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

CHEYENNE RIVER SIOUX TRIBE, A federally-recognized Tribe of Indians, Plaintiff,	CIV. 15- 3018
vs.	
SALLY JEWELL, Secretary, United States Department of Interior, or her Predecessor in Office, and the UNITED STATES DEPARTMENT OF INTERIOR, and the UNITED STATES BUREAU OF INDIAN EDUCATION, KEVIN WASHBURN, in his official capacity as the Assistant Secretary of Indian Affairs for the United States Department of Interior, or his Successor in Office, CHARLES ROESSEL, in his capacity as Director of the Bureau of Indian Education, or his Successor in Office,	COMPLAINT AND PETITION FOR PERMANENT INJUNCTION, DECLARATORY RELIEF, AND WRIT OF MANDAMUS
Defendants.	

Plaintiff for its Complaint and Petition against the Defendants, state and allege as follows:

NATURE OF THIS ACTION

1. Plaintiff, an Indian Tribe operating under grants from or contracts with the United States Bureau of Indian Affairs under the Indian Self-Determination and Education Assistance Act (Public Laws 93-638 and 100-297, as amended), and upon whose reservation the Defendant directly operates a BIE-run school, seeks a permanent injunction pursuant to Fed.R.Civ.P. Rule 65, a Writ of Mandamus pursuant to 28 U.S.C. §§ 1361 and 1362, and Declaratory Relief pursuant to 28 U.S.C. § 2201 *et seq.*, and an Order to enforce compliance with the terms of the Settlement Agreement and Stipulated Final Judgment entered by this Court in *Yankton Sioux Tribe, et al. v. Kempthorne, et al*, #4:06-cv-04091-KES (DSD) to enjoin Defendants from proceeding with their announced plan to restructure the Department of Interior's Bureau of Indian Education (hereinafter "BIE"), and its subsidiary offices and staff in a manner that will reduce and/or eliminate its legal obligations to Indian Tribes, Tribal Schools, and ultimately to the individual Tribal member students of those schools, including the Plaintiff, under the United States Constitution, treaties with the various Indian tribes, federal statutes, regulations, or policies, in a manner that is arbitrary, capricious, an abuse of discretion given to the Executive Branch to carry out the United States Congress' legislative mandates, and/or violation of federal law or regulation.

2. The Defendants have, in the past, provided oversight, monitoring, and technical assistance to the Plaintiff for schools that were formerly required to be directly operated by the Defendants. Under the Indian Self-Determination and Education Assistance Act (hereinafter "ISDEAA"), as amended, Indian Tribes are allowed to assume the operation of schools formerly

operated by the United States Bureau of Indian Affairs (hereinafter "BIA"), but the ISDEAA also requires that the federal government must continue to provide oversight, technical assistance, and monitoring of its tribal assumption of education services and schools, so that an Indian Tribe may learn how to operate and administer its own schools as a step toward self-determination. The Defendants also directly operate a BIE school on the Plaintiff's reservation.

3. This Court previously issued a Preliminary Injunction Order regarding an identical case in *Yankton Sioux Tribe, et al. v. Kempthorne, et al*, #4:06-cv-04091-KES (DSD). In that case the Plaintiff and Defendants entered into a Stipulated Settlement Agreement (hereinafter called "Settlement Agreement") **Exhibit 1**. Settlement Agreement requires Defendants to: 1) maintain Educational Line Offices (hereinafter "ELO or ELOs") on the Pine Ridge, Cheyenne River Sioux, Rosebud, Crow Creek/Lower Brule, Turtle Mountain, and Standing Rock reservations; 2) staff each ELO with a minimum of three employees and have a combined total of twenty-four employees; 3) notify and particularly describe to the Plaintiff any funding issues which prevent the BIE from fully staffing each ELO. Defendants' proposed changes to the BIE organization directly violate the Stipulated Settlement Agreement. Specifically, the Defendants' conduct and proposed changes violate paragraphs two and five of the Settlement Agreement.

4. This lawsuit seeks to prevent the Defendants from restructuring its programs and eliminating or reducing Indian education programs and government employees who serve and provide technical assistance to and oversight of those programs and the Tribal Schools, as are required by the Constitution, treaty, federal law, regulation or policy.

5. This Complaint and Petition also requests a Writ of Mandamus compelling the named Defendants to keep open and maintain at the 2006 levels of operation and services the ELO on the Cheyenne River Sioux Reservation, to retain 2006 levels of education personnel and

educational services at their present location on the Cheyenne River Sioux Reservation and elsewhere throughout North and South Dakota, and to continue to provide technical assistance and contract and grant support to the Plaintiff Indian Tribe until such time as the Defendants have complied with its obligations pursuant to federal law, regulation, and policy, as well as to enter into meaningful pre-decisional consultation with the affected Tribal Governments, as required by federal law.

PARTIES

6. Plaintiff Cheyenne River Sioux Tribe (hereinafter "Cheyenne River") is a federally-recognized Indian Tribe. Its principal headquarters are located in Eagle Butte, South Dakota, Cheyenne River Sioux Indian Reservation. Plaintiff is responsible for the health, safety and welfare of its individual tribal members. A large number of its younger members attend a school that is directly operated by Defendants in Eagle Butte, South Dakota. Plaintiff is also the ultimate contractor with the Defendants under the Indian Self-Determination and Education Assistance Act, as amended (Pub.L. 93-638 and Pub.L. 100-297, 25 U.S.C. § 450 *et seq.*) to provide educational services to its tribal members and eligible Indian children that were previously provided by the Defendants. Plaintiff also receives technical assistance and monitoring of its tribally-controlled schools grants from the ELO located at Eagle Butte, South Dakota.

7. Defendant Sally Jewell, or her Predecessor-in Office, is the Secretary of the United States Department of the Interior, an executive department of the United States Government. She is the most senior executive branch official under the President of the United States, and is responsible for executing and carrying out in good faith and upholding her trust responsibility while providing educational services pursuant to federal law, regulation, and policy to American

Indians and Indian Tribes, including the Plaintiff, and while entering into and overseeing contracts or grants pursuant to the Indian Self-Determination and Education Assistance Act, as amended, (Pub. L. 93-638 and Pub. L. 100-297, 25 U.S.C. § 450 *et seq*., 25 U.S.C. § 13). Defendant Jewell released a "Blueprint for Reform of BIE" and related Secretarial Order #3334 on June 13, 2014, which state that BIE is to be reorganized commencing in August 2014 and would roll out in two phases, with the latter phase designed to focus on BIE's longer term mission of transferring control over schools to Tribes.

