UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHEYENNE RIVER SIOUX TRIBE, Plaintiff, and ROSEBUD SIOUX TRIBE, Intervenor Plaintiff, vs. RYAN ZINKE, Secretary of Interior, UNITED STATES DEPARTMENT OF INTERIOR, UNITED STATES BUREAU OF INDIAN EDUCATION, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs of the United States Department of Interior, or his Successor in Office, and CHARLES ROESSEL, in his official capacity as Director of the Bureau of Indian Education, or his Successor in Office, Defendants.	3:15-CV-03018-KES MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF'S AND INTERVENOR PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

On October 10, 2015, plaintiff, Cheyenne River Sioux Tribe (CRST), filed a complaint seeking injunctive relief, declaratory relief, and a writ of mandamus, that would preclude defendants from carrying out plans to restructure the Bureau of Indian Education (BIE). Docket 1. Defendants moved

to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Docket 14.

On September 9, 2016, this court issued an opinion and order granting in part and denying in part defendants' motion to dismiss. Docket 31; *Cheyenne River Sioux Tribe v. Jewell*, 205 F. Supp. 3d 1052 (D.S.D. 2016). In the order, the court concluded that CRST plausibly alleged the following claims: (1) that defendants failed to consult with the Tribe in an open, government-to-government discussion on the proper means of BIE reform as required under 25 U.S.C. § 2011 and the Bureau of Indian Affairs' (BIA) internal consultation policies; (2) that defendants acted arbitrarily and capriciously under the Administrative Procedure Act (APA) in carrying out the restructuring of the BIE; (3) that defendants breached their trust responsibility owed to CRST; and (4) that defendants breached their obligations owed to CRST under the 1868 Fort Laramie Treaty. The order dismissed CRST's claim alleging that defendants breached the settlement agreement entered into in *Yankton Sioux Tribe, et al. v. Kempthorne, et al.*, No. 4:06–CV–4091–KES, Docket 73.

On June 1, 2017, the Rosebud Sioux Tribe (RST) intervened as an additional plaintiff. Docket 53. RST's complaint raises the same claims as CRST's complaint, with the exception that RST's complaint omits the count alleging that defendants breached the settlement agreement from *Yankton*

Sioux Tribe, et al. v. Kempthorne, et al., No. 4:06–CV–4091–KES, Docket 73. Docket 53-1 (RST complaint).

Consistent with the parties' joint briefing schedule, CRST and RST (collectively "the Tribes") move for summary judgment or partial summary judgment. Dockets 76 and 82. Defendants responded to the Tribes' motions and filed a cross-motion for summary judgment. For the reasons that follow, the court denies the Tribes' motions for summary judgment and grants defendants' motion for summary judgment.

BACKGROUND

The undisputed facts are:[1]

The Tribes are both federally recognized Indian Tribes. CRST's principal headquarters are located in Eagle Butte, South Dakota. RST's principal headquarters are located in Rosebud, South Dakota. Defendant Ryan Zinke is Secretary of the Department of Interior (DOI). The BIE is a component of the DOI and is responsible for managing school systems on or near Indian reservations. The school systems serve over 40,000 American Indian students in 183 elementary and secondary schools. Defendant Kevin Washburn was the Assistant Secretary for Indian Affairs and was responsible for overseeing the reorganization of the BIE. Defendant Charles Roessel was the Director of the BIE and a key part of the efforts to reorganize the BIE.

[1] The court draws facts from the administrative record and from the portions of the statements of undisputed material facts that are either not disputed or not subject to genuine dispute.

In September 2013, the then-Secretaries Sally Jewell of the DOI and Arne Duncan of the Department of Education, convened the American Indian Education Study Group. The Study Group had two main goals: research and diagnose challenges facing BIE funded schools, and recommend potential solutions to improve education in these schools. AR 0572.[2] To gather information on how to best carry out these goals, the Study Group visited various tribal schools and conducted six listening sessions across the country during the fall of 2013. AR 0540. At least one of these listening sessions, which included some site visits, was held in South Dakota. AR 0059-0070. The Study Group's initial visit to South Dakota also included individual meetings with both RST and CRST. AR 0059-0062 (notes from RST meeting); AR 0067-0070 (notes from CRST meeting). In addition to the listening sessions and site visits conducted by the Study Group, Assistant Secretary Washburn reached out to all employees at the BIE and set up an email account to take in feedback from teachers and administrators on their suggestions for reorganizing the BIE.[3] AR 0001-0002.

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[2] Defendants filed a certified copy of the administrative record for this matter on April 7, 2017. The record spans multiple docket entries and is over 4,000 pages long. The contents of the administrative record are bates stamped with the designation "CRST" followed by the document number. For the sake of convenience, the court will refer to the administrative record as "AR" and will cite the last four digits of the relevant page or pages. An index of the administrative record is filed at Docket 40-1 at 2-28.

[3] After the South Dakota listening sessions and site visits in October 2013, the Study Group received multiple comments and suggestions from tribal educators and tribal school officials in South Dakota during the late parts of

After gathering initial information, the DOI and BIE began setting up formal consultations with tribes to discuss the Study Group's findings. AR 0540-0541 (March 27, 2014, Federal Register notice of tribal consultations). On March 28, 2014, Assistant Secretary Washburn sent a letter to tribal leaders that detailed some of the developments that came from the Study Group's research. AR 0542-0544 (full letter with enclosure). Specifically, the letter identified the draft framework for four pillars of reform that were identified during the Study Group's listening sessions and site visits. The letter also notified tribes of four upcoming formal consultation sessions where tribes and individuals could comment on the Study Group's initial findings. The letter also invited tribes and tribal leaders to submit comments or concerns on the Study Group's initial findings to the Study Group by email, fax, or mail.

On April 17, 2014, before any of the four formal consultation sessions began, the Study Group released a draft report of the group's findings to help guide conversations during the tribal consultations. AR 0571-0601 (full draft report with appendices). This draft report identified the same four areas for reform that Assistant Secretary Washburn identified in his letter to tribal

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2013 and the early parts of 2014. *See, e.g.*, AR 0076-0079 (letter from superintendent of American Horse School); AR 0081-0083 (letter from superintendent Tiospa Zina Tribal School); AR 0094-0095 (letter from Sisseton Wahpeton Oyate Education Director); AR 0200-0204 (letter from the St. Francis Indian School); AR 0205-0217 (second letter from superintendent of American Horse School); AR 0223 (comment from chief school administrator of the Flandreau Indian School); AR 0260-0262 (comment from facility manager of the Pine Ridge Education Line office).

leaders.[4] *Compare* AR 0542 *with* AR 0573. Before creating this draft report, the Study Group had met in person with over 300 stakeholders and received nearly 150 email comments on the proposed restructuring. AR 0577.

The Study Group's first formal consultation was held on April 28, 2014, at the Loneman Day School, in Oglala, South Dakota. AR 0879-1176 (transcript of Loneman School consultation). Representatives from both RST and CRST attended the consultation. AR 0888; AR 0890. At the consultation, the attendees discussed the Study Group's initial findings and the four pillars for reform identified by the Study Group. Consultation attendees were also provided with a copy of the BIE's draft 2014-2018 strategic plan. The draft strategic plan was not provided to the Tribes before the Loneman School consultation.

