**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| CHEYENNE RIVER SIOUX TRIBE,<br><br>Plaintiff,<br><br>v.<br><br>DONALD J. TRUMP, *in his official capacity as President of the United States, et al.*,<br><br>Defendants. | Civil Action No. 1:20-cv-01709 (CKK) |

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

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## INTRODUCTION

Pursuant to an Indian Self-Determination and Education Assistance Act (ISDEAA or Act) contract entered into with the Secretary of Interior (Secretary), Plaintiff Cheyenne River Sioux Tribe (Plaintiff or Tribe) assumed the responsibility to provide its own law enforcement services to its tribal community members. While the claims in the Complaint are not a model of clarity, Plaintiff filed suit to enjoin the Secretary from reassuming this contract (*i.e.*, resuming control over the performance of the contracted-for law enforcement services, on behalf of the Tribe), based upon issues surrounding the Tribe's operation of COVID-19 Health Safety Checkpoints on public roads. However, the Tribe's Complaint, which has not been amended, has been entirely overtaken by events that have materially changed the factual bases for the suit and have demonstrated the jurisdictional and merits-based deficiencies that necessitate its dismissal.

As an initial matter, whether viewed through the lens of standing or ripeness, the Court lacks jurisdiction over Plaintiff's Complaint, as the speculative fears alleged therein have not come to pass. Rather, subsequent to the initiation of this suit (which was filed on June 24, 2020), on July 7, 2020, the Department of Interior's Bureau of Indian Affairs (BIA) issued a further letter to Plaintiff, providing notice to the Tribe to initiate a non-emergency reassumption based on the BIA's discovery that numerous of the Tribe's police officers have not undergone a satisfactory background check, and/or completed the minimal professional training, as required by the express terms of the parties' contract. Defendants' Exhibit (DEX) 1, attached hereto (July 7 BIA Letter).[1] While the July 7 BIA Letter states that, to the extent these issues are not ultimately addressed, a future reassumption is possible, any such future reassumption action is at this juncture entirely

[1] The Court make take judicial notice of the July 7 BIA Letter pursuant to the well-established rule that "judicial notice may be taken of public records and government documents available from reliable sources." *Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159, 167 (D.D.C. 2016), *aff'd*, 869 F.3d 976 (D.C. Cir. 2017).

hypothetical. As the conjectural possibility of a future reassumption is the only purported "harm" here alleged, regardless of how Plaintiff's claims are construed, it fails to present a judiciable controversy under Article III.

To the extent, *arguendo*, that the Court finds that Plaintiff has alleged some injury cognizable under Article III, that injury would still not entitle it to bring the specific claims pled in the Complaint. Count I alleges a breach of contract in the Secretary's administration of the Tribe's self-determination contract, but the ISDEAA incorporates the Contract Disputes Act (CDA)—which, in turn, requires that claims first be administratively "presented" to the agency before they may be brought in federal court. This requirement is jurisdictional, and Plaintiff has not complied with it. In any event, the contract claim also fails to satisfy the requisite elements for such a claim under federal common law, on its merits.

Count II attempts to assert a claim under the Administrative Procedure Act (APA), based on the same asserted harm as the ISDEAA claim, *i.e.*, a potential future reassumption of the self-determination contract. But Plaintiff may not evade the jurisdictional bar of the CDA merely by re-casting its contract claim as a purported APA violation. And even if, *arguendo*, the CDA does not preempt the APA's otherwise applicable waiver of sovereign immunity, Count II challenges only an entirely hypothetical future action. As such, it fails to allege either any "agency action" or any "final agency action," as required for APA review.

Finally, Count III purports to allege a breach of trust claim. But the Supreme Court has made clear that such a claim may be brought *only* under the limited set of circumstances where a statute specifically imposes a statutory obligation on the federal government to manage Indian trust resources. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176-77 (2011). As set forth in greater detail below, neither the ISDEAA nor any of the other sources of law identified by Plaintiff create this obligation. Accordingly, Count III, too, must be dismissed.

## STATUTORY AND REGULATORY BACKGROUND

### I. The Indian Self-Determination and Education Assistance Act

Congress enacted the ISDEAA, Pub. L. No. 93-638, 88 Stat. 2203, 2203-04 (1975), 25 U.S.C. §§ 5301-5423, "to help Indian tribes assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wis. v. United States*, --- U.S. ---, 136 S. Ct. 750, 753, (2016); *see also* 25 U.S.C. § 5302. Before the ISDEAA, most federal programs and services for Indians, such as health, educational, and law enforcement services, were administered directly by the federal government. *See* S. Rep. No. 100-274, at 2-3 (1987). The ISDEAA permits tribal organizations to administer such federal programs and services themselves. Under the Act, at the request of an Indian tribe, a tribal organization may enter into a "self-determination contract[]"—colloquially known as a "638 contract[]," after the Public Law that created them—with the Secretary of the Interior or the Secretary of Health and Human Services, as appropriate, to assume operation of federally funded programs and services that the Secretary would otherwise have provided directly.[2] 25 U.S.C. § 5321(a). The Secretary must accept a tribe's request for an ISDEAA contract except in specified circumstances. *See id.* § 5321(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts[.]"); *id.* § (a)(2)(A)-(E) (permitted grounds for declination). The Act thus generally permits an Indian tribe, at its initiative, to step into the shoes of a federal agency and administer federally funded services, including, as relevant here, law enforcement services.

The basic parameters of an ISDEAA self-determination contract are set out in the Act, *see generally* 25 U.S.C. § 5329(c) (model agreement), and implementing regulations, *see generally* 25 C.F.R. Part 900. Although a comprehensive summary of this statutory scheme is beyond the scope

[2] The Act defines the term "tribal organization" to include, *inter alia*, the governing body of an Indian tribe or any organization controlled or chartered by the tribe. *See* 25 U.S.C. § 5304(*l*).

of the instant suit, Defendants explain several of its key components and related requirements, as relevant to this motion, below.

### A. Requirement of Background Checks and Minimal Professional Training for Law Enforcement Officers Performing the Terms of a 638 Law Enforcement Contract

Pursuant to the Indian Law Enforcement Reform Act of 1990 (ILERA), the Secretary, acting through BIA, is "responsible for providing, or for assisting in the provision of, law enforcement services in Indian country[.]" 25 U.S.C. § 2802(a). Within the BIA, the Office of Justice Services (OJS) is responsible in Indian country for, *inter alia*, "carrying out the law enforcement functions of the Secretary in Indian country," *id.* at § 2802(b)(1), including the administration of 638 law enforcement contracts. *See* Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211 § 211 (replacing the former Division of Law Enforcement Services with the newly-created OJS), *codified at* 25 U.S.C. §§ 2801, 2802.

Pursuant to regulations promulgated in 1997 under the authority of the ILERA, "Indian country law enforcement programs that receive Federal funding …. will be subject to a periodic inspection or evaluation to provide technical assistance, to ensure compliance with minimum Federal standards, and to identify necessary changes or improvements to BIA policies." 25 C.F.R. § 12.12; 25 U.S.C. § 2802(e)(4)(A) (delegating responsibility to OJS to "develop standards and deadlines for the provision of background checks to tribal law enforcement and correction officials"); *see also generally* 25 U.S.C. § 2805 (delegating rule-making authority under the ILERA); Indian Country Law Enforcement, 62 Fed. Reg. 15,610-15,614 (Apr. 2, 1997) (Final Rule). As relevant to this suit, such "minimum Federal standards" include the following provision:

> Law enforcement authority is only entrusted to personnel possessing adequate education and/or experience, training, aptitude, and high moral character. All Indian country law enforcement programs receiving Federal funding and/or authority must ensure that all law enforcement officers successfully complete a thorough background investigation no less stringent than required of a Federal

> officer performing the same duties. The background investigations of applicants and employees must be adjudicated by trained and qualified security professionals. All background investigations must be documented and available for inspection by the [BIA].

25 C.F.R. § 12.32.

Further, under the ILERA, the Secretary is required to "establish appropriate standards of education, experience, training, and other relevant qualifications for law enforcement personnel of [OJS] who are charged with law enforcement responsibilities[.]" 25 U.S.C. § 2802(e)(1)(A). When a tribe assumes the responsibility for the conduct of law enforcement activities pursuant to a 638 contract, it likewise assumes the same training requirements: pursuant to 25 C.F.R. § 12.35, "[l]aw enforcement personnel of any program funded by the [BIA] must not perform law enforcement duties until they have successfully completed a basic law enforcement training course prescribed by the Director. The Director will also prescribe mandatory supplemental and in-service training courses." In 2010, the TLOA introduced a degree of flexibility into the training required of law enforcement officers serving in Indian Country, amending the ILERA to additionally provide:

> (B) Requirements for training
>
> The training standards established under [25 U.S.C. § 2802(e)(1)(A)] –
>
> (i) shall be consistent with standards accepted by the Federal Law Enforcement Training Accreditation commission for law enforcement officers attending similar programs; and
>
> (ii) shall include, or be supplemented by, instruction regarding Federal sources of authority and jurisdiction, Federal crimes, Federal rules of criminal procedure, and constitutional law to bridge the gap between State training and Federal requirements.
>
> (C) Training at State, tribal, and local academies
>
> Law enforcement personnel of the [OJS] or an Indian tribe may satisfy the training standards established under subparagraph (A) through training at a State or tribal police academy, a State, regional, local, or tribal college or university, or other training academy (including any program at a State, regional, local, or tribal college or university) that meets the appropriate Peace Officer Standards of Training.

