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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mdewakanton Sioux Indians of Minnesota, Margo Bellanger, Tina Jefferson, Michael J. Childs, Jr.

Plaintiffs,

v.

Sally Jewell in her official capacity as Secretary of the U.S. Department of the Interior, or her successor, U.S. Department of the Interior; United States

Defendants.

Case No. 1:16-cv-02323-RC

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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The Mdewakanton Sioux Indians of Minnesota[1] (MSIM) file this reply memorandum in response to the government's opposition to a preliminary injunction, including a temporary restraining order prior to June 14, 2017,[2] enjoining the U.S. Department of the Interior's scheduled June 14, 2017 Secretarial Election at Prairie Island Indian Community in the State of Minnesota (PIIC). Under the preliminary injunction, no future Secretarial Elections shall be held without prior approval by this Court.

ARGUMENT

The Department's opposition to the Plaintiffs' motion for preliminary injunction is unpersuasive for two reasons. The first reason is the Department's opposition of 11 pages leaves most of the Plaintiffs' memorandum of 45 pages in support of preliminary injunction uncontested. Second, the Department's opposition at pages 5 through 10 is limited to a few unpersuasive arguments which are addressed below.

I. The relief sought in Plaintiffs' motion filed on May 30, 2017 is consistent with the Complaint filed on November 23, 2016.

At page 5, the Department errs by arguing that the relief sought in Plaintiffs' motion lies outside the Complaint and therefore cannot be

[1] The reference to MSIM includes all Plaintiffs.
[2] For the sake of brevity, all brief references to "preliminary injunction" include the motion for temporary restraining order.

granted.[3] To the contrary, the Plaintiffs' motion for a preliminary injunction is consistent and is within the Complaint's claims and allegations. The Complaint filed on May 30, 2017 has a separate section, pages 29 through 35, on the PIIC proposed Constitution being contrary to federal law titled:

> The Community's proposed constitution and bylaws terminate the Mdewakanton Sioux Indians of Minnesota without a Congressional Act.

Additionally, the Complaint's prayer for relief at page 61 seeks declaratory and injunctive relief and "whatever additional relief the Court finds just and equitable." Therefore, the Plaintiffs' motion for a preliminary injunction is consistent and within the Complaint's claims and allegations.

II. Sovereign immunity does not bar Plaintiffs' claims.

The Department at pages 5 and 6 of the opposition memorandum errs in claiming federal sovereign immunity bars Plaintiffs' claims. The Department focuses on the pending nature of the June 14, 2017 secretarial election and states no "final agency action" has taken.

Yet, the Department knows or should know that the APA, 5 U.S.C. § 706(1), allows the MSIM to sue to "compel agency action unlawfully withheld." The Complaint and motion claim that MSIM's right as an acknowledged tribe under the 1934 IRA to consultation with the Department

[3] *See, e.g., De Beers Consol. Mines. v. United States,* 325 U.S. 212, 220 (1945).

is being unlawfully withheld, contrary to applicable federal law. 5 U.S.C. § 706(1) states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-- (1) compel agency action unlawfully withheld or unreasonably delayed…

In turn, 5 U.S.C. § 551(13) defines "agency action" to include a "failure to act." The APA does allow a party to sue to "compel agency action unlawfully withheld," *id.* (quoting 5 U.S.C. § 706(1)). Such a suit must seek to compel a discrete agency action, coming within the limitations of Section 551(13), that the agency is required to take.[4] The Complaint and motion satisfy these requirements because the Complaint and motion allege that the Department has unlawfully withheld the MSIM's right to consultation, contrary to federal law, and because the Complaint and motion allege that once the Department consults with MSIM, MSIM as a tribe will exercise its rights under unrepealed statutes with current legal effect – namely the Act of July 17, 1854, section 9 of the Act of February 16, 1863, the 1888-1890 appropriation acts, the 1934 Indian Reorganization Act, and the Act of December 19, 1980.[5]

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[4] *Id.*, at 62-65 (quoting 5 U.S.C. § 551(13)).