8. Defendant United States Department of Interior (hereinafter "DOI") is an executive department of the United States Government organized and existing under 5 U.S.C. § 101, as amended. Defendant DOI is responsible for, among other things, the supervision, management, direction, and oversight of the Defendant BIE, which is a federal agency subsidiary of the DOI, pursuant to the provisions of 25 U.S.C. § 1 *et seq*.

9. Defendant BIE is responsible for, among other things, the supervision, management, direction, and expenditure of appropriations for education of Indians, making grants and self-determination contracts for the education of Indians previously provided by the United States government, and for the hiring and supervision of ELOs, pursuant to the provisions of 25 U.S.C. §13; 25 U.S.C. §2006; 25 U.S.C. §2009, and 25 U.S.C. §2012(h), 25 C.F.R. §33.2. This Defendant directly operates a school on the Cheyenne River Sioux Reservation. This Defendant is also responsible for contracting with, overseeing, monitoring grants and contracts, providing technical assistance to Indian Tribes and Tribal Schools, including the Plaintiff, for both Tribal education grants and "self-determination" contracts, pursuant to federal law, regulation, and policy.

10. Defendant Kevin Washburn is the most senior government official overseeing the BIE. He is the Assistant Secretary for Indian Affairs to the United States Secretary of Interior and he is ultimately responsible for the manner in which the Executive Branch carries out its Indian education functions pursuant to 25 U.S.C. §§ 13 (the Snyder Act, as amended), and other federal law, regulation, and policy, including but not limited to the provisions of the United States Department of Interior's Departmental Manual. Defendant Washburn is mandated by federal statute to "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…[g]eneral support and civilization, including education." 25 U.S.C. § 13. Defendant Washburn is also the governmental official making the final decisions regarding reorganization of the BIE, including closure and/or relocation of ELOs and termination of ELO staff, and in particular those facilities located with Indian Reservations in North and South Dakota. 25 C.F.R. § 33.8. Defendant Washburn was responsible for issuing a detailed restructuring plan that, among other actions, included: a) converting ELOs into Education Resource Centers (hereinafter "ERC"), b) reducing the number of ERCs/ELOs, c) terminating existing positions within these offices, and d) moving many of the offices to distant locations and in some cases consolidating ELOs/ERCs with Associate Deputy Director Offices.

11. Defendant Charles Roessel, or his successor in office, is the Director of the BIE. In his capacity as the BIE Director, he is responsible for carrying out the policy and directives of the Assistant Secretary of Interior Kevin Washburn and other DOI officials. 25 C.F.R. § 33.7(b). He is the direct supervisor to all ELOs located within the United States, which includes all of the ELOs within North and South Dakota, including the ELO serving the Plaintiff. 25 U.S.C. § 2012(h). He is responsible for overseeing the financial and administrative affairs, and

educational facilities operated and/or funded by the BIE. Defendant is further responsible for ensuring that no positions shall be established for which funds are not available pursuant to 25 C.F.R. § 38.4. This Defendant is also responsible for ensuring that all policies and actions carried out by him are in accordance with the law, including applicable constitutional requirements, treaty obligations, statutes and regulations.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1331 and 25 U.S.C. § 450m-1; pursuant to a request for relief through a Writ of Mandamus under 28 U.S.C. § 1361; 28 U.S.C. § 1362; 28 U.S.C. §1346; a request for declaratory relief pursuant to 28 U.S.C. § 2201 *et seq.*; the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*; and a request for injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. Finally, the Court retains jurisdiction over *Yankton Sioux Tribe, et al. v. Kempthorne, et al*, Civ. # 06-4091KES to enforce compliance with the terms and conditions of the Stipulated Settlement Agreement between Defendants and Plaintiff.

13. Plaintiff Tribe brings this Complaint on its own behalf and on behalf of its individual tribal members.

14. Venue lies in this Court under 28 U.S.C. § 1391(e).

15. This action arises under Article 1, Section 8, Clause 3 of the United States Constitution; the Fifth Amendment to the United States Constitution; the Treaty of Fort Laramie of 1868, Articles V, VII and Article IX, 15 Stat. 635; the Snyder Act of 1921, as amended, at 25 U.S.C. § 13 (Act of Nov. 2, 1921, Stat. 208, as amended); Section 2501 of Title 25 of the United States Code; Chapter 22 of Title 25 of the United States Code; the Administrative Procedures Act at 5 U.S.C. § 702 *et seq.*; the Rural Development Act of 1972, P.L. 92-419; the Indian Self

Determination Act, as amended (25 U.S.C. § 201 *et seq.*) with regard to its provisions about Tribal consultation; the 1934 Indian Reorganization Act and subsequent amendments; the special trust relationship between the Federal government and the Indians; the plenary power of Congress; violation of and all other applicable constitutional provisions, federal law, regulation and policy.

FACTS

16. Congress specifically appropriated funds for Indian education programs and placed limitations on the use of those funds for administration of Indian education to ensure appropriations for direct services were not diminished by administrative costs, and to "facilitate Indian control of Indian affairs in all matters relating to education." 25 U.S.C. § 2011.

17. To give effect to the stated Congressional purpose for Indian education programs, Congress placed statutory conditions upon the expenditure of the education funds for administrative costs, including the provisions of 25 U.S.C. § 2012; 25 U.S.C. § 2005(1); 25 U.S.C. § 2007(d); 25 U.S.C. § 2008, as well as the provisions in the Indian Self-Determination and Education Assistance Act.

18. Defendants DOI and BIE passed federal regulations restricting the establishment of new personnel positions for which no funds have been appropriated, and restricting allocation of funds for administration to ensure that funds were distributed equally across all education programs for all Tribes nationwide. 25 C.F.R. § 38.4; 25 C.F.R. § 39.79; and 25 C.F.R. § 39.122.

