

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

LOWER BRULE SIOUX TRIBE,
A federally recognized Indian Tribe,

Plaintiff,

v.

HON. DEB HAALAND, Secretary, United States Department of the Interior, or her successor in office; the UNITED STATES DEPARTMENT OF INTERIOR; BRYAN NEWLAND, Acting Assistant Secretary of the Interior for Indian Affairs, or his successor in office; DARRYL LACOUNTE, Director of the Bureau of Indian Affairs; THE UNITED STATES BUREAU OF INDIAN AFFAIRS; KRISSANNE STEVENS, or her successor, Awarding Official for the Bureau of Indian Affairs Great Plains Region; and THE UNITED STATES OF AMERICA.

Defendants.

3:21-CV-03018-RAL

AMENDED COMPLAINT

Plaintiff for its Amended Complaint and Petition against the above-named Defendants, states and alleges as follows:

NATURE OF THE ACTION

1. Plaintiff Lower Brule Sioux Tribe (hereinafter “the Tribe”) is an Indian Tribe operating in part under grants from, or contracts with, the United States Bureau of Indian Affairs (hereinafter “the BIA”) under the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638, as amended) and the United States Bureau of Indian

Education (hereinafter "the BIE") under the Tribally Controlled Schools Act of 1988 (Public Law 100-297, as amended).

2. The Tribe seeks a permanent injunction pursuant to Fed. R. Civ. P. 65, and Declaratory Relief pursuant to 28 U.S.C. § 2201 *et. seq.*, enjoining and prohibiting Defendants, collectively and individually, from any further collection, diversion, or seizure of Bureau of Indian Affairs (BIA) funding due to the Tribe pursuant to the Tribe's self-determination contracts under the Indian Self-Determination Act, or any other federal grants, funding, or payment; and for restoration of funds already collected, seized, or diverted that constitute an over-payment of any debt owed by the Tribe to Defendants.
3. Defendants have instituted a collection action against the Tribe, alleging that the Tribe misapplied federal funds.
4. The Tribe respectfully asserts that Defendants have collected an amount in excess of the alleged debt.
5. The Defendants have a duty to liberally construe provisions of federal law and regulation to benefit the Tribe and its members, and a trust responsibility to act in the best interests of the Tribe and its members.
6. The claims set forth in this Amended Complaint arose out of the conduct, transactions, or occurrences set out in the original Complaint filed by Plaintiffs in this action.

PARTIES

7. Plaintiff Lower Brule Sioux Tribe is a federally recognized Indian Tribe. Its principal headquarters are in Lower Brule, South Dakota, Lower Brule Sioux Indian Reservation. The Tribe is responsible for the health, safety, and welfare of its individual tribal members. The Tribe is also a contractor with the Defendants under the Indian Self-Determination and

Education Assistance Act of 1975, as amended, and a grantee relative to the Defendants under the Tribally Controlled Schools Act of 1988, as amended (Pub.L. 93-638 and Pub.L. 100-297, 25 U.S.C. § 450 et seq.) to provide various services to its tribal members. The Tribe brings this action on its own behalf and on behalf of all its members.

8. Defendant Deb Haaland, or her successor in office, is sued in her official capacity as Secretary of the United States Department of the Interior, an executive department of the United States Government.
9. Defendant United States Department of the 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 Bureau of Indian Affairs and the Bureau of Indian Education, which are federal agencies within the DOI, pursuant to the provisions of 25 U.S.C. § 1 et seq.
10. Defendant Bryan Newland, or his successor, is sued in his capacity as the Principal Deputy Assistant Secretary of the Interior for Indian Affairs (hereinafter “AS-IA”) and is the most senior government official overseeing both the Bureau of Indian Affairs and the Bureau of Indian Education.
11. Defendant Darryl LaCounte, or his successor, is sued in his capacity as the Director of the Bureau of Indian Affairs.
12. Defendant Krissanne Stevens, or her successor, is sued in her capacity as the Awarding Official for the Bureau of Indian Affairs Great Plains Region.
13. Defendant Bureau of Indian Affairs (hereinafter “BIA”) is responsible for fulfilling the United States’ trust responsibility to American Indian people, including maintaining the