Pub. L. No. 111-211 § 231, *codified at* 25 U.S.C. § 2802(e)(1)(B), (C).

**B. Reassumption Authority**

Pursuant to 25 U.S.C § 5330, the Secretary retains the authority to reassume a 638 contract, in certain defined circumstances. Reassumption of a program occurs when the Secretary "rescind[s a] contract or grant agreement, in whole or in part, and assume[s] or resume[s] control or operation of the program, activity, or service involved." 25 U.S.C. § 5330. The Secretary may exercise this authority "unilaterally," and "may reassume a program on either a non-emergency basis or an emergency basis." *Keen v. United States*, 981 F. Supp. 679, 681 n.3 (D.D.C. 1997) (Kollar-Kotelly, J.); 25 U.S.C. § 5330; *see also* 25 C.F.R. §§ 900.246-247.

A non-emergency reassumption is permitted when there has been: (1) a "violation of the rights, or endangerment of the health, safety, or welfare of any person"; or (2) "gross negligence or mismanagement in the handling or use" of contract funds, trust funds, trust lands, or interest in trust lands under the contract. 25 U.S.C. § 5330; 25 C.F.R. § 900.247. In a non-emergency reassumption, the Secretary must: (a) notify the tribe in writing of the deficiencies in contract performance; (b) request that the tribe take specific corrective action within a reasonable period of time, which cannot be less than forty-five days; and (c) offer and provide, if requested, the necessary technical assistance and advice to help the tribe overcome the specified deficiencies. 25 C.F.R. § 900.248. If the tribe fails to ameliorate the deficiencies, the Secretary shall provide a second written notice to the tribe that the Secretary will reassume the contract, in whole or in part. *Id*. § 900.249. The second written notice shall include: (a) the intended effective date of the reassumption; (b) the details and facts supporting the intended reassumption; and (c) an explanation of the tribe's right to a formal hearing within 30 days of receiving the notice. *Id.* § 900.250. The Secretary cannot reassume the contract before the issuance of a final decision in any

administrative hearing or appeal. *Id.* § 900.251; *see also id.* §§ 900.170-176 (setting forth appellate procedures available to a tribe in the instance of an emergency reassumption).

An emergency reassumption is permitted when a tribe fails to fulfill the ISDEAA contract's requirements, and that failure poses: (1) an "immediate threat of imminent harm to the safety of any person"; or (2) "an imminent substantial and irreparable harm to trust funds, trust lands, or interest in such lands." 25 U.S.C. § 5330; 25 C.F.R. § 900.247. In an emergency reassumption, the Secretary must: (a) immediately rescind, in whole or in part, the contract; (b) assume control or operation of all or part of the program; and (c) give written notice of the rescission to the tribe, and to the community that the contract serves. 25 C.F.R. § 900.252. The written notice must include: (a) a detailed statement of the findings that support the Secretary's decision; (b) a statement explaining the tribe's right to a hearing on the record within 10 days of the reassumption, or such later date as the tribal organization may approve; (c) an explanation that the tribe or tribal organization may be reimbursed for actual and reasonable "wind up costs" incurred after the effective date of the reassumption; and (d) a request for the return of property, if any. *Id.* § 900.253; *see also id.* §§ 900.150-169 (setting forth appellate procedures available to a tribe in the instance of an emergency reassumption).

### C. <u>Applicability of the Contract Disputes Act</u>

In 1988, Congress amended the ISDEAA to apply the CDA, 41 U.S.C. § 7101 *et seq.,* to disputes arising under the ISDEAA. *See* 25 U.S.C. § 5331(d); Indian Self–Determination and Education Assistance Act Amendments of 1988, § 206(2), 102 Stat. 2295. Disputes concerning ISDEAA compacts and contracts are thus treated the same as other contract disputes involving the government, *see Menominee Indian Tribe*, 136 S. Ct. at 753-54, and of particular relevance here, are subject to the requirement under the CDA that "[e]ach claim" arising under that Act must first be presented administratively, *see id*. (citing 41 U.S.C. § 7103(a)(1)). Presentment is a

jurisdictional requirement. *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015); *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 407-08 (D.D.C. 2008).

Under the CDA, the contracting officer's decision is generally final, unless challenged through one of the statutorily authorized routes. 41 U.S.C. § 7103(g). A contractor dissatisfied with the officer's decision may either take an administrative appeal to a board of contract appeals or file an action for breach of contract in the United States Court of Federal Claims. *Id.* §§ 7104(a), (b)(1), 7105(b); 25 U.S.C. § 5331(d) (specifying that for disputes arising under the ISDEAA, the relevant administrative appellate body is the Interior Board of Contract Appeals). Both routes then lead to the United States Court of Appeals for the Federal Circuit for any further review. 28 U.S.C. § 1295(a)(3); 41 U.S.C. § 7107(a)(1); *see* 25 U.S.C. § 5331(a). Under the ISDEAA, however, "tribal contractors have a third option. They may file a claim for money damages in federal district court, . . . and if they lose, they may pursue an appeal in one of the regional courts of appeals[.]" *Menominee Indian Tribe*, 136 S. Ct. at 754 (citing 25 U.S.C. § 5331(a); 28 U.S.C. § 1291).

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Plaintiff's 93-638 Contract And Related Deficiencies[3]

Plaintiff is currently operating its law enforcement program pursuant to self-determination contract A16AV00143 entered into by the Secretary, on behalf of the United States, under the authority provided in the ISDEAA. DEX 2, attached hereto (Plaintiff's 638 contract). Under that agreement, Plaintiff is required to "provide security on the Cheyenne River Indian Reservation through effective crime prevention and law enforcement activities." *Id.* at 37. As a condition of

[3] All the exhibits cited in this section are either documents that are incorporated by reference in the Complaint or documents that may be judicially noticed by the Court. *See Abhe & Svoboda,* 508 F.3d at 1059; *Johnson*, 202 F. Supp. 3d at 167.

providing its own law enforcement services, Plaintiff agreed to "obtain all necessary" training required by "federal statutes to perform all programs under this contract," *id.* at 67, and "to ensure that, in accordance with 25 C.F.R. Subpart D, § 12.32, a thorough background investigation is completed on applicants for all law enforcement positions," *id.* at 75.

The pending July 7 BIA Letter initiating the non-emergency reassumption process is predicated on evidence that Plaintiff has failed to comply with the background investigation and training requirements of its 638 contract and the Department's related regulations. This is not a new issue. Since as early as 2015, OJS compliance reviews have confirmed that Plaintiff lacked adjudicated background investigations for all actively employed tribal police officers. *See* DEX 3, attached hereto (Feb. 25, 2015 OJS Letter). OJS provided Plaintiff with a corrective action plan to address this deficiency in 2015. *See id.* Over 18 months later, OJS determined that Plaintiff was not in full compliance with its background investigation requirements. *See* DEX 4, attached hereto (Sept. 26, 2016 BIA-OJS Letter). As noted in an OJS letter dated September 26, 2016, OJS requested that Plaintiff initiate the process for all outstanding background investigations within 10 days, remove from duty any officer who lacked a completed background investigation, and warned that failure to comply could result in suspension, withholding, or delay in payment of funds up to and including potential reassumption of its 638 contract. *Id.* at 2.

Plaintiff's more recent deficiencies—which it does not dispute (*see, e.g.*, Compl. ¶ 97, ECF No. 3)—were brought to light in connection with BIA's investigation into the Health Safety Checkpoints. Specifically, OJS became aware of potential violations of the background investigation and training requirements when OJS agents traveled to Plaintiff's reservation in late May 2020 on a fact-finding mission. DEX 5 at 2, attached hereto (June 22, 2020 OJS Letter). OJS agents were stopped at one of Plaintiff's checkpoints by tribal employees who identified themselves as tribal police. *Id.* These monitors confirmed they had not completed federally

required law enforcement training, and OJS had reason to believe they likewise had not undergone necessary background investigations. *Id.* Given its findings and serious compliance concerns related to ongoing police activity on the reservation, OJS conducted a review of Plaintiff's law enforcement files on June 9, 2020 and confirmed that "21 of the 26 tribal law enforcement officers did not have the appropriate background documents in their files, and 10 of the 26 [] tribal officers" did not have records showing they completed all required police training. *Id.* at 3 (emphasis omitted). Plaintiff did not permit OJS to review files related to the checkpoint monitors. *See* Compl. ¶ 64.