19. All of the Defendants failed to provide due process of law to the individual Plaintiff, as required under the Fifth Amendment to the United States Constitution, and failed to provide

substantive pre-decisional consultation to the affected Plaintiff as required pursuant to 25 U.S.C. § 2011 prior to the decision to reorganize and close ELOs.

20. In 2006 Plaintiff was one of several Tribes and Tribal Schools to file an action against Defendants or their predecessors to enjoin the closure of a number of BIE Education Line Offices in the Great Plains Region of the BIE. *Yankton Sioux Tribe, et al. v. Kempthorne, et al*, Civ. # 06-4091KES.

21. In the *Yankton* case, *supra*, this Court issued a Preliminary Injunction Order stopping the restructuring that was then underway. The Plaintiff and Defendants entered into a Stipulated Settlement Agreement wherein Defendants agreed to: 1) maintain Educational Line Offices on the Pine Ridge, Cheyenne River Sioux, Rosebud, Crow Creek/Lower Brule, Turtle Mountain, and Standing Rock reservations; 2) staff each ELO with a minimum of three employees and have a combined total of twenty-four employees; 3) notify and particularly describe to the Plaintiff any funding issues which prevent the BIE from fully staffing each ELO. **Exhibit 1**.

22. Since the *Yankton* case was settled, Defendants have continued to discreetly restructure BIE and violate the terms of the Settlement Agreement reached in that case.

23. Via letter dated March 6, 2012, Defendants invited Plaintiff and other Tribes and Tribal Schools to a two-day meeting scheduled for May 2012 in Rapid City, South Dakota. The purported reason for the meeting was to solicit input on proposed organizational streamlining changes to the Office of Assistant Secretary – Indian Affairs (AS-IA), Bureau of Indian Affairs (BIA), and Bureau of Indian Education (BIE). **Exhibit 2.** As it related to the BIE, the Dear Tribal Leader Letter said that "The BIE is seeking tribal input on ways to streamline its organization to meet imminent budgetary constraints and to improve the quality of education

provided to student served by BIE-funded schools." No reorganization plan specific to BIE was presented to the Plaintiff to consider in advance of the meeting.

24. In response to the March 6, 2012 letter, Plaintiff requested via letter dated April 2, 2012, additional information from Defendants about the specific details of the proposed BIE streamlining. **Exhibit 3**. No response was ever received from Defendants.

25. At the consultation session on May 3, 2012, Defendants offered general remarks about the need to streamline the BIE due to budgetary constraints, but still did not offer a concrete, definite plan for Plaintiff and other Tribes to consider. **Exhibit 4.**

26. Plaintiff, as a member of the Great Plains Tribal Chairman's Association ("GPTCA"), offered alternatives and suggestions for improving the delivery of services to BIE-operated and BIE-funded schools. **Exhibit 5.** No response was given by Defendants to the Tribes' suggestions.

27. Despite sending a follow up letter to Defendants again on May 9, 2012, requesting additional information about the BIE's proposed streamlining, no additional information was ever provided to Plaintiff.

28. Upon information and belief, in September 2012 a proposed organizational chart was distributed to BIE ELO offices with a request for input. Nothing was provided to Tribes for input, nor were the Tribes informed about the existence of a proposed organizational chart.

29. Upon information and belief, in November 2012 at least one ELO office in the Great Plains Region was informed that the organizational chart distributed in September 2012 was being implemented and that the remaining ELOs would be given additional duties. There was still no consultation with Plaintiff about this internal restructuring.

30. Upon information and belief, in January 2013 the BIE notified at least one Tribe in the Great Plains Region that the BIE was not going to fill positions being vacated at the ELOs.

31. On February 7, 2013, Attorney Charles Abourezk, on behalf of Plaintiff and other Tribes and Tribal Schools involved in the *Yankton* case, *supra*, sent a notice to Defendants via the US Solicitor's Office notifying them that they were in breach of the Settlement Agreement because, inter alia, there were less than the requisite number of personnel staffing the ELO offices in the Great Plains Region and Defendants had failed to inform Plaintiff and other Tribes and Tribal Schools as required in the Settlement Agreement. **Exhibit 6**.

32. On April 3, 2013, the Defendants, through counsel, responded to Mr. Abourezk's February 7 letter. **Exhibit 7**. The Defendants' response, however, failed to comply with the requirements of Paragraph 6 of the Settlement Agreement because the Defendants did not make a *prior* determination that the reduction in staffing levels at the ELO Offices in the Great Plains Region was due to budgetary constraints. Nor did their response comply with Paragraph 10 of the Settlement Agreement, because they did not consult with Tribes prior to their affirmative decision to not fill vacant positions in the Great Plains Region as employees quit or retired under threat of budget cuts. The letter, in essence, shows that the BIE not only breached the *Yankton* Settlement Agreement, but that it knowingly did so by encouraging employees to quit or retire under the ruse of budget cuts, and then never bothering to inform – let alone consult with – Tribes about the situation.

33. The BIE response letter (**Exhibit 7**) also stated that as of April 2013 the agency was still reviewing findings and recommendations received in 2012 from an independent third party to accomplish streamlining (i.e., reorganization), and that it had received several suggestions from tribes on how to proceed with restructuring but that it had not yet made any decisions as to the

proffered suggestions. All the while, employees were leaving the BIE's ELOs in the Great Plains Region and the agency was not filling the vacancies. This was a violation of Paragraph 10 of the Settlement Agreement. **Exhibit 1.**

34. In September 2013 Defendant Jewell and United States Education Secretary Arnie Duncan convened an "Indian Education Study Group" to review and provide feedback on ways to improve Indian Education.

35. On November 5, 2013, Defendant Washburn invited Plaintiff and other Tribes to a "listening session" to be held on November 14, 2013, in Washington, DC. At no time was a specific plan for reorganization presented on which the Plaintiff could comment.

36. On March 28, 2014 Defendant Washburn scheduled a consultation session for April 28, 2014, at Loneman Day School on the Pine Ridge Reservation. Again, at no time did the Defendant present a reorganization plan to the Plaintiff to comment on. Rather, attached to the consultation notice was a one-page summary of issues that the Indian Education Study Group said it had heard during its "listening sessions." **Exhibit 8.** The Federal Register notice announcing the consultation included a description of four "Pillars of Reform" that, according to the Federal Register notice, were to be the topic of discussion at the consultation sessions. **Exhibit 9**.