federal government-to-government relationship with federally recognized Indian tribes, and promoting and supporting tribal self-determination. This duty includes the administration of self-determination contracts under the Indian Self-Determination and Education Assistance Act and the distribution of contract funds to the Tribe, pursuant to federal law, regulation, and policy. The Great Plains Regional office of the BIA also currently serves as the Tribe's cognizant oversight agency for audit, and served as the Tribe's cognizant oversight agency for audit at all relevant times hereto.

JURISDICTION AND VENUE

14. This Court has jurisdiction under 28 U.S.C. § 1331 and 25 U.S.C. § 450m-1; under the Indian Self-Determination and Education Act, at 28 U.S.C. § 5331(a); 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.; and the Contracts Disputes Act, at 41 U.S.C. § 7104(b).
15. Venue lies in this Court under 28 U.S.C. § 1391 (b)(2) and (e)(1).
16. This action arises under Article 1, Section 8, Clause 3 of the United States Constitution; Article VI, Section 2 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); Chapter 22 and Chapter 46 of Title 25 of the United States Code; the Indian Self-Determination Act and Education Assistance Act of 1975, as amended (25 U.S.C. § 5301 *et. seq.*); the Tribally Controlled Schools Act of 1988, as amended (25 U.S.C. § 2501 *et. seq.*); the 1934 Indian Reorganization Act and subsequent amendments;

the special trust relationship between the Federal government and the Indians; the plenary power of Congress.

FACTS

17. Pursuant to Public Law 100-297, the Tribally Controlled Schools Act of 1988, as amended (hereinafter "TCSA") (25 U.S.C. § 2501 *et. seq.*), the Lower Brule Sioux Tribe receives federal funding enabling it to assume direct control over school programs previously controlled by the federal government, for the benefit of the Tribe and its members. Often, these funds are advanced funds, so called because they are paid to the Tribe in advance of the expenditures being incurred for which they are intended.
18. The Tribe records such advanced funds as deferred revenue, and therefore a liability on its balance sheet because it reflects revenue that has not been earned and represents services that are owed to the federal government under a contract or grant. As services are provided, or carried out over time, it is recognized proportionally as revenue on the Tribe's income statement.
19. Pursuant to the Single Audit Act of 1984, and consistent with the TCSA, the Tribe conducts an annual audit. The Tribe's auditors report their audit findings in a Schedule of Findings and detail questioned costs attached to these findings in a Schedule of Questioned Costs. The Tribe prepares a Corrective Action Plan (CAP) to respond to the auditors' findings and to address questioned costs. The Tribe then submits the audit, with its CAP included, to the Federal Audit Clearinghouse (FAC) and to the Department of Interior, Division of Internal Evaluation and Assessment (DIEA) - the audit liaison/point of contact for all Indian Affairs organizations to the Department of the Interior, including the Bureau of Indian Affairs (Great Plains Region), the regional office of the Tribe's

cognizant oversight agency for audit (2 CFR §200.18, Defined; 2 CFR §200.513, Responsibilities).

