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UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

MDEWAKANTON SIOUX INDIANS OF MINNESOTA, *et al.*,	)	
Plaintiffs	)	Case No. 1:16-cv-02323-RC
v.	)	
ZINKE, *et al.*,	)	
Defendants.	)	

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Federal Defendants Ryan Zinke,[1] Secretary of the Interior ("Secretary"), and U.S. Department of the Interior oppose Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 17).

I. INTRODUCTION

Plaintiffs Mdewakanton Sioux Indians of Minnesota ("Mdewakanton Sioux") and three individuals challenge the approval by the Regional Director of the Bureau of Indian Affairs ("BIA") of a Secretarial election requested by the Prairie Island Indian Community ("Prairie Island"). Secretarial elections are carried out pursuant to federal statute, 25 U.S.C. § 5123, and implementing regulations at 25 C.F.R. part 81. In Secretarial elections, federally recognized Indian tribes may vote to adopt or amend tribal constitutions. Prairie Island is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4918 (Jan. 17, 2017). Prairie Island asked the Regional Director to approve a Secretarial election for the Tribe to vote on an amended Constitution. On March 20, 2017, the Regional Director approved the election, which is scheduled for June 14, 2017.

On November 23, 2016, Plaintiffs filed suit requesting that the federal government, among other things, consult with them as with a federally recognized tribe. Federal Defendants moved to dismiss Plaintiffs' complaint, and that motion has been fully briefed.[2] (*See* ECF Nos.

[1] Ryan Zinke, Secretary of the Interior, is substituted as a defendant for former Secretary Sally Jewell, pursuant to Federal Rule of Civil Procedure 25(d).

[2] In briefing their motion to dismiss, Federal Defendants have addressed the legal and factual assertions Plaintiffs' advance again in their motion for emergency relief. Plaintiffs' motion also asserts (without any corresponding claim in their Complaint) that the federal government has managed a former reservation at Lake Pepin in Minnesota for their benefit. (*See* ECF No. 17, at 11–15.) The Lake Pepin Reservation was created by the Treaty of Prairie du Chien, 7 Stat. 328, 330, art. IX (Jul. 15, 1830). The land was specifically set apart for "half-breeds" of all the Sioux

10, 13, 14.) Plaintiffs' Complaint (ECF No. 1) does not include any claim concerning the upcoming Prairie Island election. Plaintiffs have not sought, much less been granted, leave to amend their Complaint. As explained below, that failing is enough to defeat Plaintiffs' motion.

Plaintiffs also fail to meet the exacting standards for entitlement to the extraordinary relief they seek. Plaintiffs are unlikely to succeed on the merits for a number of reasons. First, the court lacks jurisdiction over their claims because the Federal Defendants enjoy sovereign immunity against suit except under limited circumstances. The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, waives that sovereign immunity, but it does not apply to the claims advanced in Plaintiff's Motion because the BIA Regional Director's scheduling of an election is not a final agency action subject to judicial review. Second, Plaintiffs' claims are not ripe. Third, Plaintiffs lack standing to bring these claims because, as explained in Federal Defendants' motion to dismiss (*see* ECF Nos. 10, 14), the Mdewakanton Sioux Indians of Minnesota is not, and has never been, a federally recognized tribe. Fourth, Plaintiffs fail to state

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Nations, not for any particular tribe. (*See* ECF No. 17, at 11–13.) As noted in Federal Defendants' motion to dismiss (ECF No. 10, at 2), *all* rights created by Sioux treaties prior to 1863 were expressly terminated by the Act of Feb. 16, 1863, ch. 37, 12 Stat. 652. *See Wolfchild v. United States*, 731 F.3d 1280, 1293 (Fed. Cir. 2013). Moreover, the Act of July 17, 1854, 10 Stat. 304 (cited in ECF No. 17, at 11–12), which Plaintiffs claim affords them rights in Lake Pepin land, predated the 1862 Sioux uprising that gave rise to the "loyal Mdewakanton" as a group and therefore could not have created any rights in the Mdewakanton Sioux from whom Plaintiffs claim descent. (*See* ECF No. 10, at 22–23.) Further, the 1854 statute provided individual Indians a means to buy land, using scrip, *in exchange for* their former interests in the Lake Pepin Reservation and opened all unclaimed lands in that Reservation up for public sale. *Id.* §§ 1, 3. (In fact, using their scrip, individuals could buy any unoccupied land not reserved by the government. *Id.* § 1. *See Carter v. Ruddy*, 166 U.S. 493, 494 (1897) (involving land in *Idaho* purchased with Lake Pepin scrip).) Finally, *Midway Company v. Eaton*, 183 U.S. 602, 609–11 (1902) (cited in ECF No. 17, at 15) does not demonstrate federal supervision of a Lake Pepin reservation as late as 1902. That case concerned land in St. Louis County, Minnesota, which is quite far removed from Lake Pepin, which lies in Goodhue and Wabasha Counties, Minnesota, and Pepin County, Wisconsin. *See* https://en.wikipedia.org/wiki/St._Louis_County, Minnesota (last visited June 2, 2017); https://en.wikipedia.org/wiki/Lake_Pepin (last visited June 2, 2017).

