tribes in the Great Plains Region. Collectively, these affidavits illustrate exactly what is happening on the ground. Contrary to Defendants' claim that this restructuring is merely proposed, and without reprogramming of appropriations or new appropriations, the BIE has already essentially moved or has begun to move ELO facilities and personnel to its urban center near Minneapolis, Minnesota.

In her affidavit, Dr. Farlee states, first, that "That the Education Line Office (ELO) which serves the Cheyenne River Sioux Tribe no longer exists." Ex. 1, Dr. Cherie Farlee Affidavit, at ¶ 3. Dr. Farlee also states that "there are seven (7) Tribal Early Childhood Special Education employees using the building. The Tribe, through an Intergovernmental Agreement that preexisted my becoming the Education Line Officer years ago, requested to have the Infant/Toddler Program supervised by the Cheyenne River ELO. The Tribe reimburses the government for the Infant/Toddler costs. This is not a Self-Determination contract, but a longstanding intergovernmental agreement that is not related to Education and Administration and ELO functions. The current program is located in Eagle Butte, they are not Education Line Office employees. The three (3) funded ELO positions are no longer occupied and the Cheyenne River ELO office no longer is open." *Id.* She also states that "the Infant/Toddler program has

been transferred to the Associate Deputy Director East of the BIE now. These employees do not work with or provide any support services for the tribal schools." *Id.*, at ¶ 4. She also goes on to state that "There are no Title V education and administrative employees and no Indian Self-Determination and Education Assistance Act (ISDEAA) employees at what was formerly known as the Cheyenne River Education Line Office. We do not have a current Line Officer who works on the Cheyenne River Sioux Reservation. If we need something from the Bureau of Indian Education, we have to call Rosie Davis, the Associate Director for this area, in the Minneapolis, Minnesota area." *Id.*, at ¶¶ 5-6.

The ELO at Rosebud has been completely closed since July 1, 2015, and files have been transferred to Minneapolis, Minnesota or Pine Ridge, South Dakota. The Rosebud Indian Reservation no longer has an Education Line Office located there. Ex. 1, Affidavit of Cindy Young, at ¶ 3. Director Young also states that the Rosebud Education Line Office is closed and if the Tribe's Education Department needs assistance, it must call the BIE offices now located at or near Minneapolis, Minnesota. *Id.*

"The Sisseton/Lower Brule/Crow Creek Education Line Office is closed, and there are no more offices located at any of the three tribes formerly served by this Education Line Office." Ex. 1, Affidavit of Sherry Johnson, Ed.D., at ¶ 3. Dr. Johnson also states that "[i]f we need something from the Bureau of Indian Education, we have to call Rosie Davis, the Associate Director for this area, in the Minneapolis, Minnesota area." *Id.*, at ¶ 4. In addition, Dr. Johnson states that in fact, at least one or more Line Officers (Charmaine Weston, ostensible Line Officer for Sisseton/Crow Creek/Lower Brule) – are already working *from Minneapolis* in their function as Line Officer for various tribes in the Dakotas. Sherry Johnson Affidavit, ¶ 8.

This last statement is supported by a memo dated December 31, 2015, Exhibit #2, that was recently sent to Tribal schools and education departments, informing them of their assigned Acting Education Line Officers for their tribally-controlled grant schools. It is noted that the ELO for Takini School and Tiospaye Topa School, both tribally-controlled grant schools located on the Cheyenne River Sioux Reservation, is Rosemarie Davis, who is located in the Bloomington, MN, office of BIE and whose title is "Interim Associate Deputy Director, Tribally Controlled Schools."

If this reorganization is only "proposed" and not yet final, then how and why is Ms. Davis purporting to be the ADD – Tribally Controlled Schools? Defendant's Motion to Dismiss at 4. And why are many ELOs in the Great Plains Region closed? Ex. 1. There is a clear inference that the Education Line Office closures are deliberate – part of a persistent effort by the BIE to ignore its duty to meaningfully consult with Plaintiff and other Tribal Nations and to realize, before it has been approved by the Congress, its effort to restructure and reorganize the BIE. The facts on the ground appear to belie the assurances given by the Defendants that their action is only proposed and not final.

Even though the proposed reorganization has not been approved by both houses of Congress as required by 160 Cong. Rec. at H971; 160 Cong. Rec. at H9759, there is overwhelming evidence that Defendants have already undertaken some of the realignment that they say is merely being requested at this point. This is not a situation in which there are some anticipated future events which may or may not come to pass - the restructuring has taken and is taking place now, and it is creating a hardship on the Cheyenne River Sioux Tribe. These events are even more egregious considering the fact that in its conditional approval of the BIE's reprogramming request, the House Appropriations Committee mandated as its first condition,

"That every effort be made not to proceed with components of the reorganization at the field office level that may be directly impacted by pending litigation." Exhibit #3, Letter from Hon. Ken Calvert and Hon. Betty McCollum, House Committee on Appropriations, to Hon. Sally Jewell, U.S. Secretary of Interior, at Enclosure A Paragraph 1 (December 18, 2015).