After the Loneman School Consultation, the Study Group received feedback on the Study Group's draft report and the BIE's draft strategic plan from Tribes in the Dakotas. For example, on May 30, 2014, the Tribes responded through the Pierre Indian Learning Center, which adopted a resolution in opposition to the draft report and the draft strategic plan. AR 1680-1682. This resolution also adopted the response to the Study Group's

[4] The four areas for reform identified by the Study Group were: (1) Highly Effective Teachers and Principals; (2) Agile Organizational Environment; (3) Budget that Supports Capacity Building Mission; and (4) Comprehensive Supports through Partnerships.

draft report and the BIE's draft strategic plan put together by the Great Plains Tribal Chairman's Association (GPTCA). AR 1683-1714.

On June 2, 2014, the CRST Tribal Council issued its own resolution opposing the Study Group's draft report and the BIE's draft strategic plan. AR 1746-1751. And like the Pierre Indian Learning Center, the CRST Tribal Council's resolution also adopted the response to the Study Group's draft report and the BIE's draft strategic plan put together by the GPTCA.[5] *Id.* Also on June 2, 2014, the Study Group received separate feedback from the Sisseton Wahpeton Oyate, which also opposed the Study Group's draft report. AR 1796-1806.

The Study Group took the feedback it received during the listening and consultation sessions and incorporated those suggestions into a final report, which was released to the public on June 11, 2014. AR 1829-1895 (full report with appendices). The goal of the Study Group's final report was to give an in-depth analysis of the issues facing BIE funded schools and to present an analysis of the wide-range of primary and secondary data that the Study Group examined. AR 1830. This report, known as the "Blueprint for Reform," identified five areas for reform that the BIE should focus on during its

[5] The study group received a response similar to that of the CRST Tribal Council from the Little Wound School in Kyle, South Dakota. *See* AR 1795.

reorganization. AR 1830-1831. Four of these areas of reform were identified in the Study Group's draft report.[6] *Compare* AR 0573 *with* AR 1830-1831.

On June 12, 2014, then-Secretary Jewell issued Order No. 3334: "Restructuring the Bureau of Indian Education." AR 1896-1898. Order 3334 adopted the Study Group's findings developed from research, listening sessions, and consultation sessions, and was aimed at beginning to implement the Study Group's reforms "by redesigning and restructuring the BIE into an innovative organization that will improve operations for both tribally-controlled and BIE-operated schools." AR 1896.

As set forth in Order 3334, the restructuring of the BIE was to occur in two phases. *Id.* In Phase I, the BIE was to (1) establish a School Operations Division and (2) restructure the BIE by: (a) realigning three current Associate Deputy Directors (ADDs) to supervise different areas of the department, (b) transitioning the then-existing Education Line Offices (ELOs) into Education Resource Centers (ERSs), and (c) creating a new Office of Sovereignty and Indian Education. AR 1897. In Phase II, each office of the three ADDs was to create "School Support Solutions Teams" that would be responsible for providing greater local support to BIE funded schools. AR 1897-1898. Also in Phase II, the DOI would transfer resources to the BIE from the DOI and the BIA to provide financial support for the School Support Solutions Teams. *Id.*

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[6] The additional area for reform identified in the Study Group's final report was to "Promote Educational Self-Determination for Tribal Nations." AR 1831.

After Secretary Jewell's issuance of Order 3334, the BIE began to explore how to best implement the order. The method the BIE decided to follow was to hold additional national, regional, and individual tribal consultation sessions, and to engage stakeholders by holding monthly conference calls, conducting webinars, and meeting with large tribal groups. Specifically, between February and April 2015, the BIE held twelve regional and individual consultation sessions with tribes. AR 3518-3519. Of these twelve consultations, eight were with tribes located in the Dakotas. *Id.* The BIE held individual consultations with CRST on February 19, 2015, and with RST on March 26, 2015. AR 2190 (sign-in sheet from individual consultation with CRST); AR 2394-2396 (sign-in sheet from individual consultation with RST).

The eight individual tribal consultations were not the only contact the BIE had with the Tribes and other tribes from the Dakotas after the issuance of Order 3334. In fact, BIE officials met twice with the GPTCA, of which the Tribes and the rest of the tribes located in South Dakota are members.[7] Docket 97 ¶ 12; Docket 99 ¶ 12; Docket 101 ¶ 12. One of the BIE's meetings with the GPTCA was held in Watertown, South Dakota in June 2014. Docket 97 ¶ 12. The BIE also met with the Tribal Interior Budget Council (TIBC) during their

[7] Officials from the GPTCA also attended the formal consultation between the BIA and the Oglala Sioux Tribe on February 18, 2015 held in Rapid City, South Dakota. AR 2150-2153 (sign-in sheet from individual consultation with the Oglala Sioux Tribe).

meeting in May 2015. AR 3689-3735 (transcript of meeting). CRST's chairman represented the Great Plains region and participated at this meeting. AR 3709.

In April and May 2015, the BIE held an additional six national tribal consultations to discuss the BIE's proposed restructuring. AR 3518. One of these national consultations was held in Rapid City, South Dakota. AR 2454-2561 (transcript of consultation). CRST, RST, and the GPTCA each had representatives attend the consultation. AR 2581-2584 (sign-in sheet from Rapid City consultation). Connected with the national consultations, the BIE received nineteen comments and resolutions as to the proposed restructuring of the BIE. AR 3519.

Substantively, several changes to the BIE's proposed plans were the result of meeting with tribes in the Dakotas. For example, the idea to realign the ADDs by function instead of by region came from a meeting with tribes in the Dakotas. AR 1133 (testimony of Charles Roessel at the Loneman School consultation). And the decision to have an ERC located in Kyle, South Dakota, and not Rapid City or Pine Ridge, South Dakota, came from discussions with tribes in the Dakotas. AR 2502 (testimony of Charles Roessel at the Rapid City consultation in 2015).

After finishing the individual, regional, and national consultations with tribes, the BIE moved forward with attempting to gain approval from Congressional appropriations committees to allow the BIE to transform ELOs to ERCs. As such, the DOI began reaching out to members of the

appropriations committees in September 2015. *See, e.g.*, AR 3808-3813. Although approval from the Congressional appropriations committees came in early 2016, the approval came with the condition "[t]hat 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." AR 4114-4116.

LEGAL STANDARD

Generally, a motion for summary judgment may be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir. 2000). A factual dispute that does not rise to the level of materiality will not preclude summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Mosley v. City of Northwoods*, 415 F.3d 908, 910-11 (8th Cir. 2005). Rather, " 'the dispute must be outcome determinative under prevailing law.' " *Mosley*, 415 F.3d at 911 (quoting *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992)).

The general standard set forth in Rule 56 does not apply where, as here, the parties are seeking this court's review of an administrative decision. Thus, this court is guided by the standards provided in the APA. 5 U.S.C. § 706; *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004).