a claim upon which the court can grant relief because the Secretary of the Interior has no discretion *not* to call for a Secretarial election following a tribal request in compliance with the governing regulations.

Not only have Plaintiffs failed to demonstrate likely success on the merits, they have not shown that they will likely suffer irreparable injury if the court denies their motion. Even if Prairie Island ratifies the amended Constitution, any injury Plaintiffs may suffer as a result would be amenable to cure through an ordinary APA challenge to the Regional Director's approval of the Constitution. Plaintiffs have not and cannot show any exigency to their alleged injuries justifying the extraordinary remedy of a temporary restraining order or preliminary injunction.

Finally, Plaintiffs cannot show that the balance of equities favor granting their motion for emergency relief. For all these reasons the Court should deny Plaintiffs' motion.

II. Legal Background

A. Standard of Review

The grant of a preliminary injunction or temporary restraining order is an "'extraordinary and drastic remedy.'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation omitted). Such emergency relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)); *accord Konarski v. Donovan*, 763 F. Supp. 2d 128, 133 (D.D.C. 2011) ("As an extraordinary remedy, courts should grant such relief sparingly."). A party seeking a preliminary injunction must demonstrate four elements: (1) that it has a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that the balance of the equities tips in its favor; and (4) that the public interest would be furthered by the injunction. *Winter*, 555 U.S. at 20; *accord Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). A party seeking such relief

must make a "clear showing" that, taken together, the four *Winter* factors weigh in its favor. *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016).

B. Secretarial Elections Under the Part 81 Regulations

A Secretarial election is a federal election held within a tribe pursuant to regulations issued by the Secretary of the Interior ("Secretary") as authorized by Section 16 of the Indian Reorganization Act of 1934, *recodified at* 25 U.S.C. § 5123. Under Section 16, Indian tribes have "the right to organize for [their] common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto . . . ." 25 U.S.C. § 5123(a). Section 16 further provides that a tribe's constitution, bylaws, or any amendments

> shall become effective when ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe; and . . . approved by the Secretary . . . .

Id. The regulations in 25 C.F.R. Part 81 establish a detailed process for Secretarial elections. The regulations allow a tribe to request a Secretarial election by submitting an appropriate tribal resolution, ordinance, or other document, along with the document or amended language to be voted on, together with a voting list of members eligible to vote. *Id.* § 81.6. Under Section 16 of Indian Reorganization Act, once a tribe makes a request for a Secretarial election, the Secretary "*shall* call and hold an election as required by subsection (a) [25 U.S.C. § 5123(a)]." 25 U.S.C. § 5123(c)(1) (emphasis added). A person included on the list of eligible voters and who has submitted a voter registration form may challenge the election results by submitting a written challenge to the Chairman of the Secretarial Election Board within five days *after* the election results are certified.[3] 25 C.F.R. § 81.43. Neither the Indian Reorganization Act nor the

[3] The Chairman of the Secretarial Election Board is a BIA official appointed to serve in that capacity. 25 C.F.R. § 81.19(c).

Secretarial election regulations provide any other avenue for challenging a Secretarial election and certainly no avenue for seeking to *enjoin* an election.

III. ARGUMENT

A. The Relief Sought in Plaintiffs' Motion Lies Outside that Sought in the Complaint and Therefore Cannot be Granted

"[A] preliminary injunction may not issue when it is not of the same character as that which may be granted finally and when it deals with matter outside the issues in the underlying suit." *Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 8–9 (D.D.C. 2014) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure: Civil § 2947 (3d ed.); *De Beers Consol. Mines. v United States*, 325 U.S. 212, 220 (1945) (a preliminary injunction is inappropriate when it would provide relief that "in no circumstance" could be provided "in any final injunction that may be entered")). That limitation goes to the Court's subject matter jurisdiction to order the requested relief. *Id*. at 9.