As described in the Affidavit of Dr. Cherie Farlee, Exhibit #4, the Cheyenne River Sioux Tribe and its schools are suffering since the BIE has moved its ELO functions to Minneapolis. There has been no technical assistance provided to Plaintiff's schools for over two years. Ex. #4, Affidavit of Dr. Cherie Farlee, ¶7. Takini School and Tiospaye Topa School's Indian Student Equalization Program (ISEP) fund review audit has been delayed twice because BIE's staff has had to cancel their trip from Minneapolis due to delay in having their travel authorized. *Id.* Fund distribution documents are not being sent to the Tribe in a timely fashion, or in some cases at all, by the ELO in Minneapolis. *Id.* In each of these situations, the Tribe has not received support from BIE (financial and technical). All of these delays and oversights never would have happened if the restructuring was truly only speculative. *Id.* At ¶8. If the ELO on Plaintiff's reservation had not been closed (or allowed to become unstaffed) by Defendants, none of these financial and administrative hardships would have happened.

The BIE *has* been taking final action without prior Congressional approval, and the Cheyenne River Sioux Tribe's claim *is* ripe for judicial review. *Missouri Soybean Ass'n v. U.S. E.P.A.*, 289 F.3d at 512.

IV. THERE EXISTS A COGNIZABLE FAILURE-TO -CONSULT CLAIM

Defendants contend that Plaintiff has failed to plead a cognizable consultation claim because, inter alia, (1) the BIE engaged in extensive consultation with all interested parties,

including the Plaintiff, (2) the BIE provided sufficient time for the Plaintiff to provide input, and (3) Plaintiff did in fact provide input into the proposed restructuring.

In order to survive Defendant's Rule 12(b)(6) motion CRST's Complaint merely needs to "…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)). When considering a Rule 12(b)(6) motion the Court must accept as true all of the factual allegations contained in CRST's Complaint, "no matter how skeptical the court may be." *Id.* at 1959.

As to consultation with Indian Tribes, Defendants are not only held to the requirements of 25 U.S.C. §2011(a) and (b), but also to their own consultation policy. That policy provides that:

> "Consultation" means a process of government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input. Consultation includes that Indian tribes are:
>
> 1. To receive timely notification of the formulated or proposed Federal action;
>
> 2. To be informed of the potential impact on Indian tribes of the formulated or proposed Federal action;
>
> 3. To be informed of those Federal officials who may make the final decisions with respect to the Federal action;
>
> 4. To have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision; and
>
> 5. To be advised of the rejection of tribal recommendations on such action from those Federal officials making such decisions and the basis for such rejections.

> Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability.
>
> BIA Government-to-Government Consultation Policy. Complaint Ex. 30 at Section IV.

Defendants assert that the Tribe was given sufficient time and opportunity to provide input on this major management reorganization at the BIE, Defendants Motion to Dismiss at 22-23. They argue that there is no minimum number of days required to be given to Tribes prior to implementing an agency action. However, their own consultation policy contradicts that assertion. It says that Indian tribes have a right "to receive *timely* notification of the formulated or proposed action." While it may be the government's opinion that nine days' notice prior to beginning a major restructuring of a federal agency crucial to Indian tribes is adequate time and opportunity to consult,[1] the Tribe adamantly disagrees with this position. That this is not meaningful consultation.

Nor is it meaningful consultation for the government to simply choose to disregard tribal input into a proposed restructuring without at least responding with the decision makers' reasons for rejecting a tribe's input. Complaint at ¶¶26, 27, 32, 43, 45, 51; Complaint Ex. 5, 12, 14. Indeed the BIA Government to Government Consultation Policy, requires that Indian Tribes are "to be advised of the rejection of tribal recommendations on such action from those Federal officials making such decisions and the basis for such rejections." Complaint Ex. #30 at Section IV subparagraph 5. To simply ignore Tribal input is not meaningful consultation.

[1] In section III, *supra*, and in the Complaint ¶¶54-55, the Tribe has shown that, despite the Defendant's claim to the contrary, in actuality the restructuring did begin within days after Secretary Jewell issued her Secretarial Order #3334 in June 2014. *See also*, Ex. #4, Affidavit of Dr. Cherie Farlee at ¶5.

Finally, the Defendants have incorrectly put words in Plaintiff's mouth in an apparent effort to show that the Cheyenne River Sioux Tribe was (1) meaningfully consulted, Motion to Dismiss at 22-23, 25, and that the Tribe (2) was in agreement with the restructuring so long as an ERC would be located at Pine Ridge, *Id.* at 25. Both of these insinuations distort the truth. While Defendant Roessel did travel to the Cheyenne River Sioux Reservation in February 2015 in an attempt to meet with Tribal leaders, he was specifically told that any time spent with Tribal leaders was not "consultation." The meeting consisted of Defendant Roessel showing to several Tribal representatives the same set of handouts similar to those attached to the Complaint as Exhibit 20. For the Defendants to now state that this brief meeting was "consultation" is untrue because it in no way met the mandates of 25 U.S.C. §2011 or the BIA Government to Government Consultation Policy. *See State of Wyoming, et al., v. United States Department of Interior, et al.,* Case No. 2:15-CV-043-SWS, 36-39 (D. Wyo. Sept. 30, 2015) (Order granting preliminary injunction to tribal petitioners because federal government failed to meaningfully consult when "consultation" sessions were more informational and focused more on "discussion" rather than tribal concerns.)