On June 10, 2020, the Assistant Secretary – Indian Affairs (Defendant Tara Katuk Mac Lean Sweeney), who oversees BIA and OJS, sent Plaintiff a letter setting forth information about the Department's non-compliance findings regarding the checkpoints—*i.e.*, that Plaintiff was operating checkpoints with unlawfully deputized individuals who did not have the required background investigations and/or basic police training. *See* ECF No. 3-1 at 2 (Exhibit A to Complaint). The Assistant Secretary requested that the Tribe rescind any deputization of monitors, instruct monitors operating checkpoints not to present themselves as law enforcement officers, and to disband the checkpoints to allow consultation with the State. *See id.* On the next day, Plaintiff confirmed in writing that the Tribe's Health Safety Monitors are "not deputized as police officers and are not paid using the Tribe's P.L. 93-638 contract funding," and it agreed to remove any patches or badges on monitors to ensure "no further confusion as to their status." Compl. ¶ 69 (emphasis omitted). Plaintiff does not allege that any further action has been taken by the Department on the Assistant Secretary's June 10 Letter.

Nonetheless, OJS has continued to follow up on the separate issue that it discovered in its June 9 review regarding the substantial non-compliance of Plaintiff's law enforcement program. As it did in 2016, OJS requested that Plaintiff immediately correct the background investigation

and training deficiencies, remove from duty any officer who has not satisfied the background investigation and/or training requirements, and warned that failure to comply could result in suspension, withholding, or delay in payment of funds up to and including potential reassumption of its 638 contract. *See* DEX 6 at 2-4, attached hereto (June 12, 2020 OJS Letter). OJS offered to assist Plaintiff in coming into compliance with its obligations. *See id.* at 2, 4; *see also* DEX 5 at 1.

As of June 24, 2020, however, Plaintiff had not removed from duty all police officers lacking adjudicated background investigations who were identified in OJS's June 9 review. *See* DEX 1 at 2. As of July 7, 2020, 18 police officers—including the Chief of Police—did not have an adjudicated background investigation. *See id.* at 2-3 (emphasis omitted). Accordingly, on July 7, 2020, BIA served Plaintiff with a written notice to initiate a non-emergency reassumption based on the Tribe's failure to comply with the background investigation and training requirements. *See* DEX 1. The letter requested that Plaintiff immediately remove non-compliant officers from duty and take other specific corrective action within 45 days. *See id.* at 3-4.

## II. <u>Plaintiff's Complaint</u>

Plaintiff initiated the instant action on June 24, 2020, prior to BIA sending its July 7 letter, alleging that Defendants have "threaten[ed] to take unlawful actions to shut down the Tribe's Health Safety Checkpoints, including threats of reassumption of control of the Tribe's law enforcement program." *See* Compl. ¶ 1. The Complaint raises three claims. Count I asserts a breach of contract claim, alleging three violations of the Tribe's 638 contract: breach of a duty of trust to Plaintiff, failure to act in good faith, and the Assistant Secretary's June 10 Letter and subsequent acts to reassume the contract. *See id.* ¶¶ 112-15. In Count II, Plaintiff alleges that the Assistant Secretary's decision to "unilaterally sever" the parties' contractual relationship violated the APA. *See id.* ¶ 121. Count III alleges a breach of a trust duty allegedly owed to Plaintiff under various federal treaty and statutory laws. *See id.* ¶¶ 126. Counts I and II are asserted against only

the Assistant Secretary—Indian Affairs. *See id.* ¶¶ 112-16, 120-22. Count III is asserted against all Defendants. *See id.* ¶ 126. Plaintiff seeks an order, *inter alia*, enjoining Defendants "from taking any further actions to enforce [the Assistant Secretary's June 10 Letter]," including "shut[ting] down the Plaintiff's Health Safety Checkpoints, reassuming jurisdiction of the Plaintiff Tribe's [638 contract], or threatening the Plaintiff Tribe's COVID-19 funding under the CARES Act." *Id.* ¶ 131.

## LEGAL STANDARDS

### I. Rule 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject-matter jurisdiction. "When considering a motion to dismiss for lack of jurisdiction, the court 'is not limited to the allegations of the complaint.'" *Harris v. Fulwood*, 989 F. Supp. 2d 64, 70 (D.D.C. 2013) (quoting *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987)). Rather, "a court may consider such materials outside the pleadings as it deems appropriate to resolve the question of whether it has jurisdiction to hear the case." *Id.*; *see also Jerome Stevens Pharms.*, *Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). To survive a Rule 12(b)(1) motion to dismiss, the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *Moran v. U.S. Capitol Police Bd.*, 820 F. Supp. 2d 48, 53 (D.D.C. 2011) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

### II. Rule 12(b)(6)

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). In assessing a Rule 12(b)(6) motion, the Court must consider all well-pled allegations in a complaint as true and view the complaint in the light most favorable to the plaintiff. *See Albright v. Oliver,*

510 U.S. 266, 268 (1994). However, these principles do not apply to "a legal conclusion couched as a factual allegation." *Papasan v. Allain,* 478 U.S. 265, 286 (1986). In deciding a motion under Rule 12(b)(6), a court may additionally consider "documents attached [to the complaint] or incorporated therein, and matters of which it may take judicial notice," without converting the motion into one for summary judgment. *Abhe & Svoboda, Inc. v. Chao,* 508 F.3d 1052, 1059 (D.C. Cir. 2007).

## ARGUMENT

### I. The Court Lacks Article III Jurisdiction over Any of Plaintiff's Claims.

#### A. Plaintiff Does Not Establish Standing to Obtain Prospective Relief.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Def. of Wildlife*, 504 at 555. The "irreducible constitutional minimum of standing contains three elements[:]" (1) the plaintiff must have suffered an "injury in fact" which is "concrete and particularized" and "actual or imminent," not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision from the court. *Id.* at 560-61; *see Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Plaintiff, as the party seeking to invoke the jurisdiction of the Court, has the burden of alleging "clearly and specifically" "facts sufficient to satisfy" these requirements. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

Threatened rather than actual injury may satisfy Article III standing requirements only if the threat is likely and imminent. Moreover, to obtain the type of prospective relief sought by Plaintiff here, it is not enough to rely on allegations of past injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Rather, Plaintiff must

demonstrate that there is a "real and immediate threat" that it will suffer some *future* harm. *Lyons*, 461 U.S. at 102. As the Supreme Court has "repeatedly reiterated," a "'threatened injury must be *certainly impending* to constitute injury in fact,'" and "'allegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore*, 495 U.S. at 158).

Plaintiff's standing claims fail at the first step because they rely on the very sort of "allegations of *possible* future injury," *id.* (citation omitted), that are insufficient to establish standing. Plaintiff does not allege that any action by Defendants is currently preventing it from operating Health Safety Checkpoints or has affected any CARES Act funding that it has received or expects to receive, or that Defendants have acted on the Assistant Secretary's June 10 Letter (or the July 7 BIA Letter) and reassumed Plaintiff's 638 contract. The Complaint alleges only that Defendants have "threaten[ed]" to shut down the checkpoints by "threatening" reassumption and "threatening" to limit Plaintiff's funding under the CARES Act. *See, e.g.*, Compl. ¶ 127. Defendants dispute those characterizations. But even accepting the truth of its allegations, as the Court must do at the motion-to-dismiss stage, these contentions demonstrate at best that Plaintiff's standing claims are based solely on anticipated future harm. These types of "'someday' injuries are insufficient" for purposes of establishing an Article III injury-in-fact. *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996) ("It is not enough for the [plaintiff] to assert that it might suffer an injury in the future, or even that it is likely to suffer an injury at some unknown future time.") (quoting *Defs. of Wildlife*, 504 U.S. at 564)); *see Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996).

Indeed, that the Department has not acted on the Assistant Secretary's June 10 Letter in the almost three-months since it was sent, well beyond the time period for compliance requested in the letter, demonstrates that the alleged threatened enforcement of that letter is not "certainly

impending." *See Defs. of Wildlife*, 504 U.S. at 564 n.2 (the meaning of "imminence" is "stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time"). And although the July 7 BIA Letter advises Plaintiff that the Department may reassume Plaintiff's 638 contract if certain background-investigation and training deficiencies are not timely remedied, this notice is on its face entirely unrelated to Plaintiff's Health Safety Checkpoints and does not seek in any way to prevent checkpoint operations. *See* DEX 1. It thus does not demonstrate that the harms alleged in the Complaint pose a "real and immediate threat." *Lyons*, 461 U.S. at 102; *Ctr. for Biological Diversity v. Bernhardt*, 442 F. Supp. 3d 97, 112 (D.D.C. 2020), *appeal filed*, No. 20-5088 (D.C. Cir. 2020) (allegations relating to unrelated conduct of defendant did not alter court's conclusion that plaintiff failed to establish injury-in-fact for actual or certainly impending future harm).