In this case, Plaintiffs' Complaint seeks relief that would afford the Mdewakanton Sioux certain rights to be consulted with and treated as a federally recognized Indian tribe and to benefit from certain land assignments (including land currently held by the United States for the benefit of Prairie Island). (*See* ECF No. 1, at ¶¶ 231–259.) Nothing in Plaintiffs' Complaint challenges the June 2017 Secretarial election and seeks relief on that basis. In the absence of an operative complaint requesting such relief, this Court cannot and should not grant Plaintiffs' motion for temporary restraining order or preliminary injunction.

B. Plaintiffs Are Unlikely to Demonstrate Success on the Merits

1. Sovereign Immunity Bars Plaintiffs' Claims

The APA is a limited waiver of sovereign immunity that provides that a reviewing court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with law." 5 U.S.C. § 706(2)(A). In order to obtain judicial review of agency action, a plaintiff must identify a final agency action governed by applicable substantive law, or show that it has exhausted administrative mechanisms for compelling agency action that the agency was required by law to take but did not. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62–65 (2004).

Plaintiffs do not challenge "final agency action"; instead, they challenge the scheduling of an election, requested by a federally recognized tribe, whose outcome is unknown at this point. Indeed, any "final agency action" must await voting by the tribal members eligible to vote and certification of the election results *and* approval of the adopted constitutional amendments by BIA under 25 C.F.R. § 81.45. Because Plaintiffs do not at this point challenge "final agency action," they have no claim that comes within the sovereign immunity waiver of the APA.

2. Plaintiffs' Claims are Not Ripe

Plaintiffs' challenge to the upcoming election is not ripe, and Plaintiffs therefore fail to demonstrate likely success on the merits. Ripeness is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction[.]" *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Social Services*, Inc., 509 U.S. 43, 57 n.18 (1993)). The doctrine is designed to prevent premature adjudication of disputes that, at present, are merely hypothetical. *Nat'l Park Hosp. Ass'n*, 538 U.S. at 807–08. Plaintiffs' challenge to the upcoming Secretarial election cannot support an order granting preliminary relief. The outcome of the election is not known at this point; in fact, the Prairie Island voters may vote down the proposed constitutional amendments. Even if they vote in favor of the amendments, BIA must certify the results and approve the constitutional amendments as consistent with federal law. 25 C.F.R. § 81.45. If any of the Plaintiffs wish to

challenge the election, and if they meet the requirements of the regulations, they may follow the procedures at 25 C.F.R. § 81.43, and if they wish to challenge BIA's certification of the election results and approval of the constitutional amendments, they may bring suit under the APA. At this point, however, Plaintiffs' claims are not ripe and not subject to judicial review.

3. The Mdewakanton Sioux Have No Standing to Challenge the Election

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)); *accord Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 48 (D.C. Cir. 2016) ("The standing requirements of Article III are . . . grounded in respect for the separation of powers tenets that are the foundation of our system of government"). Where plaintiffs lack standing, a case must be dismissed under Federal Rule of Civil Procedure 12(b)(1). *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 48 (D.C. Cir. 2016). "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010); *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The burden is on the plaintiff to make the necessary showing, *Lujan*, 504 U.S. at 561, and mere conclusory allegations, unsupported by particularized facts, will not suffice, *Summers*, 555 U.S. at 495–97.

The Mdewakanton Sioux lack standing to challenge the upcoming Secretarial election. The entire premise of Plaintiffs' motion is that the Mdewakanton Sioux "is a tribe, acknowledged under the [Indian Reorganization Act]" (ECF No. 17, at 1) and that the scheduled election is antithetical to their tribal interests. But as explained in briefing on Federal Defendants' motion to dismiss (ECF Nos. 10, 14), the Mdewakanton Sioux cannot establish their purported status as a federally recognized tribe. First, Plaintiffs' underlying claim—that they have long been a federally recognized tribe and should be treated as such now—rises or falls on the basis of events occurring long ago, including statutes dating back to the 19th Century and opinions from the Office of the U.S. Solicitor of the Interior dating back to the 1930s. Such a claim has thus been time-barred for decades. Second, the non-recognition of the Mdewakanton Sioux has been established in litigation in the Federal Circuit and is binding, as set out in briefing on the pending motion to dismiss. *See Wolfchild v. United States*, 731 F.3d 1280, 1294 (Fed. Cir. 2013).