[5] Act of July 17, 1854, 10 Stat. 304; Act of Feb. 16, 1863, 12 Stat. 652; Act of June 29, 1888, ch. 503, 25 Stat. 217, 228–29; the Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992–93; Act of Aug. 19, 1890, ch. 807, 26Stat. 336, 349. App.

III. Plaintiffs' claims are ripe.

The Department errs at pages 6 to 7 that Plaintiffs' claims are not ripe because the June 14, 2017 election has not occurred yet and because the BIA has not certified any favorable results and approved the constitutional amendment as consistent with federal law. 25 C.F.R. § 81.45. To the contrary, the Complaint and motion present ripe claims because the Complaint and motion allege that the Department has unlawfully withheld the MSIM's right to consultation, contrary to federal law, and because the Complaint and motion allege that once the Department consults with MSIM, MSIM as a tribe will exercise its rights under unrepealed statutes with current legal effect – namely the Act of July 17, 1854, the 1934 Indian Reorganization Act, section 9 of the Act of February 16, 1863, the 1888-1890 appropriation acts and the Act of December 19, 1980.[6] The Secretary's authorization of the June 14, 2017 election is a continuation of the Department's unlawful withholding of MSIM's tribal right to consultation – all contrary to applicable law.

165-172; Act of June 18, 1934, P.L. 73-383, 48 Stat. 984; Act of December 19, 1980, P.L. 96-557, 94 Stat. 3262.

[6] Act of July 17, 1854, 10 Stat. 304; Act of Feb. 16, 1863, 12 Stat. 652; Act of June 29, 1888, ch. 503, 25 Stat. 217, 228–29; the Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992–93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349. App. 165-172; Act of June 18, 1934, P.L. 73-383, 48 Stat. 984; Act of December 19, 1980, P.L. 96-557, 94 Stat. 3262.

IV. The MSIM has standing to sue because the MSIM, with its three reservations, is a tribe acknowledged by the Department under the IRA which has three reservations under unrepealed statutes with current legal effect.

The Department at pages 7 and 8 err in claiming that the MSIM does not have standing to sue because the MSIM is not a federally-recognized tribe. The Department here resists the holdings in *Cherokee Nation of Oklahoma v. Babbitt*[7] and *Carcieri v. Salazar*, 555 U.S. 379 (2009)[8] which, collectively, show that MSIM has the standing to challenge the Department's list for a legally inaccurate tribal listing.

According to the D.C. Circuit in *Cherokee Nation of Oklahoma*, the Department's federal listings are not determinative of standing of an acknowledged tribe to make tribal claims; instead, the Article III judicial branch gets the final word on a tribal listing as part of the judiciary's administrative oversight per the Administrative Procedures Act.[9] The D.C. Circuit in *Cherokee Nation of Oklahoma* held that *the federal listing* of the Delaware Tribe was *not determinative of tribal sovereign immunity* vis-à-vis the Cherokee. Notwithstanding the federal listing of the Delaware Tribe, the court held that Delaware Tribe's status as a "separate sovereign" vis-à-vis the

[7] *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997).
[8] *Carcieri v. Salazar*, 555 U.S. 379 (2009).
[9] *Id.* at 1501.

Cherokee had been relinquished by an 1867 Agreement.[10] The D.C. Circuit concluded "that by entering into the 1867 Agreement the Delaware Tribe of Indians relinquished its tribal identity or sovereignty in relation to the Cherokee Nation."[11] Similarly, the legal history of the MSIM, 1863 through present, demonstrates that the PIIC and the other two communities are not "separate sovereigns;" therefore, the Department's listing is not determinative of standing of the MSIM as an acknowledged tribe to bring its claims against the Department.[12]