37. In advance of the April 28, 2014 Loneman School consultation, Defendants distributed a "Transformation Plan," **Exhibit 10**, which was intended to describe a summary and overview of the proposed BIE reform. It was allegedly based on the "listening sessions" held with Tribal leaders in late 2013. However, no transcripts of these listening sessions have been made available, despite requests for the same by Plaintiff, so we are forced to just take the Defendants' word that their plan was based on what they heard from various stakeholders.

38. The April 28 Transformation Plan **(Exhibit 10)** does not contain essential budgetary or staffing information that would be necessary in order for the Plaintiff to meaningfully consult with Defendants about the proposed restructuring of the BIE.

39. A similar document entitled "Draft Proposal to Redesign the US Department of Interior's Bureau of Indian Education," (hereinafter "April 17, 2014 Draft Proposal") **(Exhibit 11)** was released on April 17, 2014. Although it contained more detailed information about the Indian Education Study Group's findings and recommendations, it still did not contain crucial budget sources/uses information, proposed staffing changes, or empirical data that shows how the proposed plan for reform would benefit Indian children or the delivery of education services to BIE funded and/or operated schools.

40. Plaintiff, along with other Tribes who are members of the Great Plains Tribal Chairmen's Association, met in preparation for the April 28, 2014 Loneman School consultation. That group developed a response to the Defendants' Four Pillars of Reform. **Exhibit 12.**

41. Several Tribes, including representatives of Plaintiff, attended the Loneman School consultation on April 28, 2014. Plaintiff informed Defendants that it strongly objected to the restructuring and informed Defendants that they had not yet meaningfully consulted with Plaintiff prior to undertaking the restructuring of the BIE.

42. At the Loneman School consultation, Plaintiff and other Tribes were also asked to consult on a "DRAFT Bureau of Indian Education Strategic Plan 2014-2018." **Exhibit 13.** This 41-page document was not provided to Tribal leaders prior to the meeting. Furthermore, it does not contain any of the critical budgetary, staffing, or other service delivery information that Plaintiff and other Tribes have been repeatedly requesting from Defendants throughout all these

discussions. It is unclear to Plaintiff how or whether this document relates to the Defendants' other restructuring documents.

43. Plaintiff and other Tribes, through the Great Plains Tribal Chairman's Association, prepared and submitted a response (**Exhibit 14**) to the "DRAFT Bureau of Indian Education Strategic Plan 2014-2018." As per the Notice of Tribal Consultation (**Exhibit 9**), the deadline to submit such feedback was June 2, 2014. No response from Defendants was ever received regarding this submission by Plaintiff and other Tribes.

44. On June 5, 2014, President Barack Obama published an op-ed article in Indian Country Today entitled, "On My Upcoming Trip to Indian Country." **Exhibit 15.** In that article, President Obama said that he would be announcing "new initiatives to expand opportunity in Indian country by … improving Indian education." Apparently Defendants decided to move forward with their education reform plans without meaningfully consulting with Plaintiff or any other Indian Tribe.

45. On June 13, 2014, on the same day President Obama visited the Standing Rock Sioux Indian Reservation, Defendants released a report entitled, "Findings and Recommendations Prepared by the Bureau of Indian Education Study Group," also known as the "Blueprint for Reform." **Exhibit 16**. The Blueprint for Reform is substantially similar to the April 14, 2014 Draft Proposal. **Exhibit 11**. Defendants, via their Blueprint, did not address the Plaintiff's comments and suggestions shared via **Exhibit 12** and **Exhibit 14**, nor did their Blueprint provide crucial budget sources/uses information, proposed staffing changes, or empirical data that shows how the proposed plan for reform would benefit Indian children or the delivery of education services to BIE funded and/or operated schools. Indeed, a recurring theme among the recommendations contained in the Blueprint is that (1) authority over funding decisions should

be centralized with the BIE Director in Washington DC, and (2) the federal government should shirk its federal trust and treaty responsibility to operate schools on Indian reservations, and instead shift that responsibility to Tribal governments. Opposition to both of these ideas was strongly conveyed repeatedly to Defendants by Plaintiff and other Tribes, but their voices went unheard and/or unacknowledged.

46. On the same day as the Blueprint for Reform (**Exhibit 16**) was released and President Obama visited the Standing Rock Sioux Reservation, Defendant Jewell issued Secretarial Order #3334 (**Exhibit 17**), which implemented the key recommendations contained in the Blueprint for Reform. Among the key reforms that went into effect immediately was the re-organization of the BIE. (**Exhibit 18**)

47. Section 4 of the Secretarial Order (**Exhibit 17**) created a School Operations Division within the BIE. According to the Secretarial Order, this new Division is responsible for teacher and principal recruitment, acquisition and grants, school facilities, educational technology, and communications. It effectively centralized much authority directly with the BIE Director, which was one of the actions Plaintiff and other Tribes strongly opposed.

48. The Secretarial Order also re-aligned the three Associate Deputy Directors (hereinafter "ADD") into an arrangement whereby one ADD was responsible for BIE-operated schools, one ADD was responsible for Tribally-operated schools, and the third ADD was responsible for all Navajo schools. This re-alignment is a strange hybrid. If the BIE is trying to restructure based on functionality (BIE-operated schools versus Tribally operated schools), then it makes no sense to leave the Navajo school administration division intact because that is still a geographic-based alignment rather than an alignment based on function. **Exhibit 17, Sec. 4(b)(i).**

49. In direct violation of the *Yankton* Settlement Agreement, *supra*, the Secretarial Order restructured and renamed Education Line Offices into Education Resource Centers. It changed the function of ELOs to one where the new ERCs will provide customized technical assistance to tribally controlled schools. **Exhibit 17, Sec. 4(b)(ii).** It calls for a reduction of ELOs from 22 to 15 ERCs. It is still unclear where these ERCs will be located but it appears that Defendants intend to place them in urban locations.

50. The Secretarial Order established another new office – the Office of Sovereignty and Indian Education. **Exhibit 17, Sec. 4(b)(iii).** This office, which reports directly to the BIE Director, will be responsible for encouraging Tribes to operate their own schools. Plaintiff and other Tribes opposed the creation of this office and instead stressed that this money would be better spent at the local level as contemplated in, among other legal authorities, Article VII of the Fort Laramie Treaty of 1868. Plaintiff's input was ignored by Defendants.