> Specifically, a motion for summary judgment . . . makes no procedural sense when a district court is asked to undertake judicial review of administrative action. Such a motion is designed to isolate factual issues on which there is no genuine dispute, so that the

> court can determine what part of the case must be tried to the court or a jury. Agency action, however, is reviewed, not tried. Factual issues have been presented, disputed, and resolved; and the issue is not whether the material facts are disputed, but whether the agency properly dealt with the facts.

Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n, 47 F. Supp. 3d 912, 918 (D.S.D. 2014) (citing *Lodge Tower Condo. Ass'n v. Lodge Props., Inc.*, 880 F. Supp. 1370, 1374 (D. Colo. 1995)); *see also N.C. Fisheries Ass'n v. Gutierrez*, 518 F. Supp. 2d 62, 79 (D.D.C. 2007). Consequently, a motion for summary judgment at this stage requires this court to determine "whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review" as a matter of law. *Brodie v. U.S. Dep't of Health & Human Servs.*, 796 F. Supp. 2d 145, 150 (D.D.C. 2011).

Under the relevant standards set by the APA, this court will set aside an agency's action only if its decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Sierra Club v. E.P.A.*, 252 F.3d 943, 947 (8th Cir. 2001) (citing 5 U.S.C. § 706(2)(A)). An agency decision fails the "arbitrary and capricious" standard if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). While this court's review of the facts before the agency " 'is to be searching and careful, the ultimate standard of review is a narrow one. The

court is not empowered to substitute its judgment for that of the agency.' " *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Thus, if the agency's decision "is supportable on any rational basis," it must be upheld. *Voyageurs*, 381 F.3d at 763 (citing *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1184 (8th Cir. 2001)).

Nonetheless, to pass scrutiny "[t]he agency must articulate a 'rational connection between the facts found and the choice made.' " *Bowman Transp.*, 419 U.S. at 285 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). And while a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given," the court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 285-86 (internal citations omitted). This court must confine its review to the administrative record as it existed at the time of the agency's decision, rather than a new record made for the first time before this court. *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Voyageurs*, 381 F.3d at 766 ("It is well-established that judicial review under the APA is limited to the administrative record that was before the agency when it made its decision." (citations omitted)).

The Eighth Circuit has recognized, however, that exceptions exist to the "general rule limiting APA review to the administrative record." *Voyageurs*, 381

F.3d at 766. "These exceptions apply only under extraordinary circumstances, and are not to be casually invoked unless the party seeking to depart from the record can make a strong showing that the specific extra-record material falls within one of the limited exceptions." *Id.* (citation omitted); *see also South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 803 (8th Cir. 2005) (stating that courts may look beyond the administrative record in cases where "a strong showing can be made that the record is so incomplete as to preclude effective judicial review or that there is clear bad faith or improper behavior."). "When there is 'a contemporaneous administrative record and no need for additional explanation of the agency decision, there must be a strong showing of bad faith or improper behavior before the reviewing court may permit discovery and evidentiary supplementation of the administrative record.' " *Voyageurs*, 381 F.3d at 766 (quoting *Newton Cty. Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807-08 (8th Cir. 1998)). Nevertheless, a court need not "blindly defer to an agency decision that is uninformed or unexplained." *Qwest Corp. v. Boyle*, 589 F.3d 985, 998 (8th Cir. 2009). Thus, where the explanation offered by an agency for its decision "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise[,]" *Sugule v. Frazier*, 639 F.3d 406, 411 (8th Cir. 2011) (internal quotation omitted), the court may look outside of the administrative record to determine if the agency's decision "is supportable on any rational basis[.]" *Voyageurs*, 381 F.3d at 763.

DISCUSSION

Here, the parties agree that BIE's present restructuring efforts are subject to judicial review under the APA. *See, e.g.*, Docket 90 at 12-13; Docket 98 at 5. In their motions for summary judgment, the Tribes raise two claims that the court must review under the APA specific standard of review described above. First, the Tribes argue that defendants violated their statutory and self-imposed obligations to meaningfully consult with tribes before formulating and implementing the proposed restructuring of the BIE. Second, the Tribes argue that defendants acted arbitrarily and capriciously when implementing the plans to restructure the BIE.

I. Consultation Claim

Standard principles of statutory interpretation do not have their usual force in Indian law cases. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985). The court must construe statutes liberally in favor of Indians, with ambiguous provisions interpreted in their favor. *Id.* The canons of construction applicable in Indian law are based on the unique trust relationship between the United States and Indian Tribes. *Id.* The court must construe federal statutes liberally in favor of the tribe and interpret ambiguous provisions to the tribe's benefit. *See Hagen v. Utah*, 510 U.S. 399, 411 (1994).

A. Consultation requirements

Here, federal statutes set out the baseline obligations of the BIA requiring consultation with tribes before taking actions affecting Indian education.

See 25 U.S.C. § 2011. "It shall be the policy of the United States acting through the Secretary, in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education." 25 U.S.C. § 2011(a). "All actions under this Act shall be done with active consultation with tribes. The United States . . . and tribes shall work in a government-to-government relationship to ensure quality education for all tribal members." 25 U.S.C. § 2011(b)(1).

The term " 'consultation' means a process involving the open discussion and joint deliberation of all options with respect to potential issues or changes between the Bureau and all interested parties." 25 U.S.C. § 2011(b)(2)(A). During discussion and deliberation, interested parties such as the Tribes must be given an opportunity

> (i) to present issues (including proposals regarding changes in current practices or programs) 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).

Under Executive Order 13175, the BIA has also adopted a set of internal policies to define the requirements for government-to-government consultation between tribes and the federal government for proposed federal actions

affecting tribes. Docket 1-30 (*BIA Consultation Policy*). The *BIA Consultation Policy* includes the following definition of consultation:

> "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 Consultation Policy.

Agency action taken without statutory authorization, or that frustrates the congressional policy that underlies a statute, is invalid. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 715 (8th Cir. 1979). An agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA. *Id.* at 713 (citing *Morton v. Ruiz*, 415 U.S. 199,

235 (1974)). Where the BIA has established a policy requiring prior consultation with a tribe, and as such has created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given. *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 399 (D.S.D. 1995) (citing *Oglala Sioux Tribe*, 603 F.2d at 721). *See also Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. 157, 163 (D.S.D. 1996) (holding that the BIA has the discretion to terminate employees, but must consult with tribe first). Because the BIA's internal consultation policy is more rigorous than the baseline consultation obligations set forth by statute, the court will evaluate the Tribes' consultation arguments under the BIA's internal consultation policy. *See Cheyenne River*, 205 F. Supp. 3d at 1058; *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D.S.D. 2006).

B. Defendants' consultation efforts

In responding to the Tribes' consultation argument, defendants contend that they not only satisfied their duty to consult with tribes, but that they exceeded that obligation. Specifically, defendants argue that the administrative record shows the efforts that defendants undertook to consult with tribes at all stages during the BIE's reorganizational process. Thus, defendants argue that because they exceeded the consultation requirements imposed upon them by statute and policy, they are entitled to summary judgment.