Accordingly, Plaintiff lacks standing to obtain the declaratory and prospective injunctive relief it seeks.

### B. Plaintiff's Claims Are Also Unripe.

Relatedly, inasmuch as Plaintiff's claims relate to any potential future reassumption, they should also be dismissed as unripe. Ripeness is an aspect of the justiciability analysis, "inextricably linked to [the] standing inquiry," since it is one of the "doctrines that cluster about Article III." *Cooksey v. Futrell*, 721 F.3d 226, 239–40 (4th Cir. 2013). The ripeness doctrine prevents the court from premature adjudication and protects "agencies from judicial interference until an administrative decision has been formalized." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Typically, the two primary factors considered by a court in determining ripeness are "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior,* 538 U.S. 803, 808 (2003).

First, in evaluating the fitness of an issue for judicial review, courts consider whether the issue is "purely legal" and the agency action is final, or, on the other hand, whether "the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *see Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) ("Under the fitness prong, we inquire into whether the disputed claims raise purely legal, as opposed to factual, questions and 'whether the court or the agency would benefit from postponing review until the policy in question has sufficiently crystallized.'"). A court must stay its hand when "judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n*, 523 U.S. at 733.

Under these standards, Plaintiff's claims are not presently "fit" for judicial review under the first prong of the ripeness test. The July 7 BIA Letter, which reflects material events that occurred subsequent to the initiation of this suit, merely requests that the Tribe work come into full compliance with the requirements of its 638 contract. It does not impose any legal consequences or effect any reassumption of the contract; nor does it commit BIA to a future reassumption—indeed, if the Tribe makes the necessary corrections to the conceded deficiencies in its present contract performance, no reassumption will occur. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (citation omitted); *Nevada v. DOE*, 457 F.3d 78, 84 (D.C. Cir. 2006) (finding plaintiff's claims unripe because the agency's statement of its plan was not a final determination, and was "replete with conditional phrases").

Further, to the extent that the Secretary were (hypothetically) to deem it necessary to proceed with the non-emergency reassumption process, the Tribe would, by regulation, be entitled to a second notice letter and opportunity to rectify the performance issues, as well as a formal hearing—and the Secretary could not reassume the contract before the issuance of a final decision

in any administrative hearing or appeal. 25 C.F.R. §§ 900.249-251; *see also id.* §§ 900.170-176 (setting forth appellate procedures available to a tribe in the instance of an emergency reassumption); *cf. Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 465 (4th Cir. 1999) (considering the court's interest in "avoiding unnecessary adjudication and in deciding issues in a concrete setting"); *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (emphasizing "the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer," and noting that "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context."). Thus, in the circumstances presented, the Court should allow the relevant reassumption procedures—if, hypothetically, any are even necessary—to play out, before permitting Plaintiff to seek the Court's review of any final reassumption decision that *might*, in the future, be reached.

Nor has Plaintiff demonstrated that withholding judicial review now will cause it hardship—the second element of the ripeness test. "In order to outweigh institutional interests in the deferral of review, the hardship to those affected by the agency's action must be immediate and significant." *Devia v. NRC*, 492 F.3d 421, 427-28 (D.C. Cir. 2007) (citation omitted). Here, however, BIA is at present merely requesting that Plaintiff comply with the background check and training requirements that it agreed to undertake when it entered into the 638 contract. As explained above, ISDEAA contracts are subject to ordinary contract principles, *see Menominee Indian Tribe*, 136 S. Ct. at 754; *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 643-44 (2005); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 190-92 (2012)—and as such, Plaintiff cannot plausibly claim any "hardship" in being held accountable to fulfill these contractual terms.

For these reasons, Plaintiff's claims are not ripe for this Court's review.

### C. Any Alleged Injury Is Not Fairly Traceable to Actions of the White House Defendants And Not Redressable By the Relief Requested.

Plaintiff's claim against White House officials Mark Meadows, Dr. Deborah Birx, and Douglas Hoelscher fails for the separate reason that it does not satisfy the traceability and redressability prongs of Article III standing. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,* 528 U.S. 167, 180–81 (2000). "The 'traceability' and 'redressability' requirements are closely related." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 801 (D.C. Cir. 1987) (Bork, J.) (citing *Von Aulock v. Smith*, 720 F.2d 176, 180 (D.C. Cir. 1983)). In such cases, both prongs can be said to focus on principles of causation: traceability turns on the causal nexus between the challenged agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and the requested judicial relief. *See Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984), *overruled on other grounds in Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Here, the absence of traceability from Plaintiff's alleged injury to the relief sought against the White House defendants is clear. Even assuming that it has sufficiently asserted an imminent injury to its ability to operate Health Safety Checkpoints or to provide its own law enforcement services (which it has not), Plaintiff alleges that such injury stems not from the conduct of White House officials—who participated in phone calls with the Tribe about alternative COVID-19 response strategies and offers of federal assistance, *see* Compl. ¶¶ 65, 73, 78—but rather from actions by Interior officials, specifically the Assistant Secretary's June 10 Letter, *see id.* ¶¶ 117, 123, 129, 132, and the July 7 BIA Letter. Where "the necessary elements of causation . . . hinge on the independent choices of [a] . . . third party," *e.g.*, Interior, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as

to produce causation and permit redressability of injury."[4] *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (quoting *Defs. of Wildlife*, 504 U.S. at 562) (internal quotation marks omitted). Plaintiff falls far short of its burden.

It is indisputable that by statute only the Department has the authority to determine whether Plaintiff is complying with the obligations of its 638 contract and the Department's related regulations, and to initiate reassumption of Plaintiff's law enforcement services as necessary. *See* 25 U.S.C. § 5321(a)(1) (authorizing the Secretary to enter into self-determination contracts with tribal organizations); *id.* § 5328(a)(1) (authorizing the Secretary to promulgate certain regulations relating to self-determination contracts, including reassumption procedures); *id.* § 5330 (authorizing the Secretary in certain circumstances to reassume services provided for in self-determination contracts). Additionally, the authority to apportion funds made available under the CARES Act is vested solely in the Secretary of the Treasury, 42 U.S.C. § 801(b), and the amount of such payment to Indian tribes is determined by the Treasury Secretary in his discretion after consultation with the Interior Secretary and the tribes, *id.* § 801(c)(7).[5] Thus any perceived

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[4] Although courts sometimes state that the plaintiff's injury must be traceable to the defendant instead of "some third party *not before the court*," *Defs. of Wildlife*, 504 U.S. at 560 (emphasis added), it would be a mistake to conclude that a plaintiff can establish standing to sue a party whose actions did not allegedly cause injury simply by also suing the party whose actions allegedly did. A plaintiff "must demonstrate standing separately for each form of relief sought" and "for each claim he seeks to press." *Cf. DaimlerChrysler v. Cuno*, 547 U.S. 332, 352 (2006).

[5] The nature of Plaintiff's claim against the White House defendants further illustrates that they are not appropriate parties. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996). Even assuming Count III stated obligations that are enforceable through a breach of trust action (which Defendants dispute, *infra* § IV), the authorities that Plaintiff alleges create a trust duty are patently inapplicable to the named White House officials. *See* Treaty of Fort Laramie (1868) (setting forth terms of agreement ending hostilities between the United States and bands of the Sioux Nation of Indians); Snyder Act, 42 Stat. 208 (1921) (authorizing BIA, under the supervision of the Secretary, to expend appropriations for the administration of Indian affairs); ISDEAA, 25 U.S.C. § 5301 *et seq.* (authorizing the Secretary to, *inter alia*, enter into self-determination contracts with Indian tribes); ILERA, 25 U.S.C. § 2801 *et seq.* (charging the Secretary, acting through BIA (specifically OJS), to provide for and assist in the provision of law enforcement

injury, even if it existed, is not traceable to any alleged actions or "threatened" actions of the named White House officials.