Because the Mdewakanton Sioux are not a federally recognized tribe, any action taken by the Prairie Island Indian Community to amend its Constitution could not have any effect on the Mdewakanton Sioux Indians' tribal status. Therefore, the Mdewakanton Sioux fail to establish a "concrete" injury that is "fairly traceable" to the challenged election. For the same reason, an order enjoining the upcoming election would not redress any claim of injury, because the Mdewakanton Sioux would remain a non-federally recognized group of Indians whether or not the election is held.

4. Plaintiffs Do Not State Claims Upon Which Relief May be Granted

As explained above, once a tribe has requested a Secretarial election, the Secretary "*shall*" call an election. 25 U.S.C. § 5123(c)(1). That mandatory congressional directive leaves no room for judicial review under the APA. Review under the APA is unavailable if another

statute "preclude[s] judicial review." 5 U.S.C. § 701(a)(1); *see NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 130–33 (1987) (National Labor Relations Act precludes judicial review of settlement of labor complaint); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (decisions not to take enforcement action not reviewable); *NTCH, Inc. v. FCC*, 841 F.3d 497, 503 (D.C. Cir. 2016) (same). Here, Section 16 of the Indian Reorganization Act *directs* the Secretary to hold a requested election, which makes application of APA § 701(a)(1) "easy." *Heckler*, 470 U.S. at 828–29 (citing *Southern R. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 [, 454] (1979), *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). For that reason, Plaintiffs cannot seek APA review of the Secretary's action taken pursuant to congressional direction.

C. Plaintiffs Cannot Demonstrate Irreparable Injury

Plaintiffs seek an order enjoining an election that has not been held and whose outcome is unknown. It could be that the members of the Prairie Island Indian Community reject the proposed constitutional amendments. If that occurs, even under Plaintiffs' theory—that they face injury if the amendments are enacted—Plaintiffs would not be injured. Plaintiffs therefore do not face "likely" irreparable injury. *See Winter*, 555 U.S. at 20. There is no reason for the Court to enjoin an election simply because Plaintiffs fear what the outcome might be.[4]

If any of the Plaintiffs are dissatisfied with the result of the election, the Part 81 regulations prescribe the appropriate avenue for challenging the election for those eligible to do so under the regulations. 25 C.F.R. § 81.43. If, after pursuing those administrative remedies, Plaintiffs remain dissatisfied, they may pursue an APA challenge in district court. *Id*. § 81.45.

[4] And, as argued in the preceding Section, there is no authority for enjoining an election in advance of its results.

Thus, even if Plaintiffs could claim that an injury to their interests is "likely" (rather than merely "possible," which does not satisfy the standard for injury under *Winter*, 555 U.S. at 21–22), any such purported injury would certainly not be "irreparable," because Plaintiffs have an adequate remedy provided by the governing regulations and under the APA.

D. The Balance of the Equities and Public Interest Require that Plaintiffs' Motion be Denied

Congress has stated federal support for tribal self-determination. Plaintiffs' Motion seeks to prevent Prairie Island, a federally recognized tribe, from exercising its fundamental right, long recognized by the courts, to "make their own laws and be ruled by them." *N.M. v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (internal citations and quotation marks omitted). Even if there were equitable considerations militating against Prairie Island's proposed constitutional amendments, the ability of the Plaintiffs to challenge the approval of those amendments in an APA suit deprives such equitable considerations of any weight in deciding whether to grant Plaintiffs' motion.

Congress has articulated a federal policy of supporting tribal self-government and "a special government-to-government relationship with Indian tribes, including the right of the Indian tribes to self-governance." Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 2(2), 114 Stat. 711; Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. II, § 202(2); 108 Stat. 4250, 4271. The public interest would be thus be best served by permitting the federally recognized Prairie Island Indian Community to exercise its right to self-governance and would be harmed by an order enjoining that election, as Plaintiffs request.

IV. CONCLUSION

Plaintiffs have failed to make a clear showing that the four *Winter* factors, taken together, weigh in their favor. Instead, all four factors tilt the balance in the opposite direction. Plaintiffs also seek relief on claims not brought in their Complaint and fail to bring claims coming within the APA's waiver of the government's sovereign immunity. Plaintiffs' motion for emergency relief should therefore be denied.

Dated: June 5, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 5, 2017, I filed the foregoing electronically through the Court's CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Dated: June 5, 2017

/s/*David B. Glazer*
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