51. There is a Phase II of the BIE restructuring described in the Secretarial Order. **Exhibit 17, Sec. 5.** It will focus on moving Defendant BIE completely out of the school operations business and place that burden on Tribes such as Plaintiff. This is slated to occur in direct violation of Article VII of the Fort Laramie Treaty of 1868 and despite the strongly voiced opposition of Plaintiff and other Tribes in the Great Plains Region, all of which the Defendants simply ignore.

52. The BIE is moving forward with the provisions purportedly authorized in the Secretarial Order. There have been follow up meetings and webinars by BIE officials explaining in more detail what has taken and what will be taking place. On August 29, 2014, Defendant Roessel presented the attached Power Point presentation (**Exhibit 19**) to members of the National Indian

Education Association. It provides a high level overview of the changes initiated via Secretarial Order #3334.

53. On July 22, 2014, representative of Defendant Jewell, Don Yu, who is also a member of the Indian Education Study Group, and then-White House Policy Advisor on Indian Affairs, Jodi Gillette, met with representatives of Tribes and Tribal Schools in Rapid City, South Dakota, to discuss the BIE changes that were being implemented. At that meeting, Mr. Yu stated that this was an "iterative process," that the Blueprint can be changed again, and that he is always listening. Yet later in the same meeting, Ms. Gillette said that there might not be another draft of the Blueprint but that Defendant Roessel would be able to provide more information about each Blueprint function. She also stated that the changes recommended in the Blueprint were "happening now." She informed the group of Tribal leaders that some functions of the Office of Assistant Secretary of Indian Affairs - Deputy Assistant Secretary of Management (DAS-M) were being moved under Defendant Roessel's control. It appears that Defendants' left hand does not know what their right hand is doing. The Secretarial Order authorized the initiation of major BIE reforms, and at least some of those changes have begun, yet one of the key architects of the "draft" reform says it is not yet final document.

54. On August 13, 2014, Defendant BIE's representative Bart Stevens traveled to Eagle Butte, South Dakota, to meet with representatives of Plaintiff. He informed Plaintiff that the Blueprint and the Secretarial Order were being implemented. He said that the mechanism to get the change has not been developed, but that BIE was definitely going "from Point A to Point B." He said that "BIE just wasn't sure how to get there yet." He informed the Plaintiff that he had been notified the previous week that his position and responsibilities would now be changing, and the changes he described were in essence the restructuring that was laid out in the Blueprint.

He stated that within days of the Secretarial Order being issued, he was notified that he would now be the ELO for the BIE-operated school on the Cheyenne River Sioux Reservation, and that the two schools on the Reservation that were operated by the Tribe as BIE grant schools (also called "Tribally controlled schools") would be reporting to someone else.

55. At the August 13 meeting, in response to a question from Plaintiff, Mr. Stevens informed the group that he believed the funding for the ERCs being created via the Blueprint restructuring would be coming from Enhancement funds. Plaintiff has repeatedly asked Defendant Roessel and Defendant Washburn for this information, and the only response we receive is that the restructuring will be "budget neutral."

56. On September 25, 2014, Plaintiff was provided a copy of the attached "Bureau of Indian Education Implementation Plan" not by any of the Defendants, but by a tribal educational organization. **Exhibit 20**. It contains more detailed organizational charts describing the proposed changes, but does not include important information about funding sources or budget impacts caused by these changes. Nor does it contain empirical data that shows how the proposed plan for reform would benefit Indian children or the delivery of education services to BIE funded and/or operated schools.

57. According to the September 2014 Implementation Plan (**Exhibit 20**), the BIE-operated school on the Cheyenne River Sioux Reservation would report to an Education Resource Center (ERC) in Flandreau, South Dakota, and the two Tribally controlled schools would report to an ERC in Belcourt, North Dakota.

58. On November 25, 2014, Plaintiff's attorney sent the attached letter (**Exhibit 21**) to the Office of the Solicitor of the Department of Interior, alleging violations of the *Yankton* Settlement Agreement, *supra*.

59. In response, the Solicitor's Office sent the attached letter (**Exhibit 22**), assuring Plaintiff that it would be consulted prior to any changes taking effect.

60. On April 22, 2015, Defendants held a consultation in Rapid City, South Dakota, to present and take comments on yet another "proposed" restructuring plan for BIE. Prior to the consultation, the document attached as **Exhibit 23** was available for download on the BIE website. However, on the day of the consultation, Defendants handed out the attached color and black and white Power Point slides. **Exhibit 24**. Plaintiff was not given advance opportunity to review and prepare feedback on any slides that were handed out at the consultation. It is interesting to note that the belatedly-available slides were the ones that showed new positions in the DC office of BIE. It was not until sometime *after* the April 22 consultation that the color Power Point slides showing the proposed new Washington D.C. management positions were made available on the BIE Streamlining website. **Exhibit 25**.

61. Yet again, when asked at the April 22, 2015 consultation about the source of funding for this restructuring, Defendant Roessel simply told the Tribes in attendance that the changes would be "budget neutral." This response does not allow the Tribes to adequately and meaningfully consult with the federal government about actions that will have significant effects on the education of Plaintiff's K-12 children. For example, we do not know, and Defendants would not tell us, if the funds being used for the new positions are funds that could otherwise be used directly for classroom purposes rather than for administrative positions in Washington DC. Unless we are given that information, we cannot meaningfully consult.

62. At the April 22 consultation, Plaintiff submitted the attached comments regarding the restructuring. **Exhibit 26.** No response was ever received from Defendants to Plaintiff's requests for additional information about the restructuring.

63. As a follow up to the April consultation, Plaintiff submitted the attached letter (**Exhibit 27**) to Defendants on May 15, 2015, requesting additional information about the "proposed" restructuring (which by all appearances is now underway) so that the Tribe could adequately and meaningfully consult with Defendants about the proposed action.