20. The Tribe's cognizant oversight agency for audit, in this case, the BIA (GPR), has a duty to provide technical assistance to the Tribe; and a duty to endeavor to resolve costs questioned by the Tribe's auditors to avoid having to disallow the costs. The federal awarding official for the cognizant oversight agency for audit has a 365-day time frame in which to resolve questioned costs. If the federal awarding official for the cognizant oversight agency for audit does not act in time, it forfeits its ability to recoup disallowed costs. 25 U.S.C. §450j-1(f); *see also* DOI-BIA Single Audit Handbook 5 IAM 2-H.
21. In the case of a questioned cost, the federal awarding official for the Tribe's cognizant oversight agency for audit may: (a) sustain the questioned cost by disallowing the questioned cost; or (b) reinstate the questioned cost and deem the cost to be allowable.
22. If a questioned cost is disallowed, the federal awarding official for the Tribe's cognizant oversight agency for audit has a duty to issue a Findings & Determinations memorandum (hereinafter "F&D") to disallow the cost; and issue a formal notice to the Tribe.
23. In the event of a dispute between the Tribe and the federal awarding official for the Tribe's cognizant oversight agency for audit, the Tribe has the right to seek resolution of the dispute via alternative dispute resolution, such as arbitration or third-party mediation. 25 U.S.C. § 5329.
24. In a case of suspected misapplication of federal funds or deferred revenues that are not fully collateralized, the federal awarding official for the Tribe's cognizant oversight agency for audit is required to perform an analysis of the Tribe's financial statements to ascertain whether federal funds have been misapplied or deferred revenues are not fully

collateralized. If it is determined that funds have been misapplied or deferred revenues are not fully collateralized, the federal awarding official for the Tribe's cognizant oversight agency for audit will document the misapplication of funds or lack of full collateralization of deferred revenues by issuing a F&D memorandum to initiate either 1) a recovery of misapplied funds, or 2) the placement of the Tribe on no less than quarterly allowances until a subsequent financial statement audit shows that all discrepancies have been corrected.

25. The federal awarding official bears the burden of proving that costs should be disallowed, and the agency disallowing costs has a legal obligation to assist the Tribe in resolving any issues.
26. The federal awarding official for the Tribe's cognizant oversight agency for audit responsible for the duties described in the preceding paragraphs with respect to the Tribe's audits for FY2012 and from FY2016 to FY2019 was Defendant Krissanne Stevens of the BIA (GPR). Ms. Yvonne LaRocque of the BIA (GPR) served as the federal awarding official for the Tribe's cognizant oversight agency for audit from FY2013 to FY2015.
27. The Tribe's single audit reports for the fiscal years 2012, 2013, 2014, and 2015 resulted in the federal awarding official questioning costs on the grounds that the Tribe had used deferred revenue in the form of advanced federal funds to pay operating expenditures. On each occasion, the Tribe responded, providing financial statements establishing that the liability by that deferred revenue was more than offset by the value of tribal assets. In both cases, the federal awarding official accepted the Tribe's response and reinstated the questioned costs, declining to issue a bill of collection.

28. On November 9, 2017, Michael J. Chatmon of the DIEA sent a memorandum to Ms.

Danelle Daughtery of the BIA (GPR), the Acting Regional Director at that time for the Tribe's cognizant oversight agency for audit, that the BIA (GPR)'s acceptance of the Tribe's defense that its deferred revenue shortfall relative to the 2015 Audit was offset by the value of the Tribe's capital assets was "unsound". Mr. Chatmon stated that "IA advanced funds (deferred revenue) must be maintained in cash and /or short term investments and must be readily available for program expenses. IA advanced funds (deferred revenue) cannot be covered by a capital asset that must be sold in order to generate cash needed to sustain an IA program".

29. Mr. Chatmon's memorandum to Ms. Daughtery was not shared with the Tribe until April 2021. Had the Tribe known of Mr. Chatmon's narrow interpretation of the guidance provided at 25 USC § 450e-3, which states that advance payments made by the Department of the Interior to Indian tribes may be invested by the Indian tribe before such funds are expended for the purposes of the grant so long as such funds are "fully collateralized to ensure protection of the funds," it would have defended its position and opposed Mr. Chatmon's interpretation.

30. In relaying this internal communiqué to the Tribe via email on April 14, 2021 (months after initiation of this Collection Action), Ms. Steven of the BIA (GPR) stated that Mr. Chatmon's memo to the BIA "really put BIA in a bind for accepting the Tribe's previous responses" relative to deferred revenue shortfalls.