Further, the U.S. Supreme Court in *Carcieri v. Salazar* held that Secretary of the Interior's authority under the Indian Reorganization Act (IRA) to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when the IRA was enacted in 1934.[13] The MSIM was under federal jurisdiction when the IRA was enacted in 1934; the Department acknowledged the MSIM to organize under IRA.[14] On November 17, 1934, the MSIM voted favorably at a Secretarial Election to be organized under the IRA.[15] The Department approved the MSIM's Communities later

[10] *Id.* at 1501.
[11] *Id.* at 1503.
[12] Complaint at ¶ 147.
[13] *Carcieri v. Salazar*, 555 U.S. 379 (2009).
[14] App. 404.
[15] App. 404.

in 1936 and 1969.[16] So, under *Carcieri,* the MSIM has standing to sue with respect to its reservations and its communities.

Additionally, the MSIM has standing because the June 14, 2017 proposed constitution fails to address the 1886 Lands situation at PIIC after the 1996 statutory dissolution of PIIC's corporate charter. The Department, after Congressional revocation of the Prairie Island Indian Community corporate charter in 1996, must make land assignments to the MSIM. The MSIM has standing to make this and the other claims alleged in the Complaint.

V. Plaintiffs do state a claim upon which relief may be granted.

The Department at page 8 and 9 errs in claiming that the Plaintiffs do not state a claim upon which relief may be granted because:

> [O]nce a tribe has requested a Secretarial election, the Secretary "shall" call an election." 25 U.S.C. § 5123(c)(1).

The MSIM's claim upon which relief may be granted is straightforward; the Department is continuously violating MSIM's tribal rights under unrepealed statutes with current legal effect – as it is with the Secretarial election on June 14, 2017. The Department's defense that it is legally required to call the Secretarial election for the PIIC to deem itself a tribe, to eliminate references to MSIM and to eliminate references to 1886 lands

[16] App. 411-434.

assignments to MSIM lineal descendants is convoluted because MSIM is an acknowledged tribe under the IRA and can only be terminated by Congress, not by a Secretarial election. Specifically, the Secretarial election calls for the PIIC to be called a "tribe" for the first time since its creation in 1936, eliminates the MSIM references for the first time since 1936 and eliminates references to 1886 Lands assignments to MSIM lineal descendants for the first time since 1936.

Importantly, the Department's argument begs the question of whether the MSIM has the right of consultation including the right to request or object to the June 14, 2017 Secretarial election. If MSIM is the tribe acknowledged under the IRA, then MSIM has the right of consultation under the IRA and can request or object to the June 14, 2017 Secretarial election – not PIIC. Thus, the Department's so-called mandatory obligation to call the election for PIIC is contradicted by MSIM having the right of consultation including the right as an acknowledged tribe to request or reject the June 14, 2017 Secretarial election.

The Department's legal reading that PIIC is the tribe, and MSIM is not a tribe, is legally null and void by the IRA's three savings clauses at 25 U.S.C. § 5121, 25 U.S.C. § 5123(h) and 25 U.S.C. § 5128 for the reasons explained in the principal memorandum.

VI. MSIM continues to suffer irreparable injury from the Department's violations of its tribal rights of consultation.

The Department errs at page 9 and 10 in asserting that the MSIM must wait until after the election to file its claim that the Department has withheld the right of consultation from the MSIM as it relates to pre-election procedures. None of the post-election procedures will restore to the MSIM the pre-election right to request or object to the June 14, 2017 Secretarial election. Obviously, the June 14, 2017 election favors PIIC over MSIM by inaccurate representations: PIIC becomes a 'tribe"; MSIM references are eliminated; references to the federal 1886 lands assignment system are eliminated. The Department fails to inform the Court that MSIM is the acknowledged tribe with three reservations -- Lake Pepin Reservation; 12 Square Mile Reservation and the 1886 Lands Reservation – and that MSIM, not PIIC, has the right to request and object to Secretarial elections regarding its reservations.