Nor does the fact that the Plaintiff submitted written requests for additional information about the proposed restructuring constitute meaningful consultation. To draw the conclusion that the Tribe was meaningfully consulted because it asked for additional information is completely baseless.

Plaintiff has never agreed to or requested that an ERC be located on the Pine Ridge Reservation. ("For example, BIE specifically took into account and incorporated CRST's request that an administrator position remain at the Pine Ridge ELO." Motion to Dismiss at 25) Any statement or insinuation to that effect is simply untrue. In support of this erroneous

contention, Defendants cite to their own letter dated July 16, 2015, and addressed to Plaintiff's attorney (Complaint Ex. 28). A careful reading of that letter does *not* support Defendants' claim that, as proof of Plaintiff's participation in a meaningful consultation process, the Plaintiff asked for (and was granted) an ERC to be located at Pine Ridge. The Cheyenne River Sioux Tribe has *never* requested or asked, as part of a consultation or otherwise, that an education office be located on the Pine Ridge Reservation. Such a claim is completely irrational and without support anywhere in the record.

What the record does show, however, is the execution of a plan that was developed without adequate consideration of Tribal concerns and without extra, meaningful efforts to involve the Plaintiff or any other Tribe who expressed a desire to keep their Education Line Office open. If a tribe's input into the plan did not fit nicely into the grand scheme, it was summarily ignored by the Defendants. The decision makers within the federal government created their own vision for the BIE and began marching on it without meaningfully heeding serious and legitimate concerns raised by the Plaintiff about the plan's effects on Indian education at the local level. The brazen execution of this plan - without Congressional approval – has harmed and will continue to harm the youngest members of the Cheyenne River Sioux Tribe until it is halted and the Defendants are made to acknowledge and account for Plaintiff's concerns.

V. DEFENDANTS HAVE ACTED ARBITRARILY AND CAPRICIOUSLY BY CARRYING OUT THEIR "PLAN" WITHOUT CONGRESSIONAL APPROVAL AND WITHOUT MEANINGFUL TRIBAL CONSULTATION

As Plaintiff has shown, Defendants have begun implementing their restructuring plan without Congressional approval. *Supra* at 13-17. Although Defendants claim there has been no final agency action, the facts show otherwise. *Id.* On its face and as applied, Defendant Jewell's

Secretarial Order #3334 constituted final agency action as the Supreme Court contemplated in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). Defendants' attempts to portray their own self-described "major management restructuring" as akin to the manner in which an agency simply implements its programs misses the mark. In the process of "merely alter[ing]" the way in which it will carry out its responsibilities to provide educational services to Indian children, Plaintiffs have shown that Defendants in fact created a clear and binding negative effect on the very constituents whose educational futures it its responsible for protecting.

A significant basis for this case is that the federal government once again has failed to meaningfully consult with the Plaintiff before undertaking major federal action that resulted in hardship to the Plaintiff and its youngest citizens. Contrary to Defendants' assertions,

> [t]he case at bar involves more than a challenge to a reallocation of funds from a lump sum appropriation. Here, federal statutes and BIA policies require the BIA to consult with Tribes before making changes in Indian school programs. … The explicit language of these statutes, regulations, and policies indicates an intent to confer important procedural benefits upon the tribes in the face of agency discretion and thus the agency action is subject to judicial review.

Yankton Sioux Tribe v. Jewell, 442 F. Supp. 2d 774, 783; *see also, e.g., Yankton Sioux Tribe v. U.S. Dep't of Health Human Services,* 869 F. Supp. 760, 765 (D.S.D. 1994) (distinguishing the Lincoln case cited by Defendants involving alleged failure to comply with statute requiring tribal consultation before expending IHS construction funds).

This case is, therefore, subject to judicial review under the APA because the government has initiated final agency action without first engaging in meaningful tribal consultation.

CONCLUSION

For all these reasons Plaintiff asks the Court to first consider CRST's Motion to Transfer pursuant to 28 U.S.C. § 1404(b), which is the statute governing intra-district transfers, and only

reach the merits of Defendants' motion to dismiss should the Court decline to grant CRST's 1404(b) Motion to Transfer. Should the Court decide to retain this case in the Central Division, then the Defendants' Motion to Dismiss should be denied for the reasons discussed herein.

Dated: January 15, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016, I electronically filed the Plaintiff's Response to Defendants' Motion to Dismiss and Memorandum in Support of Plaintiff's Motion to Transfer with the Clerk of the Court through the CM/ECF system, which will send notice of such filing to all registered participants.

/s/ Tracey Zephier
Tracey Zephier
Attorney for the Cheyenne River Sioux Tribe