Central to the parties' consultation argument is this court's prior decision in *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D.S.D.

2006). In *Kempthorne*, several South Dakota tribes sued the DOI and other federal agencies and requested a preliminary injunction to stop the BIE's[8] then-efforts to restructure the BIE. *Kempthorne*, 442 F. Supp. 2d at 778. Given the numerous similarities between this case and the situation presented in *Kempthorne*, a detailed analysis of *Kempthorne* is warranted.

1. *Kempthorne*

In 2003, the defendants in *Kempthorne* sought to close several ELOs on plaintiffs' reservations to comply with the No Child Left Behind Act of 2001 and to make the BIE more efficient. *Id.* In an effort to consult with tribes, defendants sent consultation packets to tribal leaders and other interested parties in July 2003. *Id.* at 779. In August 2003, defendants held regional consultation meetings in eleven states, including one meeting in South Dakota, to discuss restructuring the BIE and other topics but presented no specific plans as to the restructuring of the BIE. *Id.*

In April and May of 2004, the BIE held several meetings to discuss a more detailed restructuring plan that the BIE had released in March of 2004. *Id.* Under that plan, the BIE intended to reorganize 17 ELOs into four regional

[8] At the time of the court's decision in *Kempthorne*, the BIE was operated under the name the Office of Indian Education Programs (OIEP). On August 29, 2006, the BIE was renamed and established "to reflect the parallel purpose and organizational structure BIE has in relation to other programs within the Office of the Assistant Secretary-Indian Affairs." U.S. Bureau of Indian Affairs, Bureau of Indian Education, http://www.bia.gov/bie (last visited Sept. 25, 2018). For consistency, the court will continue to use the term BIE when discussing actions taken by the OIEP.

Lead Education Line Officers (LELOs). *Id.* The only LELO located in South Dakota was the Aberdeen LELO. *Id.* Under the BIE's new plan, the then-existing education staff located at the ELOs in Crow Creek and Lower Brule, Pine Ridge, Rosebud, and Standing Rock would be consolidated into the LELO in Aberdeen. *Id.*

According to the BIE, each LELO would have a Deputy ELO. *Id.* And under the BIE's new reorganization plan, ELOs would be staffed with education specialists who could provide services to schools with the greatest needs. *Id.* This reorganization, in the view of the BIE, not only would comply with the No Child Left Behind Act but would reduce the number of ELOs that reported to the deputy director each day from 22 to 9, which would, in turn, result in the deputy director having more time to spend with individual ELOs. *Id.* According to the then-director of the BIE, the locations of the 9 ELOs in the 2004 plan were based on suggestions made during the 2003 consultations with tribes. *Id.*

In April of 2005, tribes began to reach out to federal officials about the proposed restructuring plan. *Id.* Specifically, CRST, through its Chairman, expressed its opposition to the proposed plan. *Id.* And in a letter to the BIE, the CRST's Chairman requested that the BIE: (1) consult with the tribes before implementing any reorganization or terminating any employees; (2) provide funding to keep the ELOs open; and (3) shift some of the special initiatives funds to the ELO positions. *Id.* In June 2005, the CRST Tribal Council adopted

a resolution requesting that DOI stop the ELO restructuring process and meet and consult with tribal leaders. *Id.* at 779-80.

In August of 2005, the BIE began another tribal consultation and requested written comments about the proposed reorganization. *Id.* at 780. The BIE made a special request for comments on the following issues: (1) the proposal to create two ADD positions to administer BIA run schools and create a third ADD position to administer tribal grant schools; (2) the validity of the rationale for restructuring; and (3) the location of the ELOs. *Id.* According to the BIE, the number of ELOs was increased from 9 to 19 in response to comments made in the 2004 consultation. *Id.*

On December 1, 2005, the BIE finalized its recommendation to Secretary of the DOI to adopt a proposal for 19 ELOs. *Id.* Although the organizational chart provided to the Secretary indicated that South Dakota would have two ELOs and North Dakota would have one ELO, the chart did not specify where the ELOs would be located. *Id.* Under the BIE's finalized plan, each ELO would have the same professional staff.

On December 22, 2005, the BIE informed tribal leaders that the DOI adopted the restructuring plan. *Id.* The BIE also requested that tribes help work with the BIE to obtain funding necessary to achieve BIE's goals. *Id.* The BIE's final plan established three ADD positions to supervise 19 ELOs. *Id.* The plan also provided for seven new high-level positions, including a director's position located in Pierre, South Dakota. *Id.* This director would supervise six

ELOs, including the ELOs in Pierre and Rapid City, South Dakota, and Minot, North Dakota. *Id.*

In March of 2006, the BIE began advertising the hiring of the ELO positions in Minot, Pierre, Rapid City, and other locations. *Id.* The ads for these positions indicated that qualified Indian candidates would be given preference in hiring and that applications would be accepted from March 1 to March 22, 2006. *Id.*

In a letter to tribal leaders dated March 6, 2006, the BIE's director indicated that he met with tribal leaders during the previous week to hear their concerns about the number and location of ELOs. *Id.* Based on these meeting, the director of the BIE scheduled two conference calls for March 9, 2006, to discuss concerns about the restructuring with Tribes and to hear their proposals for alternatives. *Id.* In these conference calls, the BIE's director told tribes that "[w]e are on the cusp of taking action regarding the advertising of staff positions and the leasing of office space, so your views will be important in guiding our implementation efforts." *Id.* And the director contended that based on the suggestions of tribal leaders, the BIE added an additional education specialist in North and South Dakota. *Id.* The BIE director also contended that congressional committees had already approved reprogramming of the BIE's budget that would allow the BIE to pay for the staffing needs of the newly restructured BIE. *Id.* at 780-81.

On May 24, 2006, several tribes filed a complaint against the BIE and other federal defendants seeking a preliminary injunction to prevent the closure of the existing ELOs pending resolution of the tribes' petition for a writ of mandamus and request for declaratory relief. *Id.* at 781. The tribes alleged, in part, that during the restructuring process, the BIE violated several statutes and BIA policies, including statutes and policies that required the BIE to meaningfully consult with tribes. *Id.*

In analyzing the tribes' request for a preliminary injunction, this court applied the four-factor test laid out in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981). *Id.* The court concluded that the first two factors weighed in favor of the tribes. *Id.* at 781-82. As to the third factor—success on the merits—the court first analyzed whether the defendants' proposed restructuring of the BIE was subject to judicial review. *Id.* at 782. After analyzing the standards set forth under the APA, this court found the BIE's actions in restructuring the Indian school programs were subject to judicial review. *Id.* at 783.

After concluding that the BIE's restructuring efforts were subject to judicial review, the court next considered whether defendants had complied with the statutory and agency imposed consultation guidelines. *Id.* Supporting the court's review of the BIE's actions were the Indian canons of construction that required the court to construe statutes liberally in favor of Indians, with ambiguous provisions interpreted in their favor. *Id.* (citing *Montana*, 471 U.S.

at 767). And in reviewing the evidence presented, this court found "evidence in the record that indicates that plaintiffs were unable to meaningfully comment on the potential impact of the proposed restructuring on the tribes and tribal schools because the BIA did not inform the tribes [about some of the funds that would be reprogrammed to pay for the restructuring efforts]." *Id.* at 784-85.