Nor can Plaintiff show that its purported injuries would be redressed by relief against these defendants. Plaintiff seeks to "[e]njoin ALL Defendants from taking any further actions to enforce" the Assistant Secretary's June 10 Letter, including shutting down the Health Safety Checkpoints, reassuming Plaintiff's 638 contract, or threatening Plaintiff's CARES Act funding. Compl. ¶ 132. For the same reasons set forth above, however, there is not a "substantial likelihood," indeed no likelihood, that obtaining such requested relief against the named White House officials will remedy its alleged injuries. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (internal citation omitted). Plaintiff appears to recognize as much, given that the causes of action in the Complaint directly challenging the Department's alleged unlawful efforts to reassume Plaintiff's 638 contract are brought solely against and seek relief solely from an agency official. *See* Compl. ¶¶ 113-17 (Count I), *id.* ¶¶ 121-23 (Count II).

Because Plaintiff has not alleged standing to bring a claim against Mr. Meadows, Dr. Birx, and Mr. Hoelscher, these defendants should be dismissed.

### D. The President Should Be Dismissed As A Party to This Lawsuit.

There is no cause of action against the President, and Plaintiffs may not obtain—and the Court may not order—declaratory or injunctive relief directly against the President for his official conduct. The Supreme Court recognized over 150 years ago in *Mississippi v. Johnson* that federal courts lack jurisdiction to "enjoin the President in the performance of his official duties," 71 U.S. (4 Wall.) 475, 501 (1866), a principle the Court reaffirmed more recently in *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *id.* at 827 (Scalia, J., concurring in part and concurring in the

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services in Indian country); TLOA, P.L. 111-211, 124 Stat. 2258 (2010) (amending the ILERA to provide for, among other things, additional law enforcement responsibilities of OJS).

judgment) ("apparently unbroken historical tradition supports the view" that courts may not order the President to "perform particular executive . . . acts"); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (the President's unique constitutional role and the potential tension with the separation of powers make it "painfully obvious" that "courts should be hesitant to grant such relief"). Moreover, the Supreme Court has twice held that causes of action that are available against other government officials should not be extended to the President absent a clear statement by Congress. *See Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (declining to assume that *Bivens* and other implied statutory damages "cause[s] of action run[] against the President of the United States"); *Franklin*, 505 U.S. at 800-01 (declining to find cause of action against the President under the APA "[o]ut of respect for the separation of powers and the unique constitutional position of the President").

Lower courts have followed the logic of *Franklin* by dismissing the President as a defendant and declining to impose either declaratory or injunctive relief against him in his official capacity. *See In Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) ("In light of the Supreme Court's clear warning that such relief should be ordered only in the rarest of circumstances we find that the district court erred in issuing an injunction against the President himself."), *vacated as moot and remanded*, 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) ("[T]he extraordinary remedy of enjoining the President is not appropriate here . . . ."), *vacated as moot and remanded*, 138 S. Ct. 377 (2017); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief.") (citation omitted); *Ctr. for Bio. Diversity v. Trump*, --- F. Supp. 3d ---, 2020 WL 1643657, at *13 (D.D.C. Apr. 2, 2020) (dismissing "the President as a party to this lawsuit"); *Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) (same).

Here, the Complaint is entirely devoid of any allegation of harm claimed to be attributable to the President's conduct. Plaintiff alleges only that the President used his authority to declare a public health emergency in January 2020 and to issue two declarations of a national emergency and an Executive Order in March 2020 to assist the nation in responding to the COVID-19 pandemic.[6] *See* Compl. ¶ 11. Nonetheless, Plaintiff includes the President generally in its claim that Defendants have breached a purported trust duty to the tribe. *See id.* ¶ 127. In the absence of an express statutory cause of action against the President or a tradition of recognizing such suits as a matter of equity, there is no basis for the Court to infer equitable relief against the President on this claim. *See Franklin*, 505 U.S. at 827. Moreover, the gravamen of the Complaint rests primarily on the alleged actions taken by Interior officials with respect to Plaintiff's checkpoint operations and its 638 contract, *i.e.*, the Assistant Secretary's June 10 letter, Compl. ¶ 129 (and the July 7 BIA Letter), for which any relief (if warranted) is appropriately sought from the agency defendants, not the President.

The Court should, therefore, dismiss the President as a defendant.

## II. <u>Plaintiff's Contract Claim Must Be Dismissed.</u>

Even if Plaintiff could establish standing, each of its asserted claims fails on additional, independent grounds. Count I, Plaintiff's contract claim, fails both jurisdictionally, because

[6] Contrary to Plaintiff's claim (Compl. ¶ 11), the public health emergency was declared by the Secretary of Health and Human Services. *See* Dep't of Health & Human Svcs. Press Release, *Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus*, Jan. 31, 2020, https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html (last visited Sept. 8, 2020). Additionally, the President declared only one national emergency related to COVID-19. His second action on March 13, 2020 consisted of a statutory determination that made emergency federal assistance available under the Stafford Act. *See Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act*, Mar. 13, 2020, https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/ (last visited Sept. 8, 2020).

Plaintiff has failed to administratively "present" any such claim, and on its merits, because Plaintiff has not alleged the requisite elements of a claim for breach of contract under federal common law. This claim must accordingly be dismissed.

### A. This Court Lacks Jurisdiction over the Unpresented Breach of Contract Claim.

As explained above, the CDA applies to disputes arising under the ISDEAA. *See* 25 U.S.C. § 5331(d). "As part of its mandatory administrative process for resolving contract disputes, the CDA requires contractors to present '[e]ach claim' they may have to a contracting officer for decision." *Menominee Indian Tribe*, 136 S. Ct. at 753-54 (quoting 41 U.S.C. § 7103(a)(1)). Presentment is a jurisdictional requirement. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1005 (federal court jurisdiction over a claim governed by the CDA "requires both that a claim meeting certain requirements have been submitted to the relevant contracting officer and that the contracting officer have issued a final decision on that claim."); *Tunica-Biloxi Tribe of La.*, 577 F. Supp. 2d at 407-08 (applying the CDA's jurisdictional requirements to a contract dispute involving an ISDEAA self-determination contract); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1106-07 (D.N.M. 2006) (same). As Plaintiff has failed to administratively present any claim regarding any alleged breach of its ISDEAA law enforcement contract—much less obtained the requisite "final decision" from a contracting officer—it follows straightforwardly that Count I must be dismissed for lack of subject matter jurisdiction. *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1005; 25 U.S.C. § 5331(d).[7]

[7] The "contracting officer" for an ISDEAA contract is a BIA awarding official. 25 C.F.R. § 900.219; *see id.* § 900.6 (definition of "awarding official"); *see also generally id.* §§ 900.215-230 (post-award contract dispute process).

### B. The Contract Claim Also Fails on its Merits.

Even if, hypothetically, Plaintiff had administratively presented a breach of contract claim and obtained a final decision from a contracting officer, as necessary to invoke this Court's jurisdiction over its contract claim, any such claim would still fail on its merits. In order to bring a breach of contract claim against the federal government, a plaintiff must allege the following elements under federal common law: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by the breach." *Red Lake Band of Chippewa Indians v. U.S. Dep't of Interior*, 624 F. Supp. 2d 1, 12 (D.D.C. 2009) (Kollar-Kotelly, J.) (citing, *inter alia*, *San Carlos Irrigation & Drainage Dist. v. United States,* 877 F.2d 957, 959 (Fed. Cir. 1989)); *see also*, *e.g.*, *Express Damage Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, No. 1:19-CV-24127-JLK, 2019 WL 6699702, at *1 (S.D. Fla. Dec. 9, 2019) (same); *Boyle v. United Tech. Corp.,* 487 U.S. 500, 504, 108 (1988) ("[The] obligations to and rights of the United States under its contracts are governed exclusively by federal law."). While the existence of the 638 contract between Plaintiff and the Secretary satisfies the first factor of this test, as set forth below Count I otherwise fails to state any actionable claim.

Plaintiff offers three theories as to how, in its view, the Department has allegedly breached the parties' 638 contract: (1) "by requiring the Tribe to comply with policy directives of the Assistant Secretary in matters unrelated to its administration of the Tribe's contract," Compl. ¶ 112; (2) "by breaching [its] trust duty" to the Tribe, *id.* ¶ 113; and (3) "by failing to cooperate in good faith" with Plaintiff, in its administration of this contract, *id.* ¶ 114. Initially, the second of these theories—that the Department breached the 638 contract "by breaching [its] trust duty" to the Tribe, *id.* ¶ 113—fails to allege any actionable "obligation or duty arising out of the contract," as required by the second element of this cause of action under federal common law. *Red Lake Band of Chippewa Indians*, 624 F. Supp. 2d at 12. As Defendants explain at greater length in

Section IV, *infra*, while there is a general trust relationship between the Indian people and the United States, *see United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*), as reaffirmed in the ISDEAA itself, *see* 25 U.S.C. § 5329(d)(1)(A), this relationship is not actionable *in and of itself*. Rather, as the Supreme Court has made clear, a cause of action for breach of trust is extremely limited and dependent on a trust duty specifically created by statute. "[The] Tribe must first 'identify a *substantive source of law* that establishes' that specific fiduciary duty. This 'analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895 (D.C. Cir. 2014) (quoting *Navajo I*, 537 U.S. at 506); *see also Jicarilla Apache Nation*, 564 U.S. at 165 ("The trust obligations of the United States to the Indian tribes are established and governed by statute . . . .").