64. Plaintiffs received the attached letter from Defendants dated July 16, 2015, responding to our letter of May 15, 2015. **Exhibit 28**. In it, Defendants acknowledge that implementation of the Blueprint is in its "final steps." Again, regarding the source of funding used and the expected budget impacts of the restructuring, Defendants simply state that the restructuring will be "budget neutral" without further explanation. Again, the BIE's response does not contain empirical data that shows how the proposed plan for reform would benefit Indian children or the delivery of education services to BIE funded and/or operated schools.

65. On September 17, 2015, Plaintiff was provided a copy of the attached letter from Defendant Department of Interior dated September 15, 2015, addressed to the House Appropriations Committee, Subcommittee on Interior Appropriations, requesting authorization to reprogram and restructure the Defendant agency BIE. **Exhibit 29.** This is further proof that Defendants are taking unilateral federal action without meaningful consultation, in violation of 25 USC§ 2011 and their own consultation policy.

66. Although very difficult to discern - and contrary to the September 2014 Implementation Plan (**Exhibit 20**) - it appears that the two-Tribally controlled schools that serve Plaintiff's students will report to an Education Resource Center (ERC) in Rapid City, South Dakota, which is approximately 175 miles from the Tribal headquarters. **Exhibit 25**. The Bureau-controlled school that serves Plaintiff's students will report to an ERC in Belcourt, North Dakota, which is approximately 350 miles from the Tribal headquarters. **Exhibit 25**. The current ELO in Eagle

Butte would be converted into a "Facility Support Center," (**Exhibit 29**) which will only house maintenance and operational services for the BIE-funded schools on the Cheyenne River Sioux Reservation. Contrary to the BIE's claims, the new structure would not provide geographically close, improved technical assistance and comprehensive educational services to the Cheyenne River Sioux Tribe and its youngest members.

67. The ERCs are slated to be field offices with program responsibility for providing technical assistance and resources to school administrators. They will serve as the base for School Solutions Teams, which will assist BIE schools in improving the delivery of education to the students. Yet in locating the proposed ERC's, Defendants have not considered their mission and program requirements and have instead placed most of the ERCs in urban areas, in violation of the Rural Development Act of 1972.

68. Although it acknowledges that implementation of the Blueprint is in its final stages, it appears that the BIE either does not know or does not want to disclose which funds and the amount of funds that are being reprogrammed. It states that "These plans are still being vetted and finalized within the Department of the Interior. During the Department's deliberative process, this information is not publicly available." **Exhibit 28 page 3**. Plaintiff and other Tribes have a right to this vital information before any federal action is taken, not during or after. How can Plaintiff adequately and meaningfully consult otherwise?

69. When taken together, this chronology of events shows that the BIE did not adequately and meaningfully consult with Plaintiff or other Tribes in advance of deciding to undertake a major restructuring of its operations of BIE operated and Tribally controlled schools.

70. Despite repeated requests, Defendant failed to produce transcripts from any of these amorphous "consultations/listening meetings." Without a record of the proceedings, Plaintiff

cannot know which ideas and suggestions were truly the product of Tribal input as required by tribal consultation. How is Plaintiff or any other tribal education stakeholder to know whether Defendants combed through all the ideas and suggestions and only utilized those which were favorable to or easily addressed within their plan?

71. Despite Plaintiff's request for information regarding the costs associated with the BIE's proposed reorganization and the source of funds to be used to accomplish such reorganization, Defendants have failed to provide any information to establish that such reorganization is not in violation of statutory and regulatory restrictions on the use of Indian education funds for administrative costs including 25 U.S.C. § 2010; 25 U.S.C. § 2005(f); 25 U.S.C. § 2007(d); 25 U.S.C. § 2008; 25 C.F.R. § 38.4; 25 C.F.R. § 39.79; and 25 C.F.R. § 39.122.

72. Despite repeated requests, Defendant has not fully responded to our requests about the source of funds and budgetary impacts of the restructuring as required by 25 U.S.C. § 2009(c) and (d) and 25 U.S.C. § 2015.

73. Defendants have not any documentation that shows whether or how the restructuring will improve the delivery of education to children within the BIE educational system.

74. Defendant has not even acknowledged, let alone fully considered, responded, or rejected Plaintiff's recommendations on the proposed restructuring. (**Exhibits 5, 12, 14**).

75. The "consultation/listening meetings" held by the Defendants on May 3, 2012, November 14, 2013, March 28, 2014, and April 22, 2015, did not comport with the Defendants' own policy regarding government-to-government consultation between Tribes and the Federal government. In pertinent part, the Defendants own Indian Affairs Manual states that:

> "Consultation" means a process of government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input. Consultation includes that Indian tribes are:

1. To receive timely notification of the formulated or proposed Federal action;

2. To be informed of the potential impact on Indian tribes of the formulated or proposed Federal action;

3. To be informed of those Federal officials who may make the final decisions with respect to the Federal action;

4. To have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision; and

5. To be advised of the rejection of tribal recommendations on such action from those Federal officials making such decisions and the basis for such rejections.

Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability.

BIA Government-to-Government Consultation Policy. **Exhibit 30.**

76. The Defendants published the Blueprint for Reform on June 13, 2014, held a briefing for BIE stakeholders on July 22, 2014, and began Phase 1 of implementing the Blueprint's reforms in August of 2014. Meeting with "stakeholders" nine days before beginning implementation of the Blueprint for BIE Reform cannot possibly be construed as meaningful consultation with the Plaintiff.

77. The Blueprint for Reform, the Secretarial Order, and the manner in which the Defendants are carrying out reorganization provides fewer services and fewer ELOs/ERCs per number of schools and per number of students served in North and South Dakota Indian schools. It has the effect of moving educational support services further away from Plaintiff.

COUNT I:

FALURE TO ENGANGE IN PRE-DECISIONAL CONSULTATION WITH TRIBES AND FAILURE TO PROVIDE SUBSTANTIAL REASONS FOR NOT GIVING EFFECT TO TRIBAL VIEWS AND CONCERNS

78. Paragraphs 1 through 77 are incorporated herein by reference as if fully set forth herein.

79. Pursuant to 25 U.S.C. § 2011, the Defendants are required to consult with Tribes and school officials prior to making a decision on any action affecting Tribes and schools.

80. 25 U.S.C. § 2011 further requires the Defendants to "…present issues (including proposals regarding changes in current practices or programs) that will be considered for future action by the Secretary." 25 U.S.C. §2011(b)(2)(B)(i).