In summarizing the defendants' consultation efforts, this court observed that

> [b]ecause defendants did not notify the tribes that the proposed restructuring could result in the loss of funding to Indian schools, [the tribes] have demonstrated that they are likely to succeed on their claim that the BIA failed to inform the tribes of the potential impact of the proposed federal action, in violation of the [*BIA Consultation Policy*] and 25 U.S.C. § 2011(b)(2)(B).

Id. at 785. Thus, although the BIE had held three rounds of consultation meetings with tribes, the court found that the plaintiffs could likely show that the BIE failed to inform tribes on the reprogramming of funds that was necessary to make the restructuring efforts successful. *Id.*

The court later concluded that the fourth *Dataphase* factor also weighed in favor of the tribes "[b]ecause the public interest favors meaningful consultation between the federal government and Indian tribes regarding policy actions that affect Indian education[.]" *Id.* at 788. Thus, because the four *Dataphase* factors weighed in favor of the plaintiffs, this court granted the plaintiffs' request for a preliminary injunction. *See id.* at 788-89.

2. Comparing *Kempthorne* to consultation efforts here

As previously indicated, defendants contend that they not only satisfied their duty to consult with tribes, but that they exceeded that obligation. Defendants also contend that a key concern of the BIE during the reorganization process here was to make sure that they did not make the same mistakes that the defendants made in *Kempthorne*. *See* Docket 105 at 5. And it is precisely because of this court's decision in *Kempthorne*—and the settlement agreement that eventually resolved that dispute—that BIE officials claim they went out of their way to consult with tribes "at a deeper level" and to have "a deeper consultation [with tribes] than what is actually recommended in the consultation policy of the [DOI]." AR 2464:39:8-11 (testimony of Charles Roessel at the 2015 tribal consultation in Rapid City).

The Tribes, on the other hand, argue that defendants made the same mistakes here that they made in *Kempthorne*. *See, e.g.*, Docket 77 at 24-25; Docket 102 at 3-4. CRST, for example, argues that "[d]efendants were simply going thru [sic] the motions because they knew their actions would be scrutinized by the tribes in the Dakotas based on the [action in *Kempthorne*] to stop similar illegal restructuring." Docket 102 at 4. And RST similarly argues that because defendants were aware of this court's ruling in *Kempthorne*, defendants tried to avoid that decision by giving the impression of compliance with that decision. *See* Docket 77 at 19 (arguing that defendants' motivation here was the same as the defendants' motivations in *Kempthorne* in that

defendants tried to "hid[e] the ball" from tribes rather than actually address the opposition to the proposed restructuring of the BIE).

Applying this court's decision in *Kempthorne*, the court finds that defendants have complied with its requirements. In *Kempthorne*, a major consideration in this court's decision was that evidence in the record indicated that tribes were not given the ability to meaningfully consult with the BIE because some of the key budgetary information about the reprogramming of funds to support the restructuring was not shared with the tribes before the restructuring. *Kempthorne*, 442 F. Supp. 2d at 784-85. This court in *Kempthorne*, also noted that "[b]y law, consultation requires open discussion of all potential issues or changes between the BIA and [tribes]." *Id.* at 784 (citing 25 U.S.C. § 2011(b)(2)(B).

Here, the administrative record is filled with examples of the BIE engaging in dialogue with tribes—and particularly engaging in dialogue with tribes located in South Dakota—to ensure that the BIE "secure[d] meaningful and timely tribal input" as is required by the *BIA Consultation Policy*. In *Kempthorne*, the BIE held only three rounds of consultations in addition to a few other conversations with tribes over a two-year period. *See Kempthorne*, 442 F. Supp. 2d at 785. But by contrast, in a two-year period, the BIE here: (1) held six initial listening sessions and conducted site visits to schools, which included a listening session and site visit in South Dakota, *see* AR 0059-0070; (2) received numerous comments and suggestions from tribal educators and

tribal school officials in South Dakota after the initial listening sessions and site visits, *see* AR 0076-0079, 0081-0083, 0094-0095, 0200-0204, 0205-0217, 0223, 0260-0262; (3) held four formal national consultations on the Study Group's draft findings and draft *Blueprint*, including the Loneman School consultation, *see* AR 0540-0541 (Federal Register notice of consultations); AR 0879-1176 (transcript of Loneman School consultation); (4) received feedback from tribes in South Dakota about the Study Group's draft findings, *see* AR 1680-1682; AR 1746-1751; AR 1796-1806; (5) drafted a set of final recommendations, *see* AR 1829-1895; (6) held monthly conference calls with stakeholders, *see* AR 2403, and conducted numerous webinars, *see* AR 3855-3870; (7) held twelve regional or individual consultations with tribes from February to April 2015, *see* AR 3518-3519, including eight individual consultations with tribes in the Dakotas, *id.*, and an individual tribal consultation with both CRST, *see* AR 2190 (sign-in sheet from individual consultation with CRST), and RST, *see* AR 2394-2396 (sign-in sheet from individual consultation with RST); (8) met with regional and national tribal groups such as the GPTCA, *see* AR 2132, and the TIBC, *see* AR 3689-3735 (transcript of TIBC meeting); and (9) conducted six national listening sessions in April and May of 2015, including the April 2015 listening session in Rapid City, on the Study Group's final recommendations and Order 3334 approved by Secretary Jewell, *see* AR 3518; AR 2454-2561 (transcript of Rapid City consultation).

In response to the above described contacts between the BIE and tribes, the Tribes argue that it is the quality of consultations and not the quantity of contacts with tribes that matters when reviewing defendants' compliance with the *BIA Consultation Policy* and consultation statutes under the APA. Docket 98 at 14; Docket 102 at 3. The court agrees with the Tribes that under the *BIA Consultation Policy* and 25 U.S.C. § 2011, the court's review of defendants' consultation efforts should focus on the quality of defendants' consultations with tribes. *See BIA Consultation Policy* § IV (defining the term "consultation" as meaning "a process . . . intended to secure meaningful and timely tribal input"); 25 U.S.C. § 2011(b)(2)(A) ("the term 'consultation' means a process involving the open discussion and joint deliberation of *all options* with respect to potential issues or changes . . . ." (emphasis added). But what the Tribes' argument on quality over quantity fails to recognize is that both the *BIA Consultation Policy* and 25 U.S.C. § 2011(b)(2)(A) use the word "process" when defining the term "consultation." Here, the word "process" is key because it requires the court to evaluate the totality of defendants' efforts to consult with tribes.