The generalized reaffirmation of a generic trust duty in the ISDEAA does not transform Plaintiff's role under that statute from one of contractor to one of beneficiary, or the Secretary's role as disburser of federal funds for contracts to one of trustee. To the contrary, in reviewing the ISDEAA, the Supreme Court has repeatedly emphasized that ISDEAA contractors should be treated like other government contractors and their contracts subject to ordinary contract principles. *See Menominee Indian Tribe*, 136 S. Ct. at 754; *Ramah Navajo Chapter*, 567 U.S. at 190-92; *Cherokee Nation,* 543 U.S. at 639 (holding that the statutory language of the ISDEAA indicates "that Congress, *in respect to the binding nature of a promise,* meant to treat alike promises made under the Act and ordinary contractual promises (say, those made in procurement contracts)."). Moreover, for an enforceable trust relationship to exist, the government must control Indian property; *i.e.*, there must be a "trust corpus." *See United States v. White Mountain Apache Tribe,* 537 U.S. 465, 473-74 (2003); *United States v. Mitchell,* 463 U.S. 206, 225-28 (1983); *Cobell v. Norton,* 240 F.3d 1081, 1098-99 (D.C. Cir. 2001). But the ISDEAA does not authorize the Secretary to assume control over or manage Plaintiff's property. Instead, it does just the

opposite: it directs the government to transfer the management of federal programs and federal funds to Indian tribes. *See, e.g.*, 25 U.S.C. §§ 5321(a), 5325(a), 5384, 5385.

Further, while "[t]he [ISDEAA] and CDA establish a clear procedure for the resolution of disputes over ISDA contracts," "[t]he general trust relationship" between the United States and Indian tribes "does not override the clear language of those statutes," *Menominee Indian Tribe*, 136 S. Ct. at 757—and Plaintiff's attempt to bootstrap a breach of trust claim into its contract remedy under the CDA would, if successful, erode the statutory scheme chosen by Congress for the resolution of disputes involving 638 contracts. *Cf.* Restatement (Second) of Trusts § 197 cmt. B (1959) (breach of contract and breach of trust are distinct actions). Accordingly, and for the additional reasons set forth in greater detail *infra* § IV, the ISDEAA does not create trust duties for the Secretary in the execution or performance of 638 contracts. And, where there is no contractual trust duty, it necessarily follows that there cannot have been any breach, much less any injury caused thereby. *Red Lake Band of Chippewa Indians*, 624 F. Supp. 2d at 12.

Plaintiff's remaining two theories in support of its asserted contract claim—to wit, that the Department has breached its 638 contract with the Tribe "by requiring the Tribe to comply with policy directives . . . in matters unrelated to its administration of the Tribe's contract," Compl. ¶ 112, and "by failing to cooperate in good faith," *id.* ¶ 114—fare no better. These allegations rest on the Assistant Secretary's June 10 Letter and a "threatened" emergency reassumption related to the checkpoints that has not materialized, and is not likely to. And the only action BIA has taken towards reassuming Plaintiff's 638 contract is based on the background investigation and training deficiencies of tribal police personnel, which are integral to the Tribe's contract obligations. Because ISDEAA contracts are subject to ordinary contract principles, *see Cherokee Nation*, 543 U.S. at 643-44; *Ramah Navajo Chapter*, 567 U.S. at 190-92, both parties to the contract are held to their promises. Plaintiff's Complaint does not dispute—nor could it—that among the contractual

obligations it undertook by entering into its 638 contract were to ensure that all law enforcement officers performing services funded by the contract have successfully completed both (1) "a thorough background investigation no less stringent than required of a Federal officer performing the same duties," 25 C.F.R. § 12.32, and (2) "basic law enforcement training," *id.* § 12.35; *see also* 25 U.S.C. § 2802(e)(1)(B), (C) (introducing greater flexibility to the training that will satisfy this requirement, while still maintaining minimal professional standards); DEX 2 at 67, 75. Against this undisputed backdrop, Plaintiff does not plausibly allege that BIA's request that Plaintiff comply with these terms, *see* DEX 1 at 3-4, constitutes either a lack of "good faith," or an attempt to inject "extraneous" policy objectives into the Tribe's performance of its 638 contract. Thus, neither of these theories plausibly alleges any breach of the 638 contract.

Finally, Count I also fails for one additional, and elemental, reason: it does not allege, under any of Plaintiff's asserted theories, that Plaintiff has suffered any actual, concrete injury, monetary or otherwise, as a result of any of the purported breaches. *See supra* § I.A. This deficiency is alone fatal to the contract claim, where applicable federal common law requires that "a plaintiff must establish that he or she suffered a loss or injury . . . as part of a claim for a breach of contract." *Red Lake Band of Chippewa Indians*, 624 F. Supp. 2d at 12 (citing, *inter alia*, *Malissa Co., Inc. v. United States,* 18 Cl. Ct. 672, 674 (Cl. Ct.1989)); *New Valley Corp. v. United States,* 67 Fed .Cl. 277, 284 (Fed. Cl. 2005) ("[B]reach must be shown to be the proximate cause of the alleged injury") (quoting *Record Club of Am., Inc. v. United Artists Records, Inc.,* 890 F.2d 1264, 1275 (2d Cir. 1989)).

Accordingly, Count I of Plaintiff's Complaint should be dismissed.

## III. Plaintiff's APA Claim(s) Must Also Be Dismissed on Several Independent Grounds.

Plaintiff's APA claim, Count II, alleges that the Department has acted arbitrarily and capriciously, or in excess of statutory authority, "by issuing a decision that [it] would unilaterally sever the contractual relationship if the Tribe continues to act in a manner of which [it] disapproves." Compl. ¶ 120. Not only does this claim fail to square with reality, it also fails on numerous independent grounds. As an initial matter, because the CDA (as incorporated into the ISDEAA) "provide[s] final and exclusive resolution of all disputes arising from government contracts" that fall within its ambit, *A & S Council Oil Co. v. Lader,* 56 F.3d 234, 241 (D.C. Cir. 1995), Plaintiff may not evade the jurisdictional bar of the CDA merely by re-casting its contract claim as a purported APA violation. Additionally, even if, *arguendo*, the CDA does not preempt the APA's otherwise applicable waiver of sovereign immunity, Count II challenges only an entirely hypothetical, future reassumption of Plaintiff's 638 contract (no matter if the challenge is to the Assistant Secretary's June 10 Letter or the July 7 BIA Letter)—and thus plainly fails to allege either any "agency action" or any "final agency action," as required for APA review. And independently, any APA claim is also presently unripe for judicial review.

Finally, while Defendants construe Count III as asserting a freestanding breach of trust claim, to the extent that Plaintiff meant to plead (or the Court construes) this claim as arising under the APA as well,[8] each of these grounds for dismissal, as elaborated upon below, applies with equal force—and for all the same reasons—to Count III as well.[9]

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[8] While otherwise devoid of any of the elements of a claim arising under the APA, Count III is entitled "Violation of Treaty, Statutory, and Common Law Trust Duty: Declaratory and Injunctive Relief under *5 U.S.C. § 706* and 28 U.S.C. §§ 2201-2202" (emphasis added).

[9] In particular, Defendants note that like Count II, Count III is based only on "threatened" and wholly hypothetical, future agency action. *See* Compl. ¶ 126 (alleging that Defendants "have breached and continue to breach the trust duty of the United States to the Tribe and its members by

### A. **Count II Fails Because the CDA, as Incorporated by the ISDEAA, Precludes the Relief Sought.**

"It is elementary that [t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . ." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (internal quotations omitted); *see also FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). As a general matter, Section 702 of the APA grants the Government's consent to suit in actions "seeking relief other than money damages." 5 U.S.C. § 702. This waiver is subject to a number of significant exceptions, however, two of which apply here. First, Section 702 itself provides that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *Id*. Second, mirroring the first exception, the APA provides that its chapter on judicial review, including Section 702, does not apply "to the extent that . . . statutes preclude judicial review." *Id.* § 701(a)(1).