31. The Tribe's Single Audit Report for the Fiscal Year Ended September 30, 2016 (hereinafter "2016 Audit") resulted in Ms. Stevens of the BIA (GPR), questioning costs on the grounds that the Tribe had used deferred revenue in the form of advanced federal

funds to pay operating expenditures, even though the Tribe's auditors stated that the implications of this Material Noncompliance and Material Weakness Finding were unknown. The Tribe submitted its Corrective Action Plan (CAP), but the federal awarding official still chose to make the determination that the Tribe "misapplied \$6,122,556 in questioned costs" and sustained the finding, directing that a bill of collection be issued, which would require the Tribe to reimburse the BIA (GPR) the amount of the questioned costs, even though nearly fifty-nine percent (59%) of the amount questioned by the BIA's federal awarding official had not been issued by the BIA. The Tribe subsequently provided additional information in response to the federal awarding official's F&D memorandum.

32. Approximately two weeks later, Ms. Krissanne Stevens of the BIA (GPR) - the Tribe's cognizant oversight agency for audit that year, issued a Request for Suspended Action Memorandum, asking the Interior Business Center for the DOI to "temporarily suspend collection efforts related to Bill for Collection #SC2016-5499 in the sum of \$6,122,556" as she and others would need to review the additional information provided by the Tribe before revising the F&D memorandum.

33. The Tribe has no record of a revised F&D memorandum or a revised Bill for Collection ever being issued for the 2016 Audit.

34. The Tribe's Single Audit Report for the Fiscal Year Ended September 30, 2017 (hereinafter "2017 Audit") resulted in Ms. Stevens of the BIA (GPR), questioning costs on the grounds that the Tribe had used deferred revenue in the form of advanced federal funds to pay operating expenditure. The Tribe submitted a Corrective Action Plan (CAP) with the 2017 Audit, as usual, but in its Appeal Notice and its 2017 F&D, dated March

20, 2019, Ms. Stevens sustained the questioned costs ordered the issuance of a payment restriction letter.

35. The 2017 audit and F&D memorandum calculated the Tribe's unearned TCSA revenue to be \$3,814,190, offset by \$134,967 in cash equivalents, for an unearned revenue deficit of \$3,679,223.

36. In its response to the 2017 F&D memorandum, dated March 27, 2019, the Tribe argued that the "Tribe's net unrestricted assets and amounts invested in capital assets would be sufficient equity to cover the deferred revenue deficit" and that the "Tribe has assets in the component units that could be liquidated if absolutely necessary, but would not be in the best interest for the Tribe". The Tribe averred that it "has always fulfilled its obligations with all 638 contracts and grants and awards in a timely manner and paid all liabilities incurred in the execution of the contract, award or grant". Referencing the 2016 Audit, the Tribe noted the reduction of the deferred revenue deficit by approximately \$2.5 million from FY 2016 to FY 2017. Finally, the Tribe indicated that it was attempting to resolve the deferred revenue deficit issue within three years.

37. The Tribe did not receive a signed and dated payment restriction letter as was referenced in the 2017 F&D. Nor did the Tribe receive a written response to its March 27, 2019, letter.

38. The Tribe's Single Audit Report for the Fiscal Year Ended September 30, 2018 (hereinafter "2018 Audit") resulted in Ms. Stevens of the BIA (GPR), questioning costs on the grounds that the Tribe had used deferred revenue in the form of advanced federal funds to pay operating expenditures, even though no questioned costs were attached to this Material Weakness Finding and Qualification by the Tribe's auditors.