The irreparable injury suffered by MSIM also includes increased litigation costs from constant changes of government and community policy. The Plaintiffs are not in a position of funding years of litigation. The Department's approach of hitting the accelerator pedal on the June 14, 2017 Secretarial election has unnecessarily driven up litigation costs. The preliminary relief will slow down that process and make for less expensive,

more effective adjudication.

VII. The balance of the equities and public interest require that the Plaintiffs' motion be granted.

In its balance of equities and public interest analysis at page 10, the Department omits its guardian relationship to the tribal ward MSIM. As the Department knows, the Department has always maintained a federal guardianship-tribal ward relationship with tribes which have reservations. Every reservation is reserved for a tribe; the three reservations here – Lake Pepin Reservation, 12 Square Mile Reservation and 1886 Lands Reservation – are no different, being reserved for MSIM and its lineal descendants. The fiduciary nature of the government's duty was made explicit in *Seminole Nation v. United States,* 316 U.S. 286 (1942), in which the Court applied the "most exacting fiduciary standards" of the common law in assessing the government's discharge of its duties. In *United States v. Mitchell,* 463 U.S. 206 (1983), the Court reiterated the existence of a "general trust relationship" which imposes "distinctive obligation[s]" in addition to those established by statute. Those distinctive obligations include the right of consultation where the Department tells the tribal ward MSIM what the Department knows or should know about MSIM and its three reservations.[17]

[17] Restatement of Trusts, 2d § 170 (1959) ("The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to

The Department knows or should know that the MSIM exists as an acknowledged tribe under the MSIM with three existing reservations. Unfortunately, the Department's consistent policy – and it is consistent – is to inaccurately represent that the existence of MSIM's three communities legally signifies that MSIM and its three reservations do not exist. Quite to the contrary, the public interest is for the Department to accurately represent that the existence of the MSIM's three communities legally proves that MSIM and its three reservations do exist.

The public interest calls for this dispute with the Department to be resolved expeditiously. The best way to start the adjudicative process is to grant the preliminary relief, preserving the legal status quo, and giving a chance for the parties and counsel to reflect on their prior positions and make the best legal arguments. Then, the Court will decide one way or the other. Either way, the public interest is promoted by resolving the legal issues, rather than letting them linger on and on.

VIII. In the absence of an administrative record required by the local rules, the Department inaccurately represents MSIM's Lake Pepin Reservation.

In the absence of an administrative record required by the local rules[18],

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deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.").

[18] Local Rule 7(n), which incorporates the APA's standard of review, states, "In cases involving the judicial review of administrative agency actions,

the Department inaccurately represents MSIM's Lake Pepin Reservation on pages 1 and 2 (note 2). The Department as federal guardian cheapens the judicial process by inaccurately presenting information and analysis about the Lake Pepin Reservation.

As a preliminary matter, it is important to recall that the Department as federal guardian for all tribal wards knows or should know that reservation boundaries are very valuable for tribes. A tribe has regulatory authority within a reservation boundary. A tribe has land-into-federal-trust opportunities within a reservation boundary. Further, a tribe in Minnesota may receive equitable pricing under the Minnesota Land Improvement Act of October 18, 1990.[19] The Department as federal guardian for tribal wards is legally required to maintain an accurate record of reservation and tribes. The Department losing track of a reservation – or in this case three reservations – is legally unacceptable.

First, the Department contradicts the record by stating that the "Lake Pepin Reservation" was "created" by the 1830 Treaty of Prairie du Chien (1830 Treaty). To the contrary, the 1854 House Report written by Representative Daniel Wright, which is part of Plaintiffs' administrative

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unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first."

[19] P.L. 101-442, 104 Stat. 1020 (Oct. 18, 1990).

record, indicates that the 1830 Treaty recorded a gift of a reservation from the Sioux bands to their mixed blood lineal descendants:

> That under the treaty of Prairie du Chien, of date July 16, 1830, and the ninth article of said treaty, it was stipulated and agreed between the United States and the Sioux bands of Indians, that said Indians might have permission to bestow upon the half-breeds of their nation the tract of land…

App. 9. In other words, the Department's opposition inaccurately represents that the 1830 Treaty created the Lake Pepin Reservation when it was the Sioux Bands that gave the Lake Pepin Reservation to their Sioux lineal descendants as recorded in the 1830 Treaty.