The first exception "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012). As Congress explained when it enacted the APA's waiver of immunity, this "important carve-out," *id*., makes clear that Section 702 was "not intended to permit suit in circumstances where statutes forbid or limit the relief sought," that is, where "Congress has consented to suit and the remedy provided is intended to be the exclusive remedy." H.R. Rep. No. 94-1656, at 12-13 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6121, 6133. Thus, "'when Congress has dealt in particularity with a claim and [has] intended a specified

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*threatening to* shut down the Tribe's Health Safety Checkpoints…, by *threatening to* unlawfully assume law enforcement services over the Tribe, by *threatening to* limit the Tribe's P.L. 93-638 funding, and by *threatening to* limit the Tribe's CARES Act funding." Compl. ¶ 126 (emphases added).

remedy'—including its exceptions—to be exclusive, that is the end of the matter; the APA does not undo the judgment." *Pottawatomi Indians*, 567 U.S. at 216 (quoting, *inter alia*, *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 286 n. 22 (1983)); *see also id.* ("[A] plaintiff cannot use the APA to end-run another statute's limitations."); *Bowen v. Massachusetts,* 487 U.S. 879, 903 (1988) (explaining that "where the Congress has provided special and adequate review procedures," the APA does not provide additional judicial remedies).

Relatedly, Section 701(a)(1) of the APA withdraws Section 702's waiver of immunity where "statutes preclude judicial review." 5 U.S.C. § 701(a)(1) ("This chapter applies, according to the provisions thereof, except to the extent that statutes preclude judicial review"). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Id.* at 349. The question is "thus . . . whether another statute bars [Plaintiff's] demand for relief." *Pottawatomi Indians*, 567 U.S. at 215.

Here, the CDA is "the paradigm of a precisely drawn, detailed statute," which "purports to provide final and exclusive resolution of all disputes arising from government contracts" that fall within its ambit, *A & S Council Oil Co.*, 56 F.3d at 241. And, as the Supreme Court has recognized, when Congress amended the ISDEAA to apply the CDA to disputes related to extant 638 contracts, 25 U.S.C. § 5331(d), it made the determination "to treat alike promises made under the [ISDEAA] and ordinary contractual promises (say, those made in procurement contracts)." *Cherokee Nation*, 543 U.S. at 639. Thus, as another judge in this district has previously explained:

> If a dispute [related to an extant 638 contract] arises, tribal organizations may seek damages, injunctive relief, or mandamus against the Secretary in federal court . . . . [However,] [c]omplaints seeking payment of a specific sum under a contract, requesting adjustment or interpretation of a contract's terms, or advancing '*[a]ny other claim relating to*' a contract, must first be submitted to the contracting officer for decision in accordance with the [CDA].

*Seneca Nation of Indians v. HHS*, 144 F. Supp. 3d 115, 117 (D.D.C. 2015) (quoting 25 C.F.R. § 900.218(a)).

Thus, in light of the comprehensiveness and exclusivity of the remedial scheme established by the CDA—and expressly applied to the ISDEAA—Plaintiff may not evade the jurisdictional bar of the CDA merely by re-casting or "dressing up" its contract claim as one purportedly arising under the APA. Because Count II plainly "relates to" the Department's administration of its 638 contract with the Tribe, the CDA applies and precludes any exercise of this Court's jurisdiction under the APA. 5 U.S.C. §§ 701(a)(1), 702; *Pottawatomi Indians*, 567 U.S. at 215; *see also*, *e.g.*, *Penn. Higher Educ. Ass't Agency v. Perez*, 416 F. Supp. 3d 75, 89 (D. Conn. 2019) ("The 'agency action' alleged in the complaint . . . is [the U.S. Department of] Education's implied threat to terminate its contract with [the plaintiff]…. [A] claim based on such an action—no matter how it is labeled—falls under the CDA.")

### B. <u>Count II Fails to Identify Any "Agency Action," Much Less Any "Final Agency Action," within the Meaning of the APA.</u>

The APA "does not provide judicial review for everything done by an administrative agency." *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (internal citation omitted). Two related, but independent, threshold limitations are that review may only be had of certain defined "agency actions," which must, in turn, be "final." 5 U.S.C. § 702 ("A person suffering legal wrong because of *agency action*, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.") (emphasis added); *id.* § 704 ("Agency action made reviewable by statute and final agency action for which

there is no other adequate remedy in a court are subject to judicial review."). "Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006).

The first of these elements requires that Plaintiff identify a discrete "agency action," which the APA defines as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *see* 5 U.S.C. § 701(b)(2) ("For the purpose of this chapter . . . 'agency action' ha[s] the meanin[g] given . . . by section 551 of this title"). As it is used in the APA, "[t]he term 'action'" is thus "a term of art that does not include all conduct such as, for example, constructing a building, operating a program, or performing a contract." *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013). As courts have recognized, "this prohibition is motivated by institutional limits on courts which constrain [judicial] review to narrow and concrete actual controversies." *Sierra Club v. Peterson*, 228 F.3d 559, 566 (5th Cir. 2000) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). Here, Count II does not even purport to identify any "narrow and concrete" "agency action" matching the statutory definition provided by 5 U.S.C. § 551(13), but rather takes issue only with one communication (the Assistant Secretary's June 10 Letter) in a broader and then-ongoing discussion among the parties that has now been overtaken by events. The July 7 BIA Letter is likewise only an intermediate step taken by BIA in performance of its contractual and statutory obligations. At best then, Plaintiff challenges an entirely hypothetical possibility of a future reassumption action that has not yet occurred, and may never occur. Regardless of how the Court were to construe this claim, neither interlocutory steps, taken in furtherance of an oversight responsibility, nor hypothetical future actions, are within the meaning of an "agency action" that is challengeable under the APA. Accordingly, Count II fails on this ground alone.

Likewise, Count II also fails to allege finality, as separately required for APA review. Agency actions are final if two independent conditions are met: (1) the action "mark[s] the consummation of the agency's decisionmaking process" and is not "of a merely tentative or interlocutory nature;" and (2) it is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted); *see also*, *e.g.*, *Jama v. DHS*, 760 F.3d 490, 496 (6th Cir. 2014), *reh'g denied* (Sept. 16, 2014) ("An agency action is not final if it 'does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'") (quoting *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 130 (1939)). "The reason to preclude . . . interlocutory challenges to agency jurisdiction inheres in the purpose of the final agency action rule," *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003)—*i.e.*, to "avoid premature intervention in the administrative process." *West v. Horner*, 810 F. Supp. 2d 228, 236 (D.D.C. 2011) (citation omitted); *see also*, *e.g.*, *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) ("The interest in postponing review is powerful when the agency position is tentative. Judicial review at that stage improperly intrudes into the agency's decision-making process. It also squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind.").

Plainly, these well-established and sensible precepts preclude Plaintiff's attempt to prematurely challenge an ongoing administrative oversight process. To date, BIA has only requested that Plaintiff correct certain specific—and undisputed—deficiencies in Plaintiff's performance of its 638 contract, namely, the numerous instances of its police officers having not undergone a satisfactory background check and/or not completed the minimal professional training required by the terms of the contract. This interlocutory step fails to satisfy the APA's requirement of finality. It does not mark the "consummation" of the relevant decision-making

process; nor does it determine any "rights or obligations . . . from which [any] legal consequences [have] flow[ed]" to the Tribe. *Bennett*, 520 U.S. at 177-78. Rather, at most, BIA has to date "merely expresse[d] its view of what the law requires of" Plaintiff—an interlocutory step that courts have consistently found to lack finality, "even if [the agency's] view is adverse to [a] party." *AT&T Co. v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001); *see also*, *e.g.*, *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 233 (1980) (issuance of a complaint by the FTC is not "final agency action" under the APA); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (letter warning of potential enforcement action in the future did not constitute final agency action under the APA); *Indep. Equip. Dealers Ass'n. v. EPA,* 372 F.3d 420 (D.C. Cir. 2004) (letter warning of potential future enforcement action based on agency's interpretation of law not a final agency action); *Florida Power & Light*, 145 F.3d at 1419 (agency letter alleging statutory violations and warning of possible injunctive and civil penalty remedies did not constitute final agency action).

Accordingly, Count II must also be dismissed for failure to plead a "final agency action" within the meaning of the APA. 5 U.S.C. § 704.

## IV. <u>Count III Must Also Be Dismissed.</u>

Finally, to the extent that the Court does not construe Count III as pled under the APA—and thus does not dismiss this claim pursuant to one or more of the threshold grounds set forth above—this claim should also be dismissed for at least two additional reasons. First, neither the ISDEAA nor any of the other statutes cited by Plaintiff—either alone or in combination—creates a trust obligation enforceable through a breach of trust action. Second, even if, wholly *arguendo*, Plaintiff has adequately alleged an enforceable trust action, it has not plausibly alleged any breach thereof.