81. If the Defendants do not give effect to the alternatives and views presented by Tribes, the Secretary must provide "a substantial reason for another course of action." 25 U.S.C. § 2011(b)(2)(B)(ii).

82. The Defendants gave no effect to the views and alternatives presented by the Plaintiff in its decision on restructuring. Indeed, the Defendants failed to present any specific restructuring plans until June 13, 2014 upon which Plaintiff could present views and alternatives. As such, Plaintiff was forced to present its views and alternatives during the July 22, 2014 meeting, a paltry nine days before the August 2014 Phase 1 implementation date.

83. The Defendants failed to provide any reason, let alone a substantial reason, for its decision not to give effect to Tribal views and concerns in its Blueprint for BIE Reform.

84. This failure to give effect to the views of the Indian Tribes and Tribal organizations (including Plaintiff) and the failure to engage in pre-decisional consultation violates the requirements of 25 U.S.C. § 2011, and other federal regulations and policies, including the Defendants' own Indian Affairs Manual.

COUNT II:

THE RESTRUCTURING PLAN IS ARBITRARY AND CAPRICIOUS AND NOT IN ACCORDANCE WITH THE LAW

85. Paragraphs 1 through 84 are incorporated herein by reference as if full set forth herein.

86. The Defendants asserted in its April 3, 2013 letter that the reason for the current proposed reorganization is due to "budgetary constraints." This rational is not supported by the actual reorganization plan that has been published and is about to be implemented, and the plan to continue with the restructuring plan is arbitrary, capricious and in violation of federal law.

COUNT III:

BREACH OF TREATY PROVISIONS AND TRUST RESPONSIBILITY

87. Paragraphs 1 through 86 are incorporated herein by reference as if fully set forth herein.

88. Defendants have failed to provide any Tribe with the actual costs of restructuring, or the source of funds for the proposed restructuring. A response from Defendants that any restructuring is "budget neutral" is wholly inadequate for meaningful consultation.

89. Defendants violated its fiduciary trust obligations to Plaintiff to account for the use of Program funds allocated to Defendants to provide services to Indian persons and communities by failing to properly account for the use of such funds in violation of 25 U.S.C. § 2005(f); 25 U.S.C. § 2006(d); 25 U.S.C. § 2009(d) and 25 U.S.C. § 2010; *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001).

90. Defendants have violated Articles V and VII of the Fort Laramie Treaty of 1868 by creating and implementing a plan that attempts to shirk the federal government's responsibility to provide education, including the continued operation of a local office that is responsible for the faithful discharge and oversight of educational services to the children of the Cheyenne River Sioux Tribe.

COUNT IV:

BREACH OF PARAGRAPHS TWO AND FIVE OF THE STIPULATED SETTLEMENT AGREEMENT

91. Paragraphs 1 through 90 are incorporated herein by reference as if fully set forth herein.

92. Paragraph two of the Stipulated Settlement Agreement requires Defendants to send Plaintiff written **prior** notification whenever Defendants believe that they cannot maintain twenty-four ELO positions due to insufficient appropriations.

93. Paragraph five of the Stipulated Settlement Agreement requires Defendants to maintain, at a minimum, twenty-four ELO employees to be divided between six ELO offices located in the Dakotas. Each ELO office is to maintain a minimum of three employees each; BIE is permitted to allocate the remainder among the six offices as it sees fit. **Exhibit 1**.

94. The number of ELO positions dropped from twenty-four to sixteen without any prior written notification by the Defendants as required by the Settlement Agreement. Plaintiff sent written notice to Defendants regarding its breach and only then did Defendants attempt to explain its non-compliance. As an aside, the Defendants included in its response to the Plaintiff that it planned to "…streamline its organization to meet budgetary constraints…" **Exhibit 3**. The Defendants' tardy response does not excuse its material breach of the Settlement Agreement. Simply put, the Stipulated Settlement Agreement between the Defendants and Plaintiff is a contract, the material breach of which is in direct violation of fundamental principles of contract law. *See, e.g., Conant v. Office of Pers. Mgmt.*, 255 F.3d 1371, 1376 (Fed.Cir.2001); *Gilbert v. Dep't of Justice*, 334 F.3d 1065, 1071 (Fed.Cir.2003); *Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed.Cir.1998); *Tretchick v. Dep't of Transp.*, 109 F.3d 749, 752 (Fed.Cir.1997); *Lary v. U.S. Postal Service*, 472 F.3d 1363, 1369 (C.A.Fed. 2006).

REMEDIES SOUGHT BY PLAINTIFF

95. Permanent injunctive relief should be granted to restrain the Defendants from taking any actions to effect the restructuring plan, including but not limited to closure of or reduction in staffing and funding of all ELOs/ECRs in North and South Dakota and maintaining the status

quo as it existed prior to Defendants June 13, 2014 publication of the Blueprint for BIE Reform, until such time as the Defendants have complied with all applicable federal laws, regulations and policies, including but not limited to the Department of Interior Manual, and until such time as an accurate report of the effect of the proposed restructuring on the affected Tribes is made by the Defendants to the United States Congress and the appropriate Congressional Committees, and until such time as meaningful consultation has been had with the Plaintiff and the views of the Tribe has been given effect.

96. Further, such permanent injunctive relief should be ordered until Defendants engage in pre-decisional consultations with the Plaintiff; until Defendants secure appropriations and authorization from Congress necessary to fund any planned new positions; and until Defendants comply with the requirements for allocation of Administrative cost funds between Agency and Area offices based on 25 C.F.R. § 39.122 in accordance with federal statutes and regulations.

97. The Defendants should be permanently enjoined from closing the ELOs located on Cheyenne River, Rosebud, Oglala, Standing Rock, Turtle Mountain, and Crow Creek/Lower Brule/Sisseton/Flandreau, and permanently enjoined from implementing any reduction-in-force with respect to ELO positions in in manner that is in violation of the requirements of 25 U.S.C. § 44-46; 25 U.S.C. § 2014; 25 C.F.R. § 38.13; and the explicit terms of the Settlement Agreement.