Apart from the quantity of meetings, the administrative record shows the quality and totality of defendants' efforts in these sessions. Before even developing a proposal, the Study Group held "extensive listening sessions in fall 2013 with tribal leaders, educators, and community members across Indian Country[.]" AR 1830 (Final Findings and Recommendations). Only after

these meetings was a draft *Blueprint* written. *Id.*; *see also* AR 0894 (Don Yu explaining that feedback from the listening sessions was incorporated into the draft report). This report then became the subject of the four tribal consultation sessions in April and May of 2014. AR 0540-0541 (Federal Register Notice). Following these consultations, defendants visited each plaintiff's reservation in February and March of 2015, as well as six other visits to tribes in the Dakotas, culminating in the April 2015 listening session in Rapid City on the Study Group's final recommendations and Order 3334. AR 2454-2561 (Transcript of Rapid City Consultation); AR 3517-3519 (Tribal Consultation Report).

These meetings not only built upon one another but had a substantive impact on several BIE decisions. Revisions were made to the *Blueprint* based on the fall 2013 listening sessions. *See* AR 1830 (Final Findings and Recommendations stating "based on extensive listening sessions in fall 2013 . . . the Study Group proposed to tribal leaders a redesigned BIE."). For example, a new pillar of reform was added to the *Blueprint* following these initial consultations. *Compare* AR 0573 (Draft Study Group Proposal), *with* AR 1830-1831 (Final Findings and Recommendations). These revisions then served as a basis for the reorganization in June of 2014. AR 1896-1898 (Secretarial Order 3334). More revisions, including the addition of an Education Program Administrator stationed in South Dakota, occurred in April of 2015. *Compare* AR 2186 (February 2015 presentation with CRST that did

not mention the position), *with* AR 2575 (April 2015 presentation that included EPA position). Even after April of 2015, the BIE made modifications including the relocation of an ERC from Rapid City to Kyle, South Dakota. AR 3517 (Tribal Consultation Report). This structure of discussion and revisions throughout the two-year period reveal a process—a series of actions—implemented to achieve meaningful consultation. Thus, when evaluating the totality of the administrative record, the court concludes that defendants have satisfied their obligation to use a process designed to meaningfully consult with tribes about the proposed restructuring of the BIE. *See BIA Consultation Policy* § IV; 25 U.S.C. § 2011(b)(2)(A).

The Tribes also argue that because their views were not "given effect," defendants failed to comply with their statutory consultation obligations. Docket 98 at 9-10 (citing 25 U.S.C. § 2011(b)(2)(B)). Although the Tribes are correct that the statute states that their views should be "given effect," it is necessary to read that phrase in context to appreciate its true meaning. In full, 25 U.S.C. § 2011(b)(2)(B)(ii) requires that tribes shall be given an opportunity:

> (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)(ii) (emphasis added). Here, Secretary Jewell concluded that the restructuring was necessary and appropriate despite the opposition of the restructuring plan from tribes in the Dakotas. And while the tribes may

disagree with Secretary Jewell's decision, mere disagreement with an agency's decision by tribes does not mean that the agency did not meaningfully consult with the tribes. *Andrus*, 603 F.2d at 721 (concluding that while the government is required to consult with a tribe before removing the tribe's superintendent, a tribe is not "entitled to a superintendent of its choice"); *Babbitt*, 915 F. Supp. at 163 (holding that the BIA has the discretion to terminate employees but must consult with tribe first).

Contrary to this argument, as discussed above, the quality of the process used to consult with the tribes is apparent from several changes made to the BIE's proposed plans that were the direct result of consultation in the Dakotas. For example, the decision to realign the ADDs by function instead of by region came from a consultation with the tribes in the Dakotas. *See* AR 2502 (testimony of Charles Roessel at the Rapid City consultation in 2015 noting the change came from meeting with Dakota tribes); AR 1133 (Loneman Consultation Transcript). The decision to place an ERC in Kyle, South Dakota as opposed to Rapid City or Pine Ridge, South Dakota was another change implemented by the BIE after consultation with tribes in the Dakotas. *See* AR 3517 (Tribal Consultation Report). Finally, CRST's request for closer supervisory staff was incorporated by the BIE locating an Education Program Administrator in Pine Ridge, South Dakota to directly oversee Cheyenne Eagle Butte, Pine Ridge, and Flandreau. *See* AR 2501 (testimony of Wendy Grey Eyes at the Rapid City consultation in 2015 suggesting that revisions were made

based on the visits); AR 3684 (Interior Letter to CRST stating "[w]e are making the requested change by locating an Education Program Administrator at Pine Ridge . . . ."). Thus, although not all tribal views were given effect, several changes were made by the BIE following timely input by the tribes.

3. Outside the Administrative Record

As an alternative basis for finding that defendants failed to meaningfully consult with tribes about the restructuring of the BIE, the Tribes argue that the court should look beyond the administrative record and look at the totality of the discovery produced here. For example, RST argues that reviewing the evidence produced in discovery makes clear that defendants' actions were just a pretext to gain court approval for the restructuring of the BIE. *See* Docket 77 at 11-12 (arguing that defendants' restructuring process was "an elaborate effort using smoke and mirrors to appear to be complying with federal law and policy on consultation while actually keeping tribes in the dark."). And CRST argues that, during the consultation process, "[i]f a tribe's input into the plan did not fit nicely into the grand scheme, it was summarily ignored [by BIE officials]." Docket 83 at 8. The Tribes contend that defendants acted in bad faith and with improper behavior during the restructuring because defendants were attempting to get the restructuring completed quickly before the end of President Obama's term. If true, this would allow the court to look outside of the administrative record when reviewing the Tribes' consultation claim. *See Voyageurs*, 381 F.3d at 766 (indicating that a "strong showing of bad faith

or improper behavior" can allow a court to "permit discovery and evidentiary supplementation of the administrative record" (internal citation omitted)).

Having reviewed the Tribes' arguments and the administrative record, the court concludes that the Tribes have failed to meet their burden to show an "extraordinary circumstance" that would allow the court to consider evidence outside the administrative record. *See id.* While the Tribes can demonstrate that a certain email probably should have been included in the administrative record, *see* Docket 103-12,[9] the defendants' failure to include a single email in the administrative record does not make the administrative record here "so incomplete as to preclude effective judicial review or [indicate that defendants acted with] clear bad faith or improper behavior." *See U.S. Dep't of Interior*, 423 F.3d at 803. Thus, the court's review of defendants' consultation efforts is limited to the administrative record, which is all the evidence that was available to defendants at the time the decision to restructure the BIE was made. *See Camps*, 411 U.S. at 142.

Under the *BIA Consultation Policy* and 25 U.S.C. § 2011, defendants had an obligation to meaningfully consult with tribes during the reorganization process. After reviewing the administrative record, the court concludes that defendants have satisfied their obligation to use a process designed to meaningfully consult with tribes about the proposed restructuring of the BIE.

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[9] Docket 103-12 is an email from Sarah Harris, the Chief of Staff for Assistant Secretary Washburn, that encourages individuals "to stay away from calling the BIE Study Group or its recommendations a 'realignment[.]' " *Id.*

See BIA Consultation Policy § IV; 25 U.S.C. § 2011(b)(2)(A). Further, because defendants have "articulate[d] a rational connection between the facts found and the choice made[,]" *Bowman Transp.*, 419 U.S. at 285 (internal quotation omitted), defendants' reorganization passes muster under the APA. Thus, even after construing the relevant statutes and policies liberally in favor of the Tribes, *Montana*, 471 U.S. at 767, the court concludes that defendants are entitled to summary judgment on the Tribes' consultation claims. In finding that defendants are entitled to summary judgment on the Tribes' consultation claim, the court expresses no opinion as to the propriety of the substantive aspects of the proposed restructuring.