39. According to the 2018 audit and F&D memorandum, the Tribe's unearned revenue was \$4,249,064, offset by \$726,204, for an unearned revenue deficit of \$3,3,522,860. The memorandum stated that a bill of collection would issue.
40. The respective unearned revenue deficits for 2017 and 2018 are not separate debts. Rather, each figure represents the unearned revenue deficit for that particular year.
41. Following the Tribe's 2019 Audit, the BIA issued a F&D memorandum which stated that the Tribe's unearned revenue was \$5,023,679, offset by \$223,102 in cash equivalents, for an unearned revenue deficit of \$4,800,577.
42. The F&D memorandum for the Tribe's 2020 audited financial statements showed unearned revenue of \$3,558,413, offset by cash equivalents of \$1,576,657, for an unearned revenue deficit of \$1,981,756.
43. The 2020 unearned revenue deficit of \$1,981,756 is not a new debt, or in addition to the previous years' deficits. Rather, it is the latest unearned revenue deficit balance as of September 30, 2020. Put another way, the Tribe's unearned revenue deficit fluctuated from year to year, ultimately declining from \$6,122,556 as of September 30, 2016 to \$1,981,756 as of September 30, 2020.
44. In December 2020, the BIA issued a bill for collection for each of the 2017 and 2018 questioned costs to the Department of the Treasury, Bureau of the Fiscal Service, effectively attempting to collect the same alleged debt twice. The bill for collection for the 2017 costs was issued even though the F&D memorandum for that audit had stated that only a payment restriction letter would issue.
45. Collection via the Bureau of the Fiscal Service's Treasury Offset Program (TOP) of the 2017 questioned costs began on December 31, 2020. Collection of the 2018 questioned

costs began via TOP in February 2021. The TOP collection was managed by ConServe, a private debt collection agency, on behalf of the Bureau of the Fiscal Service.

46. The Tribe made repeated verbal and written requests, including a letter dated April 22, 2021, from Tribal Chairman Clyde Estes to Ms. Stevens, to have the duplicate collection revoked. However, collection commenced despite those requests.
47. According to ConServe, collection on the duplicative findings resulted in the assessment of more than \$2,000,000 in administrative costs, interest, and penalties against the Tribe. The information provided to the Tribe by ConServe also confirmed that the BIA sought to collect the entire amount of the deferred revenue deficit as it stood in both 2017 and 2018.
48. The Tribe disputed the alleged debt with the Department of Treasury, Bureau of the Fiscal Service, partially on the grounds that the BIA's duplication of questioned costs was resulting in over-collection. In May, 2021, the BIA doubled down on its error, insisting that there was no duplication. The Bureau of the Fiscal Service accepted the BIA's explanation and collection continued.
49. Ultimately, the BIA acknowledged its error in duplicating the questioned costs and terminated the collection of the 2018 amounts via TOP in May 2021. However, the BIA did not restore any of the erroneously collected funds. Instead, according to the BIA, it applied \$671,794.92 collected in connection with the 2018 deficit to the 2017 deficit. It is unclear whether administrative costs, interest, and penalties were collected in connection with the 2018 deficit and, if so, what happened to those funds.
50. Collection of the 2017 deficit continued from December 2020 until October 8, 2021, when the present action was filed in Federal District Court.

51. The Bureau of the Fiscal Service seized \$4,506.062 via TOP between December 2020 and October 8, 2021. Since the deferred revenue deficit declined from \$3,679,223 as of September 30, 2017, to \$1,981,756 as of September 30, 2020, before collection finally began, this represents an over collection of as much as \$2,524,306, minus administrative costs, interest, and penalties permitted by law.
52. In June 2021, the BIA released \$1,400,218 in IHS CARES Act funds that had previously been seized via the TOP program back to the Tribe. Taking into account this refund, the BIA has still collected \$1,124,088 more than the deferred revenue deficit balance that existed when the TOP collections commenced.
53. The BIA has claimed that the principal balance still owed on the alleged debt is \$1,013,873.36.
54. These funds are needed by the Tribe to provide necessary services for its members, including funds for public safety, public health, and education. This taking of funds adversely impacts the ability of the Tribe to perform and deliver services under its federal awards.
55. The BIA's failures have compromised the Tribe's ability to comply with the terms and conditions for delivery of services under its federal awards; and may eventually result in the termination of grant awards by federal awarding agencies; and reassumption of programs awarded by the Department of Interior / Bureau of Indian Affairs and Department of Health and Human Services / Indian Health Service for non-compliance.
56. In diverting and seizing federal funds in order to satisfy the Tribe's alleged federal debt, Defendants have prevented the Tribe from using those federal funds for their intended

purpose, and the use of federal funds to pay a federal debt is itself a disallowed costs created by Defendants.

57. The Defendants' actions have brought the Tribe dangerously close to insolvency, in violation of Defendants' trust duty to the Tribe.

COUNT 1

58. The Tribe realleges the preceding paragraphs and incorporates them by reference.

59. Collection of any principal of Tribal debt due to the deferred revenue deficit should have been limited to the balance of that debt at the time that collection commenced. At the time collection commenced, the debt principal was \$1,981,756.

60. 31 U.S.C. § 3717 permits the government to charge interest accruing from the date that notice of the debt is mailed to the debtor. 31 CFR § 901.9 permits administrative costs "based on actual costs incurred or upon estimated costs as determined by the assessing agency," and a penalty "not to exceed six percent a year on the amount due."

61. With respect to the 2017 deficit, Ms. Stevens notified the Tribe in the 2017 F&D memorandum that the BIA would issue a payment restriction letter, rather than a bill of collection. Thus, the Tribe had no notice that the deferred revenue deficit was considered a debt. Despite this, Ms. Stevens appears to have requested the bill of collections on April 9, 2019, and the BIA did not issue the bill until June 10, 2020. The Tribe's earliest record of receiving notice of the bill of collection is April 2021.

62. Interest and penalties should only have been assessed on the amount due at the time that the bill of collection was issued, and calculated from the time that the Tribe received notice of the debt.

63. Defendants' trust and statutory duties to the Tribe prohibit over-collection of a Tribal debt. These duties originate in the Snyder Act, the ISDEAA, the TCSA, 31 U.S.C. § 3711 *et. seq.* and other applicable law. These duties arise from the Defendants' responsibility to promote and support Tribal self-government, provide federal funding for necessary Tribal services, and deal fairly with the Tribe.

64. Defendants violated its duties to the Tribe by over-collecting, and by continuing to seek over-collection of the deferred revenue deficit to the detriment of the Tribe.

65. The Tribe is entitled to a declaratory judgment that Defendants violated their duties to the Tribe.

66. The Tribe is entitled to a writ of mandamus directing the Defendants to fulfill their duty to abstain from further collection and to return improperly or unlawfully collected funds to the Tribe.

WHEREFORE, The Tribe respectfully prays for relief and damages against the Defendant as follows:

1. A declaratory judgment and writ of mandamus as described *supra*.
2. Restitution of any funds unlawfully or improperly collected by Defendants.
3. For The Tribe's costs and disbursements, without limitation, including attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 and other applicable statutes, and as permitted by general principles of law and equity.
4. For such other and further relief as the Court determines to be just and proper under the circumstances.

Dated this 30th day of October, 2022.

**HEIDPRIEM, PURTELL,
SIEGEL, HINRICHS & TYSDAL L.L.P.**

BY John R. Hinrichs

John R. Hinrichs (SD Bar No. 3166)

101 West 69th Street, Suite 105

Sioux Falls, SD 57108

Tel: (605) 679-4470

Fax: (605) 679-4379

Email: john@hpslawfirm.com

Attorney for the Lower Brule Sioux Tribe

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document was filed with the Clerk of Court and served on the following individual(s) via the Court's electronic filing system.

Alexis J. Warner
Alexis.Warner@usdoj.gov

Attorney for Defendants

Dated this 19th day of December, 2022.

/s/ John R. Hinrichs
John R. Hinrichs