### A. <u>**Plaintiff Has Not Alleged Any Trust Obligation Enforceable through a Breach of Trust Action.**</u>

As both the Supreme Court and the D.C. Circuit Court of Appeals have made clear, a cause of action for breach of trust is extremely limited and dependent on a trust duty specifically created by statute. "[The] Tribe must first 'identify a *substantive source of law* that establishes' that specific fiduciary duty. This 'analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *El Paso Nat. Gas Co.*, 750 F.3d at 895 (quoting *Navajo I*, 537 U.S. at 506); *id*. at 895 (a "statute's invocation of trust terminology is not itself dispositive."). Rather, "[s]omething more is needed." *Id*. at 892. To establish a cause of action for breach of trust, a tribe must instead identify "'a specific, applicable, trust-creating statute or regulation that the Government violated.'" *Jicarilla Apache Nation*, 564 U.S. at 177 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) (*Navajo II*)).

As the D.C. Circuit has noted, two pairs of Supreme Court cases describe the contours of the specific statutory or regulatory language that may create an enforceable trust responsibility. *See El Paso Nat. Gas Co*., 750 F.3d at 893. In the early 1980's, the Supreme Court decided a pair of cases concerning the United States' management of timber resources. *See id*. (citing *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)). In *Mitchell I*, the Supreme Court held that general language in the Indian General Allotment Act of 1887 concerning the United States holding Indian land in "trust" did not "impose a judicially enforceable trust duty." *See El Paso Nat. Gas Co*., 750 F.3d at 893 (quoting *Mitchell I*, 445 U.S. at 542). In contrast to the "bare trust" created by the General Allotment Act, the Supreme Court held in *Mitchell II* that later statutes had created fiduciary obligations by establishing "comprehensive federal responsibilities to manage the harvesting of Indian timber and [to] instruct[] that sales of Indian timber should be based upon the Secretary's consideration of the

needs and best interests of the Indian owner and his heirs." *Id*. (citing *Mitchell II*, 463 U.S. at 222, 224).

In 2003, the Supreme Court decided another pair of cases, again distinguishing between circumstances where an enforceable trust duty would or would not exist. In *Navajo I*, the Supreme Court held that the Indian Mineral Leasing Act of 1938 did not create fiduciary obligations, even though the Tribe's reservation lands were generally held in trust, because the Act and associated regulations did not "'assign to the Secretary managerial control over coal leasing.'" *See El Paso Nat. Gas Co*., 750 F.3d at 894 (quoting *Navajo I*, 537 U.S. at 508). In contrast, the Supreme Court held in *White Mountain* that a statute had established a trust over a 400-acre parcel of land because that statute gave the Secretary of the Interior the right to "'use any part of the land and improvements for administrative or school purposes for as long as they are needed for [that] purpose'" and "invest[ed] the United States with 'discretionary authority to make direct use of portions of the trust corpus.'" *White Mountain,* 537 U.S. at 469, 474-75. A statutorily enforceable trust responsibility thus must arise in the context of a "specific rights-creating or duty-imposing statutory or regulatory prescription" relating to the Government's management and control over trust assets or trust funds. *Navajo I,* 537 U.S. at 506. In that context, a defined corpus exists to which specific trust responsibilities could attach. *See, e.g.*, *White Mountain*, 537 U.S. at 475 (land use); *Mitchell II*, 463 U.S. at 224 (timber management). These same standards apply to both equitable and monetary breach of trust claims. *El Paso Nat. Gas Co.*, 750 F.3d at 895.

The ISDEAA does not satisfy the Supreme Court's demanding standard, and does not create a trust obligation enforceable through a breach of trust action. First, the ISDEAA does not impose a specific, statutorily created obligation on the United States to manage tribal resources. *Navajo II*, 556 U.S. at 301. Instead, it does just the opposite: it directs the government to transfer the management of federal programs and federal funds to Indian tribes. *See, e.g.*, 25 U.S.C. §§

5321(a), 5325(a), 5384, 5385. This is precisely the type of statute that "aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role" in managing their own affairs, and therefore cannot create enforceable trust rights. *Navajo I*, 537 U.S. at 508; *see also Menominee Indian Tribe*, 136 S. Ct. at 753 ("Congress enacted the [ISDEAA] to help Indian tribes assume responsibility for aid programs that benefit their members."); *Cherokee Nation*, 543 U.S. at 639 ("The [ISDEAA] seeks greater tribal self-reliance brought about through more 'effective and meaningful participation by the Indian people' in, and less 'Federal domination' of, 'programs for, and services to, Indians.'") (quoting 25 U.S.C. § 5302(b)). For this reason, the Federal Circuit—which reviews ISDEAA disputes on direct appeal from the Interior Board of Contract Appeals under the CDA—has likewise rejected the contention that the ISDEAA creates enforceable trust duties. *See Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005) ("[T]he ISDEAA has precisely the opposite effect [to statutes that create a trust duty]. Instead of arrogating control and authority to the government . . . the ISDEAA delegates to tribal organizations authority over federal programs."). So has the Ninth Circuit. *Hopland Band of Pomo Indians v. Jewell*, 624 F. App'x 562, 563 (9th Cir. 2015); *Gila River Indian Cmty. v. Burwell*, No. CV14-00-943, 2015 WL 997857, at *4-6 (D. Ariz. Mar. 6, 2015). This Court should do the same.

None of the other authorities cited in Plaintiff's Complaint alter the above analysis. In further support of its breach of trust claim, Plaintiff invokes the below-quoted language, from the following sources:

- The 1868 Treaty of Fort Laramie, which provides:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

***

> The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them, and 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. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

1868 Treaty of Fort Laramie, Arts. I & V; *see* Compl. ¶ 101.

- The Snyder Act of 1921, which provides:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for [*inter alia*] . . . the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

25 U.S.C. § 13; *see* Compl. ¶ 102.

- The ILERA, which provides:

> The Secretary [of Interior], acting through the [BIA], shall be responsible for providing, or for assisting in the provision of, law enforcement services in Indian country as provided in this chapter. . . .
>
> [T]he responsibilities of the Office of Justice Services in Indian country shall include-
>
> (1) the enforcement of Federal law and, with the consent of the Indian tribe, tribal law; [and . . . ]
>
> (12) conducting meaningful and timely consultation with tribal leaders and tribal justice officials in the development of regulatory policies and other actions that affect public safety and justice in Indian country;

25 U.S.C. § 2802; *see* Compl. ¶ 103.

- The TLOA, which included among its prefatory statements findings that, *inter alia*:

> (1) [T]he United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country [. . . and]

> (B) [T]ribal justice systems are often the most appropriate institutions for maintaining law and order in Indian country[.]

Pub. L. 111-211, Title II, § 202, July 29, 2010, 124 Stat. 2262; *see* Compl. ¶ 104.

As other courts that have considered similar claims have agreed, none of these provisions or prefatory statements constitutes the requisite "substantive source of law that establishes' [a] specific fiduciary duty," under the well-established standards discussed at length above, *El Paso Nat. Gas Co.*, 750 F.3d at 895. *See, e.g.*, *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, 599 F. App'x 698, 699 (9th Cir. 2015) (rejecting claim that the Snyder Act "contains sufficient trust-creating language on which to base a judicially enforceable duty"); *Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar*, No. 10-cv-1448, 2011 WL 5118733, at *8 (S.D. Cal. Oct. 28, 2011) (rejecting claims that the Snyder Act, the ILERA, and/or the TLOA conferred any actionable trust duty), *rev'd in part on other grounds sub nom. Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025 (9th Cir. 2013). Moreover, the cases recognizing claims by Indian tribes against the United States for breaches of trust have universally involved the government's alleged mismanagement of a property interest held for the tribe's economic benefit—for example, the United States' sale of timber or oil and gas mining leases for the benefit of the tribe. *See, e.g.*, *Mitchell II*, 463 U.S. at 207 (forest resources); *id.* at 225 (noting that the trust relationship is "limited to the management of tribal lands and assets"); *Navajo I*, 537 U.S. at 493 (mining leases); *Pawnee v. United States*, 830 F.2d 187, 188 (Fed. Cir. 1987) (oil and gas mining leases). In each of these cases, as a condition precedent to finding a fiduciary duty, the United States exercised "elaborate" and "pervasive" control over the resource at issue. *Mitchell II*, 463 U.S. at 225; *Navajo I*, 537 U.S. at 507. None of the additional sources identify any applicable

"trust corpus"—a failure which is independently dispositive of Plaintiff's attempt to plead a breach of trust claim. *Mitchell II*, 463 U.S. at 225.

Accordingly, Plaintiff's breach of trust claim fails as well.[10]

## CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint in its entirety.

Dated: September 8, 2020

Respectfully submitted,

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[10] Because Count III is the only claim alleged against all Defendants, if the Court dismisses Count III but allows other counts to proceed, then it should also dismiss all defendants except the Secretary and/or Assistant Secretary—Indian Affairs. If the Court dismisses other counts but allows Count III to proceed, the Court should nonetheless dismiss the President and the White House defendants (Mr. Meadows, Dr. Birx, and Mr. Hoelscher) for the reasons explained above.