II. APA Claim

The Tribes raise two other arguments subject to review under the APA that are independent from the Tribes' consultation argument. The first argument raised by the Tribes is that defendants acted arbitrarily, capriciously, and without legal justification in implementing Order 3334. *See* Docket 83 at 8-9. The Tribes' second APA argument is that defendants violated the APA, in an effort to jumpstart the restructuring process, by beginning to reduce staff working at ELOs in South Dakota. Docket 77 at 25-28. In response, defendants contend that the Tribes fail to present a cognizable APA argument. Docket 90 at 34-35. Defendants also contend that, even if the Tribes raise a cognizable APA claim, the decisions here were subject to the BIE's discretion and were not arbitrary and capricious. *See* Docket 77 at 38-39.

Here, the issue before the court is not necessarily whether Order 3334 is final agency action but whether defendants' actions in allegedly implementing Order 3334 before receiving approval from congressional appropriations committees constituted "agency action." The theory put forth by the Tribes is that defendants violated the APA by failing to fill vacancies at ELOs in South Dakota and then reprogramming to implement Order 3334, which eliminates most of the ELOs in South Dakota. Docket 77 at 27-28. In support of this contention, the Tribes cite several statutes and regulations that they contend permit the court to review defendants' actions. *See* Docket 98 at 16 (citing 25 U.S.C. § 2006); *see also* Docket 98 at 20-21 (citing 25 C.F.R. §§ 33.6, 33.8, 33.9).

Upon review, the court concludes that the Tribes have failed to demonstrate that any of the alleged "actions" taken by defendants constitute "agency action" under 5 U.S.C. § 702. The court also concludes that the Tribes have failed to point to any other statute that provides them with a private right of action. Under 5 U.S.C. § 551(13), the term "agency action" "includes the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act." And while the Tribes argue that defendants' staffing decisions, i.e. defendants' failure to fill vacant ELO positions, resulted in less technical assistance being provided to tribal schools in South Dakota, "[g]eneral deficiencies in [agency] compliance . . . lack the specificity requisite for agency action." *Norton v. S. Utah Wilderness All.*, 542

U.S. 55, 66 (2004). The Tribes' failure to point to statutory factors that should guide the court's review of their claim that defendants' actions in realigning staff to cover for vacancies in ELOs without filling those positions, "supports the conclusion that the 'agency action is committed to agency discretion by law.' " *Tamenut v. Mukasey*, 521 F.3d 1000, 1003 (8th Cir. 2008) (en banc) (per curiam) (quoting 5 U.S.C. § 701(a)(2)). Thus, the court concludes that defendants are entitled to summary judgment on the Tribes' APA claims.

Still remaining are two other claims presented by the Tribes. First, the Tribes' claim that defendants violated the trust relationship they owed to the Tribes during the process of restructuring the BIE. Second, the Tribes' claim that defendants' restructuring of the BIE and elimination of the ELOs on their reservations violates the 1868 Ft. Laramie treaty.

LEGAL STANDARD

Because the court is not being asked to review an administrative decision, the standard for summary judgment set forth in Rule 56 applies. As previously discussed, summary judgment may be awarded when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir. 2000). The court views the evidence in the light most favorable to the nonmoving party. *Ludwig v. Anderson*, 54 F.3d 465, 470 (8th Cir. 1995). As the Eighth Circuit has explained, "[w]here the unresolved issues are primarily legal rather than

factual, summary judgment is particularly appropriate." *United States v. Premises Known as 6040 Wentworth Ave. S., Minneapolis, Hennepin Cty., Minn.*, 123 F.3d 685, 687-88 (8th Cir. 1997) (citing *Crain v. Bd. of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

DISCUSSION

III. Trust Responsibility Claim

"There is a 'general trust relationship between the United States and the Indian People.' " *Ashley v. U.S. Dep't of Interior*, 408 F.3d 997, 1002 (8th Cir. 2005) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)). "But that relationship alone does not suffice to impose an actionable fiduciary duty on the United States." *Id.* While courts "do not question the 'general trust relationship between the United States and Indian tribes,' " the Supreme Court has recently reaffirmed the principle that "any specific obligations the Government may have under [the trust] relationship are 'governed by statute rather than the common law.' " *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 757 (2016) (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011)).

To establish a trust duty, the burden is on the Tribes to "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." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). But "[w]hile the government's obligations are rooted in and outlined by the relevant statutes

and treaties, they are largely defined in traditional equitable terms." *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001); *see also* Cohen's Handbook of Federal Indian Law § 5.05, at 426-28 (Nell Jessup Newton ed., 2012) (discussing the scope of trust duties between the federal government and tribes, and how private trust law principles "are most often invoked in controversies involving the direct management of tribal resources and funds"). In order for a trust duty to exist, "there must be something akin to 'elaborate provisions . . . [that] give the Federal government full responsibility to manage Indian resources for the benefit of the Indians.' " *Ashley*, 408 F.3d at 1002 (alterations in original) (quoting *Navajo Nation*, 537 U.S. at 507). "The fact that a statute uses the word 'trust' does not mean that an actionable duty exists, for a 'bare trust' that does not impose upon the government . . . extensive and well-articulated duties . . . falls short of creating such a duty." *Id.*

The Tribes point to several statutes that they claim impose a duty upon the federal government to act on behalf of the Tribes when restructuring the BIE. *See, e.g.*, Docket 102 at 8 (citing 25 U.S.C. §§ 2006(d), 2009(c), 2010, 2015). The Tribes also claim that defendants' trust duty to tribes arises under the 1868 Ft. Laramie Treaty. *See id.*; *see also* Docket 77 at 29 (same). And the defendants' failure to consider the trust duty owed to tribes when restructuring the BIE, according to the Tribes, was a blatant and deliberate violation of the trust relationship between defendants and tribes. *See* Docket 77 at 30-31.

Defendants contend that the Tribes' trust relationship claim fails for two reasons. Docket 105 at 27. First, the Tribes "fail to 'identif[y] any assets taken over by the government such as tribally owned land, timber, or funds which would give rise to a special trust duty.' " *Id.* (quoting *Yankton Sioux Tribe v. U.S. Dep't of Health and Human Servs.*, 533 F.3d 634, 644 (8th Cir. 2008)). Second, defendants argue that the Tribes "cannot establish a trust claim" because the Tribes failed to identify a specific duty that required defendants to act for the benefit of the Tribes. *See id.*

The court agrees that none of the specific statutes cited by the Tribes created a fiduciary duty that required defendants to act on behalf of defendants when restructuring. One of the statutes cited by the Tribes in support of their contention that a trust duty existed between defendants and the tribes is 25 U.S.C. § 2006(d).[10] And while the Tribes are correct that this statute uses phrases such as "budgeting" and "personnel," *see* Docket 77 at 29-30, what the Tribes have failed to allege is any sort of "assets taken over by the government [under this statute] . . . which would give rise to a special trust duty." *Yankton*

[10] In full, 25 U.S.C. § 2006(d) states:

> Education personnel who are under the direction and supervision of the Director of the [BIE] . . . shall--
>
> (1) monitor and evaluate [BIE] education programs;
>
> (2) provide all services and support functions for education programs with respect to personnel matters involving staffing action and functions; and
>
> (3) provide technical and coordinating assistance in areas such as procurement, contracting, budgeting, personnel, curriculum, and operation and maintenance of school facilities.