98. A Writ of Mandamus is also being sought to require Defendants to perform a duty which they are required to do as a result of the effect and operation of the law. Plaintiff has exhausted all other administrative remedies and seeks the extraordinary Writ of Mandamus to compel the Defendants to keep the ELOs open in their present locations and to keep the present levels of staff, including all present personnel, unless terminated for cause other than related to this Complaint and Petition, until such time as the Defendants have demonstrated to the Court that

they have complied with all applicable federal statutes, regulations, and policies, as well as with the United States Constitution and applicable Indian treaties. The continued operation of the current ELOs and the BIE in its structure as it existed prior to the publication of the Blueprint for BIE reform, and the duty to provide reports to the Congress and appropriate Congressional Committees, constitutes legal duties that are both mandatory and nondiscretionary by the federal Defendants, who are officers of the United States, that are so plainly prescribed as to be free from doubt. *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D. SD 1995)

99. Plaintiff further seek a Writ of Mandamus to compel the Defendants to honor its statutory obligations to engage in pre-decisional consultation with the affected Tribal governments and to report to Congress pursuant to 25 U.S.C. § 2015, and related policies and regulations.

100. This Court is granted the authority to issue a Writ of Mandamus at 28 U.S.C. § 1361. The Writ of Mandamus is the appropriate remedy to require a federal agency to perform a duty they are legally obliged to perform. Damages are inadequate in that a later award of damages, even if awarded, cannot compensate for the disruption of essential education services to the Indian schools impacted by the reorganization, restructuring, and the services provided by ELO staff to children, including children receiving special education services. The proposed restructuring which is likely to result in serious disruption of education services according to the facts set forth herein, and immediate and irreparable harm to the Indian students and Tribal members affected.

101. This Court may also order the Defendants to specifically perform its contractual duties pursuant to the Stipulated Settlement agreement. *Lary,* 472 F.3d at 1369. As illustrated supra, monetary damages are inadequate in this controversy. An order by this Court to the Defendants to perform its contractual duties by maintaining an ELO staff of twenty-four is the only remedy

which can adequately protect the Plaintiff from the harm that will be caused as a consequence of the Defendants' non-performance.

102. Defendants, particularly the BIE, contrary to their executive powers and to federal law, regulation or policy, arbitrarily and capriciously have decided to reduce the number of ELOs without meaningfully consulting with affected Tribes beforehand, without providing any information regarding how the restructuring will be financed, without securing either Congressional appropriations or authorization for reorganization, without providing the required written justification for not giving effect to the Plaintiff's views on this matter.

WHEREFORE, Plaintiff pray that:

1. A Permanent Injunction be granted enjoining the Defendants from closing or removing oversight and discharge authority for education services at the ELO at Cheyenne River, from hiring any newly created education administration positions, and from implementing any reductions-in-force at the above mentioned ELO, until such time as the Defendants have fully complied with all applicable provisions of the United States Constitution, the Stipulated Settlement Agreement, and federal law and regulations, including providing an accurate, current, and up-to-date accounting for the cost of the proposed actions, where the funds for such actions were secured from, demonstrable proof that Congress authorized the use of funds appropriated for any administrative costs associated with the proposed reorganization, demonstrable evidence that Defendants are not implementing a reduction-in-force in a manner that discriminates against current Indian education employees through the enforcement of current Civil Service regulations in lieu of the requirements of the Indian Reorganization Act and Indian Self-Determination and Education Assistance Act; proof that such actions do not unjustly discriminate against the Plaintiff Cheyenne River Sioux Tribe or any other Tribes located in North and South Dakota

with respect to equal allocation of administrative funds pursuant to 25 C.F.R. § 39.122; and report of the impact of such reorganization actions to the Congress, pursuant to the Indian Self-Determination and Education Assistance Act, as amended, because of the lack of accuracy and compliance with the statute in reporting the impact of the proposed reorganization to Congress.

2. A decree of Declaratory Judgment be entered by the Court, pursuant to 28 U.S.C. § 2201 *et seq*. specifying to Defendants that:

a. Defendants did not provide Plaintiff with due process of law as required under the Fifth Amendment to the Constitution of the United States and the Indian Civil Rights Act at 25 U.S.C. § 1302; the requirements of substantive pre-decisional consultation pursuant to Department of Interior Indian Affairs Manual, and that Plaintiff are entitled to such due process of law. Defendants violated its fiduciary trust obligations to Plaintiff to account for the use of Program funds allocated to Defendants by Congress to provide services to Indian persons and communities by failing to properly account for the use of such funds in violation of 25 U.S.C. § 2005(f); 25 U.S.C. § 2006(d); 25 U.S.C. § 2009(d) and 25 U.S.C. § 2010. *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C.Cir. 2001).

b. Defendants did not properly follow the requirements of 25 U.S.C. § 2005(f); 25 U.S.C. § 2007(d); 25 U.S.C. § 2008(c) and (d); 25 U.S.C. § 2011; and 25 U.S.C. § 2015 in that Defendants proposed and have begun to implement a reorganization plan without properly and meaningfully engaging in pre-decisional consultation with the Plaintiff Tribe as required by the provisions of the Indian Self-Determination Act and contrary to the provisions of 25 U.S.C. § 2011 and 25 U.S.C. § 2501 and/or without properly and meaningfully giving effect to any of

the concerns raised by Plaintiff Tribe during the July 22, 2014 BIE stakeholders briefing. Further, any ELO closures and reductions-in-force are contrary to statutory obligations and obligations of the government under the federal trust responsibility of the Federal government to the members of the Plaintiff Tribe and other eligible Indians served by the ELOs.

c. Any other decree or declaratory judgment by the Court deemed just, proper and necessary based upon the pleadings, facts, law and evidence.

3. A Writ of Mandamus issued pursuant to 28 U.S.C. § 1361 and other applicable provisions of the United States Constitution and federal law, ordering that the appropriate and necessary Defendants keep open and maintain oversight and discharge authority for education services at the ELO located on the Cheyenne River Sioux Reservation, as well as the other ELOs in North and South Dakota, and halt any further actions to implement any reorganization in staffing until such time as they have complied with this Court's orders in relation to this Complaint and Petition.

4. The Court make awards of costs, disbursements and attorney fees to the Plaintiff, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq*., and other applicable authority.

5. The Court provide such other and further relief as it may deem necessary and proper.

Dated this 30th day of September, 2015.

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