Second, the Department erroneously claims that the lands were set aside for "half breeds" of all the Sioux Nations, not for any particular tribe. Again, the 1854 House Report written by Representative Daniel Wright, states that the term "[t]he term half-breed, as applied by some to them, is a misnomer for it was intended to include all those having an admixture of white and Indian blood in their veins, in whatsoever degree." App. 10. Also, the Act of July 17, 1854 itself refers to the "mixed blood" lineal descendants of the Dakota or Sioux bands. App. 21. Further, the Roll of Sioux Mixed Bloods, 1855-1856, indicates that approximately three-quarters of those 680 identified as Lake Pepin Reservation beneficiaries were MSIM lineal

descendants. App. 22-41.[20] In short, the beneficiaries of the three reservations are essentially the same Indians.

Importantly, the Department – again without an administrative record – claims that the Act of February 16, 1863 -- which does not contain the word "repeal"[21] -- repealed the Act of July 17, 1854 contradicting the contemporaneous understanding of the Department. The contemporaneous understanding of the Department was that the Act of February 16, 1863 did not diminish the Lake Pepin Reservation as the Department continued to issue Lake Pepin Reservation scrip to Indians through 1868 as indicated in the Department's tract book (App. 49-92) and as the Department continued to administer the reservation and scrip at least through 1902 as indicated in the *Midway v. Eaton,* 183 U.S. 602. App. 49-92.

Fourth, the Department is correct about the Lake Pepin Reservation scrip being issued, but the issuance of scrip has nothing to do with diminishing the reservation boundary which still exists. App. 111-118. As the Department knows, the U.S. Supreme Court recently in *Nebraska v. Parker,* 136 S.Ct. 1072 (2016) summarized that only Congress can diminish reservation boundaries:

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[20] Most of the others were Sisseton lineal descendants who already have a reservation in South Dakota.

[21] Implicit repeals are disfavored. *See Sutherland Statutory Construction* § 23.9 – implied repeal (6th ed. 2009).

> "[O]nly Congress can divest a reservation of its land and diminish its boundaries," and its intent to do so must be clear… To assess whether an Act of Congress diminished a reservation, we start with the statutory text, for "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands."[22]

The Department contradicts the holding of *Nebraska v. Parker* in that the Lake Pepin Reservation boundary remains intact even if title within the reservation boundary via scrip has been transferred to others. So, the MSIM still owns the Lake Pepin Reservation boundary which is quite valuable for tribal regulation and tribal land-into-federal-trust opportunities.

Fifth, erratically, the Department puts the cart before the horse when it complains about the MSIM has not perfectly described in the Complaint the people who are entitled to benefit from the Lake Pepin Reservation. However, the key legal issue today is whether MSIM is a tribe with three reservations; if that is answered in the affirmative, then, there will be more work to done determining qualifications to benefit from each of the three MSIM reservations.

Again, these are matters the Department knows or should know. The Department as the guardian of MSIM has a duty to inform the MSIM of its Lake Pepin Reservation as well as the 12 Square Mile Reservation and the 1886 Lands Reservation. The federal guardian in its opposition

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[22] *Nebraska v. Parker,* 136 S.Ct. at 1078-1079 (citations omitted).

memorandum continues to pretend that denying the existence of a guardian-tribal ward relationship with MISM will make the three reservations legally go away; when, in reality, the government's defense of denying the existence of the MSIM does not make the three reservations go away, but only makes the Department's legal problems worse.

CONCLUSION

The Department's memorandum in opposition is unpersuasive. The Court should grant the preliminary relief requested.

DATED: June 7, 2017.

/s/Erick G. Kaardal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 7, 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 7, 2017.

/s/Erick G. Kaardal
Erick G. Kaardal