Sioux Tribe, 533 F.3d at 645. Further, when reading the entirety of § 2006(d), it is clear that any obligations created under this statute are owed not by the Director of the BIE but rather by educational personnel "who are under the direction and supervision" of the Director of the BIE.

Moreover, because the focus of § 2006(d) appears to be aimed at educational personnel who work on the local level, it seems unlikely that Congress intended for this statute to create a substantive trust duty between tribes and the federal government for the types of activities engaged in here, namely restructuring the BIE and attempting to improve delivery of Indian education across the nation. Thus, because the Tribes failed to meet their burden to "identify a substantive source of law that establishes specific fiduciary or other duties," *Navajo Nation*, 537 U.S. at 506, the court concludes that defendants are entitled to summary judgment on the Tribes' general trust relationship claim. *Cf. Ashley*, 408 F.3d at 1002 (stating that the general trust relationship "alone does not suffice to impose an actionable fiduciary duty on the United States.").

IV. Treaty Claim

On April 29, 1868, the United States and the Great Sioux Nation[11] entered into the 1868 Fort Laramie Treaty. 15 Stat. 635 (1868). The Fort Laramie Treaty was entered into with the hopes of officially ending hostility

[11] "The Great Sioux Nation" refers collectively to the signatory tribes of the Fort Laramie Treaty of 1868, which included the Tribes.

between the Sioux tribes and the United States after the Powder River War of 1866-1867. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).

The Tribes claim that defendants' action in restructuring the BIE and reducing the number of ELOs located in South Dakota violates Articles V and VII of the 1868 Fort Laramie Treaty. Docket 77 at 33; Docket 83 at 9-10. In relevant part, Article V states:

> [t]he United States agrees that the agent for said Indians shall . . . keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law.

15 Stat. 635 (1868). Article VII provides:

> [i]n order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted . . . the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

Id.

In the view of the Tribes, these provisions, which were "agreed upon at the same time, must be read together." Docket 77 at 34. The Tribes also note that in *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 80-82 (1908), the United States Supreme Court recognized that Article VII of the 1868 Fort Laramie Treaty provides a right to education for the tribes who signed the treaty. Thus, the Tribes argue that, when reading these provisions together, for Article VII's

right to education for children living on the reservation to have effect, the court must also give effect to Article V's requirement that there be an agent available on signatory tribes' reservations. Docket 77 at 34 (citing 15 Stat. 635, Article V). The Tribes contend that the only way for the federal government to continue to meet its ongoing obligation to provide educational support and technical assistance to schools on the reservation, is to provide BIE officials with face-to-fact contact with the reservation. *Id.* at 34-35. And the only way to do that, according to the Tribes, is to continue what has been the practice of the federal government since the late 1800s: to have an educational presence on the reservation that—at least until the current restructuring—was done by having an ELO operated on the reservation.[12] *See generally id.*

Defendants contend that the Tribes' reading of the 1868 Fort Laramie Treaty as requiring the BIE to have an ELO on each reservation is inconsistent with the rest of the Treaty's text and is inconsistent with the understanding that those who signed the Treaty would have had at the time. Docket 90 at 42-44. Under defendants' view, the most the Treaty can be read to require is "one individual and one office to generally be available to hear various types of complaints (*i.e.* BIA's office and its agent)." *Id.* at 44. Defendants contend that this reading comports with Article I, IV, VI of the Treaty that each require the

[12] The tribes do note, however, that educational support to signatory tribes of the 1868 Fort Laramie Treaty was not always provided in the form of having an ELO on each reservation and instead was previously accomplished by the presence of the BIA on the reservations. Docket 77 at 34.

presence of an "agent" to deal with a wide variety of issues that are not related to education. *Id.* at 43-44.

When interpreting provisions of a treaty between a tribe and the United States, the Indian law canons of construction require that the treaty "be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit." *Oneida Cty., N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985) (internal citations omitted). Thus, courts interpret treaties to give effect to the treaty's terms that the Indians themselves would have had at the time the treaty was made. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *see also Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (stating that treaties must "be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1899))). The Indian canons of construction also require courts to "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " *Mille Lacs Band*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)).

Here, the court concludes that the Tribes' reading of the 1868 Fort Laramie Treaty as requiring defendants to operate an ELO on their reservations is inconsistent with the text and the understanding that the signatory

members to the treaty would have had in 1868. The most that the Tribes can argue is that the Treaty requires the United States Government to have a physical presence on the reservation. Even if the court were to read Article VII of the Treaty to require the United States to provide tribes with a school on each reservation, that reading does not give credence to the Tribes' view that defendants must operate an ELO on the Tribes' reservations. Thus, because the text of the 1868 Treaty is unambiguous, and because the Tribes' reading of the Treaty fails to give the effect to the treaty's terms that the Indians themselves would have had at the time the treaty was made, *see Mille Lacs Band*, 526 U.S. at 196, the court concludes that defendants are entitled to summary judgment on the Tribes' treaty claim.

CONCLUSION

Defendants complied with their obligation to meaningfully consult with the Tribes during the process of restructuring the BIE as is required by the *BIA Consultation Policy* and 25 U.S.C. § 2011. Because defendants have articulated a rational connection between the facts found and the choice made during the restructuring process, defendants' reorganization of the BIE passes muster under the APA. Defendants have also shown that their realignment of staff to cover vacancies created in ELOs on the Tribes' reservations during the restructuring process was an agency action that was committed to defendants' discretion by law. Thus, defendants are entitled to summary judgment on both of the Tribes' claims reviewed under the APA.

Defendants are also entitled to summary judgment on the Tribes' non-APA claims. As to the Tribes' trust responsibility claim, defendants have shown that the Tribes failed to identify a substantive source of law that established a specific fiduciary duty on defendants about the plans to restructure the BIE. Defendants have also shown that the Tribes' arguments as to the applicability of the 1868 Fort Laramie Treaty to defendants' efforts to restructure the BIE is unconnected to the Treaty's text and inconsistent with the understanding that the signatories to the Treaty would have had.

Thus, it is

ORDERED that defendants' motion for summary judgment (Docket 92) is granted.

IT IS FURTHER ORDERED that plaintiff CRST's motion for summary judgment (Docket 82) and intervenor plaintiff RST's motion for summary judgment (Docket 76) are denied.

DATED September 28, 2018.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE