

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

CHEROKEE NATION OF OKLAHOMA, and)
SHOSHONE-PAIUTE TRIBES OF THE)
DUCK VALLEY RESERVATION,)

Plaintiffs,)

v.)

Case No. 99-092-S CIV

UNITED STATES OF AMERICA; *et al.*,)

Defendants.)

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PLAINTIFFS' SUPPLEMENTAL BRIEF

The pending dispositive motions¹ concern the Indian Self-Determination Act, a measure enacted to promote tribal self-determination by turning over daily management of federal programs to the tribes themselves.

Congress in the ISDA made the judgment that tribes could better operate federal programs on their own given the necessary funding to do so, including contract support costs.² When the federal agencies, including the Indian Health Service,³ failed to live up to the ISDA's promises, and sought instead to elevate their own internal priorities over the ISDA's goals, Congress reacted decisively by reaffirming its commitment to providing full contract support costs. It did so through massive amendments in 1988 and

¹ There are currently pending before the Court three dispositive motions:

(1) the Plaintiffs Motion for Partial Summary Judgment of Liability on the First and Second Causes of Action. Clk. Dkt. Nos. 46 (corrected motion), 47 (corrected opening brief), 24 (supporting exhs., including statement of undisputed issues); 39 (opposition) and 38 at 1-5 (gov't statement of disputed issues); and 55 (reply with additional exhs.). *See also* plaintiffs' notices of additional authority at Clk. Dkt. Nos. 56, 94 & 125.

(2) the Plaintiffs Motion for Declaratory Judgment on the Third Cause of Action. *See* Clk. Dkt. Nos. 48 (corrected motion) (originally mislabeled a motion for "summary judgment"), 49 (corrected opening brief); 39 (opposition); and 52 (reply); and

(3) the Defendants' Cross Motion for Summary Judgment. *See* Clk. Dkt. Nos. 35 (motion), 38 (statement of undisp. issues), 39 (opening brief); 51 (opposition); and 57 (reply).

² *See* Order of Feb. 9, 2001 at 2, Fdg. No. 2.

³ IHS is an agency within the Department of Health and Human Services. It is not a part of the Bureau of Indian Affairs (which is within the Interior Department). Its functions were originally set forth in the Transfer Act of 1954, 42 U.S.C. § 2001 *et seq.*

1994 that (1) stripped the agencies of all prior discretion whatsoever over contract funding matters, (2) reinforced the agencies' duty to fully pay the tribes contract support costs, and (3) gave the tribes clear judicial remedies to address future agency misconduct. Clk. Dkt. 47 at 2-12, 23-25, 41-45; Clk. Dkt. 55 at 1-2.

1. All the relevant facts are undisputed⁴

In FY 1997, years after these congressional reforms, IHS paid the Cherokee Nation less than its full contract support cost requirements as calculated by IHS. This is undisputed. IHS likewise underpaid the Shoshone-Paiute Tribes their contract support cost requirements as calculated by IHS in FY 1996 and FY 1997. This, too, is undisputed.

The only issue is whether IHS's failure to fund the two tribes violated the ISDA, and the contracts and funding agreements entered into under the ISDA. If so, the Tribes are entitled to summary judgment.

2. The Tribes assert both statutory and contractual claims

In this case the Tribes advance two distinct claims.

Under their First Cause of Action, the Tribes contend that IHS's conduct violated their contracts and annual funding agreements, which echo the ISDA's guarantee of full funding.

⁴ With respect to the summary judgment standard, the law since the earlier briefing has changed little. *See Ford v. West*, 222 F.3d 767, 774, 777 (10th Cir. 2000). The parties have cross-moved for summary judgment.

Under their Second Cause of Action, the Tribes contend that IHS's failure to pay violated their rights under the ISDA.

If either theory succeeds, summary judgment is appropriate. And if IHS's conduct violated the ISDA, it does not matter if the Tribes have differing contract terms that may or may not have also been violated. *See* Order of Feb. 9, 2001 at 2, Fdg. 4 (noting potential differences among tribal contracts).

3. Appropriations were available for the years in question.

The Court's decision not to certify a class has narrowed this case. The two

Tribes' Complaint now addresses only fiscal years 1996 and 1997. In those years IHS received large and unrestricted "lump-sum" appropriations—which increased substantially from year to year—to implement the ISDA and other specified laws: \$1.374 billion in FY 1996, and \$1.426 billion in FY 1997. Clk. Dkt. 47 at 26-31; Clk. Dkt. 55 at 27-36. In neither year did Congress in any manner limit the amount of contract support costs IHS could pay. *Id.* That is, in 1996 and 1997 IHS had a "lump sum" appropriation with no statutory mention, no less restrictions or "caps," on expenditures for contract support costs.

Every court to have considered IHS's or the BIA's liability under such "lump-sum" circumstances has concluded that the funding mandates of the ISDA control, and that contract support costs must be paid in full because sufficient appropriations are legally "available" to do so. *Id.*⁵ Although IHS may otherwise have general discretion to manage

⁵ Clk. Dkt. 47 at 26-31; Clk. Dkt. 55 at 27-36. *See also* I U.S. General Accounting Office, *Principles of Federal Appropriations Law*, ch. 4 at 2, 1991 W.L. 645745, *1 (2d ed. 1991) (hereafter "*Federal Appropriations Law*") ("whether appropriated funds are or are not 'legally available' for a given obligation or expenditure . . . is simply another way of saying that a given item is or is not a legal expenditure"); II *Federal Appropriations Law*, ch. 6 at 159, 1992 W.L. 700361, *1 ("Restrictions on a lump sum appropriation contained in the agency's budget request or in legislative history are not legally binding on the department unless they are carried into (specified in) the appropriation act itself, or unless some other statute restricts the agency's spending flexibility.") (2d ed. 1992); and *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 & n.9 (Ct. Cl. 1980).

The tribunals finding the government liable in "lump-sum" circumstances include the Interior Board of Contract Appeals in the "*Alamo*" portion of *Alamo Navajo Sch. Bd. and Miccosukee Corp.*, 1997 WL 759441 (Dec. 4, 1997). This ruling remains undisturbed, for the government abandoned its appeal, *see Babbitt v. Alamo*, 185 F.3d 880,

its appropriation, Congress here in the operative statute—the ISDA—has set forth mandatory duties that must be obeyed. *Id.*

When it comes to the two years now remaining in issue for these two Tribes—two unrestricted lump-sum years—IHS’s first line of defense has remained the “availability of appropriations” clause at the end of 25 U.S.C. § 450j-1(b). But again, that clause has no application in years—like FY 1996 and FY 1997—when each appropriation was legally “available” to meet the ISDA’s requirements. In each instance Congress authorized the entire lump sum appropriation to be used “for purposes of carrying out . . . the Indian Self-Determination Act,” Clk. Dkt. 55 at 31-32 n.37 (and cited exhibits). Thus, to the extent the legal “availability of appropriations” was a condition precedent to the Tribes’ entitlement, that condition was met. IHS’s failure to pay cannot be premised upon the “availability” clause.

1998 WL 968465 (Fed. Cir. 1998) (unpub’d disp.).

Now that a class has not been certified, this case no longer involves “cap” year circumstances, where Congress expressly caps in the annual appropriation act the amount the agency may spend for contract support costs. This is because Congress only began to “cap” the amount IHS could spend on contract support costs in years FY 1998 and thereafter, and this case now only involves FY 1996 and FY 1997. For differing views on the government’s liability in a cap year, compare the IBCA and subsequent Federal Circuit rulings in *Babbitt v. Oglala*, 194 F.3d 1374 (Fed. Cir. 1999) and *Babbitt v. Miccosukee*, 217 F.3d 857 (Table), 1999 WL 989069 (Oct. 29, 1999) (unpub’d disp.). With class certification denied, and such a legal situation no longer presented here, *Oglala* is inapplicable. *See also* Clk. Dkt. 56 (Plaintiffs’ Notice of Additional Authority, discussing *Oglala* in the context of the class claims).

For this key reason, substantial portions of the Tribes' earlier summary judgment briefs are now in the nature of back-up arguments, in second position to those set forth here and in the balance of those briefs. *See* Clk. Dkt. 47 at 31-50; Clk. Dkt. 55 at 11-27. This is because those arguments only come into play when the issue is the government's liability when an agency is unable to pay on a contract due to *limited*, *unavailable* appropriations. *Supra* at 4, n.5. Here, this case (as narrowed following the denial of class certification), no longer involves a situation of legally unavailable appropriations. As a matter of law, appropriations were "available" to meet the statute's command. *Id.*

4. Payment of the mandated contract support costs does not implicate the "reduction clause."

IHS's second defense is the "reduction clause," appearing immediately after the "availability" clause at the end of § 450j-1(b). But this defense, too, must fail, for IHS received from Congress substantial *new* funding in each of these two particular years. These were multi-million dollar *increases*, more than sufficient to pay the plaintiff Tribes without reducing *any* funds for *any* other programs at all.⁶

⁶ IHS's insistence that the Court should instead focus on the important things IHS did with the money it failed to pay to the Tribes is like the Department of Defense seeking an excuse for not paying Boeing for a jet because it needs to recruit more soldiers. The point isn't what IHS did with the money; it's that the money by law was due the Tribes. That IHS would have had fewer increases each year with which to do other things, had the Tribes been paid, is legally irrelevant.

In this respect it is undisputed that in both years IHS received sizeable, and legally uncommitted, increases of \$35,781,000 in FY 1996, and \$52,266,000 in FY 1997. Clk. Dkt. 55 at 31-31 n.37. For this reason, IHS could *never* make the showing required under the “reduction clause.” Particularly since this case now only applies to the Cherokee and Shoshone-Paiute, IHS could *never* show that payment of contract support costs to these two tribes, in the face of broadly expanding appropriations, would require a reduction in existing funding for other tribes.⁷

Moreover, the “reduction clause” defense can only come into play if at the time IHS’s obligation to pay the two Tribes came due (that is, at the beginning of each fiscal and contract year), IHS had determined it would have been forced to reduce recurring funding for ongoing programs serving other tribes. Clk. Dkt. 55 at 33-34 and n. 41 (and cases cited therein). But IHS never made any such determinations at the time, and as the undisputed facts indicate it never could.⁸ The “reduction clause” defense is but a *post hoc*

⁷ The principal amounts claim presented here do not exceed \$1,667,566 in FY 1996 and \$1,847,196 in FY 1997 for the Shoshone-Paiute Tribes and \$3,436,868 in FY 1997 for the Cherokee Nation, Amended Complaint ¶¶ 14-15, 3-32, far less than IHS’s new lump-sum funding in those two years.

⁸ To be clear, IHS *never* made a so-called “reduction clause” assessment when it decided not to pay the Cherokee and Shoshone-Paiute tribes in these years. The record on this is clear and undisputed. Even IHS’s own recitation of the facts makes no mention of, no less an evidentiary showing that, such an assessment was ever made. *See* Clk. Dkt. 39 at 12-16 (instead noting IHS’s actions were the result of carrying out ISDM 92-2).

rationalization for actions that patently violated the plaintiff Tribes' rights under the ISDA and under their contracts.⁹

Ultimately, this is a case of statutory construction. Elsewhere we have outlined the relevant provisions, together with the overall statutory context, and the mischief Congress sought to address. Since the briefing on these motions closed, additional Supreme Court and Tenth Circuit decisions have provided supplemental guidance in such matters that support the Tribes position, including cases such as *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), at 125-26 (limiting *Chevron* deference), 132-33 (statutory words “must be read in their context and with a view to their place in the overall statutory scheme”), and 159 (noting the “extraordinary cases” where “there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation” under *Chevron*); and *Chickasaw v. United States*, 208 F.3d 871 (10th Cir. 2000), *cert. granted* 121 S. Ct. 877 (2001).¹⁰ These cases further support the Tribes’

⁹ Even in the more deferential APA setting (which clearly this is not, *see* Clk. Dkt. 55 at 5-11), an agency counsel’s post hoc rationalizations will never be relied upon to uphold agency action. *See Federal Power Comm’n v. Texaco*, 417 U.S. 380, 397 (1974). *See also SEC v. Chenery Corp.*, 330 U.S. 194, 196-97 (1947); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75, 1577 (10th Cir. 1994)(reversing district court for relying on “government’s post hoc rationalization”).

¹⁰ *See, e.g., Chickasaw*, 208 F.3d at 878:

Because resolution of this issue turns on statutory construction, our overriding purpose is to determine congressional intent. “In ascertaining the plain meaning of [a] statute, [we] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” Where the will of Congress “has been expressed in reasonably plain terms, ‘that language must ordinarily be regarded as conclusive.’”

reading of the ISDA’s funding provisions, and the rejection of IHS interpretations that would return to the agency the very discretion a distrustful Congress studiously sought to wipe out.

In short, if IHS were correct here and could spend its appropriations without regard to the ISDA’s mandatory contract support cost funding provisions, (1) the whole object and policy of the Act would be defeated, (2) annual appropriation “caps” and other limits enacted later would become meaningless and unnecessary, and (3) IHS would avoid paying the Tribes by invoking the very “discretion” Congress in the ISDA sought to eliminate. Such a construction of the ISDA’s “reduction clause” is not tenable.¹¹

4. Section 314 provides no defense.

IHS’s last defense is Section 314, an appropriations rider IHS claims extinguishes whatever rights the Tribes otherwise might have had under the ISDA. The first

(citations omitted). In instances of ambiguous statutory provisions in Indian legislation, the Circuit reconfirmed that the legislation is to be construed liberally in favor of the tribes, *id.* at 880 (though even this sound common law rule of construction takes a back seat to the even stronger congressionally mandated statutory construction rule favoring tribal contractors, as set forth in the ISDA itself, *see* Clk. Dkt. 47 at 40 & n.37). *See also In re Overland Park Financial Corp.*, 236 F.3d 1246 (10th Cir. 2001), at 1251-52 (discussing *Chickasaw*), 1252 (reading statutory language “in the context of the statute as a whole”).

¹¹ *Cf. United States v. Locke*, 529 U.S. 89, 106 (2000) (cautioning that a savings clause should not be interpreted to “upset the careful regulatory scheme established by federal law.”).

answer is that the rider simply does not mean what IHS says it means, as all other reviewing courts have held.¹² Clk. Dkt. 49 at 3-7, 11; Clk. Dkt. 52 at 1, 5, 9-10, 14-16.

But more fundamentally, if a tribe has a contractual right to contract support costs, Congress can not by section 314 or otherwise destroy that right without breaching the contract. In *United States v. Winstar*, 578 U.S. 839 (1996) the Supreme Court made abundantly clear that when the federal government enters a contract and Congress later acts to cut off such contract rights, it is merely a contracting party breaching a contract.¹³ More recently in *Mobil Oil* the Supreme Court reiterated the point, holding that Congress may not simply enact legislation with impunity that cuts off the rights of a party who entered

¹² In considering IHS's questionable reading, it bears mention that:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

Solid Waste Agency of Northern Cook Co. v. U.S. Army Corps of Engineers, 121 S. Ct. 675, 683 (2001) (citation omitted). Certainly interpreting Section 314 as a breach of contractual rights "invokes the outer limits of Congress' power," and should therefore be avoided if the language is susceptible to an alternative reading.

¹³ Statutorily created rights, like contractual rights, enjoy these same protections. *See Larionoff v. United States*, 431 U.S. 864, 879-880 (1977) (sustaining Tucker Act claim and ordering payment of a reenlistment bonus denied (1) under a subsequent regulation the Court declared invalid, and (2) under a subsequent act of Congress to which the Court gave a limiting construction); *Shoshone-Bannock v. Shalala*, 58 F.Supp.2d 1191, 1998 (D. Or. 1999) ("The government may not unilaterally abrogate a statutory right to payment in exchange for service once the claimant has completely performed that service," and discussing *Larionoff*.)

into a contract with the government.¹⁴ And most recently in *Schism v. United States*, 239 F.3d 1280 (Fed. Cir. 2001) the same principle was applied to enforce promises made to military enlistees that they would receive lifetime veteran's health care despite an intervening act of Congress purporting to cut off such rights. In all these settings, the remedy for the government's action—a breach occasioned by an intervening act of Congress—was a damages action for breach of contract (or, in the case of *Mobil*, restitution). And that is precisely what the Cherokee Nation and the Shoshone-Paiute Tribes have brought in this court: a breach of contract action.

The Tribes each had a statutory right to full contract support cost payments in the fiscal years at issue. IHS violated that right, and also breached the contracts that incorporated it. If IHS is now unable to honor the government's commitments because of an intervening act of Congress—Section 314—the remedy is the same: a damages action. Thus, while the Tribes do not believe that Section 314, when fairly read, even effects their rights, IHS's argument would in any event bring us full circle back to a damages remedy for the resulting breach. That is, even if Section 314 had the meaning IHS would give it, it would simply be a breach of the contracts IHS entered into with the Tribes.

6. A damages award here will not harm other tribes.

Finally, an award in this case will not and cannot adversely impact other tribes. Whatever happened in FY 1996 and FY 1997 is over and behind us; nothing in the

¹⁴ *Mobil Oil Exploration and Producing Southeast Inc. v. United States*, 530 U.S. 604, 120 S. Ct. 2423 (2000).

present action will undo that. If the Tribes prevail, however, the ISDA and the CDA each independently entitle the Tribes to an award of money damages.

As to the ISDA, if the Court awards money damages under that Act—simple statutory damages as authorized under 25 U.S.C. § 450m-1(a)—there isn't even a theoretical impact on the agency, no less an adverse impact on other Tribes, because the award will be paid out of the Permanent and Indefinite Judgment Fund Appropriation. 31 U.S.C. § 1304(a). That will be the end of the matter.¹⁵

As to a court award of damages under the CDA, the Court correctly observed in its February 9, 2001 Order that such damages, too, are paid out of the Permanent Judgment Fund, but thereafter are also covered by the CDA's agency reimbursement

¹⁵ See *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (discussing the Judgment Fund).

provision. 41 U.S.C. § 612(c).¹⁶ But that provision also would not adversely impact other tribes.

This is because the law governing such reimbursements is this: first, if there is to be any immediate agency reimbursement to the Judgment Fund, it must be made out of appropriations current at the time the Court awards the damages.¹⁷ Second, the agency need not reimburse the Fund if the agency determines that doing so would disrupt ongoing agency operations.¹⁸ Third, if no reimbursement occurs out of current year funds, the

¹⁶ IHS itself does not pay damage awards because “Agency appropriations are not available to pay litigative awards, unless provided for by law.” 73 Comp. Gen. 46, 49, 1993 WL 505822, *3 (1993). *See also* Opinion No. B-251061.2, 1993 WL 58276, *1 (“Under a rule established by the Comptrollers of the Treasury, agency appropriations are not, as a general proposition, available to pay litigative awards. That rule rendered the appropriations that fund most agencies legally unavailable to pay such awards”) (citations omitted); III *Federal Appropriations Law*, ch. 14 at 6, 1994 W.L. 860805, *1 (“the rule became firmly entrenched that agency operating appropriations were not available to pay judgments”); U.S. Treasury Dept., Financial Management Service, <http://fms.treas.gov/judgefund/index.html> (hereafter “FMS Judgment Fund Homepage”) at “History and Background” (“Since agency appropriations are generally not available to pay judgments unless such is affirmatively authorized by law, most judgments against the United States are paid from the Judgment Fund”) (relevant web pages attached hereto for the Court’s convenience); *see also* III *Federal Appropriations Law*, ch. 12 at 78, 1994 W.L. 856515, *6 (discussing *Bath Iron* and noting payment to the plaintiff occurs “without regard to adequacy of contracting agency’s appropriations”).

¹⁷ *See* III *Federal Appropriations Law*, ch. 12 at 78, 1994 W.L. 856515, *7 (“reimbursement . . . is chargeable to appropriations available for the agency’s procurement activities current at the time of the award or the judgment”) (citing 63 Comp. Gen. 308 (1984)).

¹⁸ *Reimbursements to Permanent Judgment Appropriations under Contract Disputes Act*, Opinion No. B-217990.25-O.M. at 3 (GAO 1987) (hereinafter “*Reimbursements*”) cited in part and discussed in III *Federal Appropriations Law*, ch. 12 at 78, 1994 WL 856515, *7 (agency “need not disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could just as easily have

agency may only reimburse the Fund out of a supplemental appropriation from Congress made in a future year (a matter which is then in Congress's hands).¹⁹ Fourth, in virtually all successful contract actions, Judgment Fund awards go *unreimbursed*, and the matter is merely an internal government accounting issue.²⁰

directed the agencies to pay the judgments and awards directly.”)

¹⁹ *Reimbursements, supra* at 3-4; III *Federal Appropriations Law*, ch. 12 at 78, 1994 W.L. 856515, *7 (“If the agency has insufficient funds available for reimbursement, the statute permits it to seek additional appropriations.”) (also noting that typically agency will not be in a position to reimburse from future appropriations for at least two years, given the federal two-year federal budget setting process).

²⁰ *Reimbursements, supra* at 4-5, cited in part and discussed in III *Federal Appropriations Law*, ch. 13 at 20, 1994 WL 858066, *5-6. *See also* FMS Judgment Fund Homepage at “Search Judgment Fund Transactions by Agency,” listing under “Indian Health Svc” 77 judgments during the period Oct. 1, 1998 to Feb. 5, 2001 totaling \$39,493,933, with *none* reimbursed. The same site lists under “Bur. Indian Affairs” another 103 judgments during the period Oct. 27, 1998 to Feb. 7, 2001 totaling \$132,663,156 (including as the 100th entry the *Ramah* \$76.2 million judgment), again with *none* reimbursed. The “Treasury Financial Manual Procedures” available from the same FMS Judgment Fund Homepage speaks simply of follow up intra-agency letters and a semi-annual report to Congress. 6 TFM 6-3150.10 (Sept. 2000)

There is, in short, no inexorable connection between actual payment to a plaintiff of a contract damages award out of the Judgment Fund, and the theoretical reimbursement of that judgment at some later date by the responsible agency. In this respect, the experience in *Ramah Navajo Chapter v. Babbitt*, 50 F.Supp.2d 1091 (D. NM 1999), is instructive, for there no such reimbursement has ever occurred.²¹

²¹ *Supra* at 13, n.20. In *Ramah*, the class plaintiffs entered into a settlement requiring the payment of contract breach damages of \$76.2 million. As contemplated by the settlement, 50 F. Supp.2d at 1095, this sum was in due course paid to the plaintiffs out of the Permanent Judgment Fund in the Summer of 1999. The BIA never reimbursed the Judgment Fund for any portion of the award out of its FY 1999 appropriation, nor did it repay the Judgment Fund in any subsequent fiscal year. In fact, to date the BIA has made no move whatsoever to reimburse the Fund from any source, and it has never requested supplemental appropriations to do so either.

At the time of judicial review of the proposed settlement, one set of Objectors expressed concern that reimbursement might someday occur, possibly resulting in the BIA tapping into appropriations that fund tribal programs. The Court found such a prospect unconscionable, calling it “a shell game” if it happened. *Id.* at 1095. The Court “retain[ed] jurisdiction to ensure that the government does not engage in such charlatanism.” *Id.*

We note for the Court’s information that the Cherokee Nation was recently paid \$4.3 million as its share of this settlement, *see Settlement Nets Cherokee Nation \$4.3M*, Muskogee Phoenix & Times Democrat, Mar. 7, 2001, at 1A. We also note that the cited article erroneously reported that the settlement was with the “the Indian Health Service” and that the funds came “from IHS”; as the Court is aware, the *Ramah* settlement was with the United States and the BIA, and the funds came from the Judgment Fund.

For the foregoing reasons and the reasons set forth in the Tribes' filings cited in fn. 1, *supra*, the Tribes' motions for partial summary judgment and for declaratory judgment should be granted and the government's cross-motion for summary judgment should be denied.

Respectfully submitted this 9th day of March 2001.

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