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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' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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REQUEST FOR ORAL HEARING

Due to the complexity of the underlying matter and because it also relates to matters of first impression, the Plaintiffs respectfully request an oral hearing on the Defendants' motion to dismiss.[1]

INTRODUCTION

The Department of Interior's motion to dismiss should be denied. The Plaintiff Mdewakanton Sioux Indians of Minnesota (MSIM) is an acknowledged tribe[2] and has a right to consultation to assert its rights for which the Department has withheld to the detriment of the tribe. The Department's five arguments – statute of limitations, limitations of Administrative Procedure Act claims, no private cause of action under the 1863 Act, res judicata and absence of a necessary party – should be rejected because these defenses do not apply in this case.

Moreover, startling to MSIM, the Department encourages this Court to dispose of this case without reference to the Department's 150 year administrative record, the Department refuses to disclose in violation of Local Rule 7(n). [3]

Without the administrative record, the Department attempts to transform this court's local legal analysis of the 150 year administrative record into a Queen of Hearts' legal process of "sentence first, verdict afterwards."[4] Yet, the administrative record shows – and should reflect — that the MSIM was acknowledged as a tribe by the Department under the 1934 Indian

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[1] Local Rule 7(f).

[2] *E.g.* Plt. Compl. ¶ 54 Ex. C. In contrast, the reservation lands of the Mdewakanton Sioux Indians of Minnesota, the Prairie Island Indian Community in 1936, the Lower Sioux Indian Community in 1936 and the Shakopee Mdewakanton Sioux Community in 1969 were organized under the Indian Reorganization Act as non-tribal Indians residing on reservation land, without tribal powers and as agent-representatives of the Department of the Interior.[2] The three Department of Interior-approved Constitutions for the three non-tribal communities based on "Indians residing on reservation land" reflect that the MSIM are the larger group upon which the legal identity of the three communities rely. *Id.* ¶ 72.

[3] Dept. Memo. at 1, n. 1.

[4] Lewis Carroll, *Alice's Adventures in Wonderland*, Chapter 12. See https://ebooks.adelaide.edu.au/c/carroll/lewis/alice/chapter12.html

Reorganization Act (IRA). The Department knows that if MSIM is an acknowledged tribe under the 1934 IRA, MSIM can exercise tribal rights under unrepealed statutes with current legal effect -- just like any other tribe. As such, the MSIM has a right of consultation under the Department's rules as claimed. The Department's actions and refusal to consult with the MSIM is governed under the Administrative Procedures Act as violations of the 1934 Indian Reorganization Act, the February 1863 Act and 1988-89 Appropriation Acts as delineated in the underlying Complaint. This Court has jurisdiction over the asserted claims. Further, the Department's assertions of defenses are inapplicable under the unique circumstances of this case as it relates to unrepealed statutes with current legal effect and impact upon over 7,000 eligible MSIM lineal descendants[5] of a tribe that has never been terminated by an act of Congress.

The Department's motion, because the defenses are inapplicable to this particular litigation, should be denied.

STATEMENT OF FACTS[6]

I. Plaintiff Mdewakanton Sioux Indians of Minnesota is an acknowledged band of Indians under the 1934 IRA which has not been terminated as a band by an act of Congress.

The Department's references to and reliance upon past litigation determinations under *Wolfchild v. United States* or *Wolfchild v. Redwood County* is misplaced.[7] Those cases do not reflect the basis of the underlying litigation and factual basis of the claims asserted, which the Department has understandably neglected. Notably, the allegations of the underlying Complaint cannot be entirely

[5] *Id.* at ¶ 60, Ex. C.

[6] On this motion to dismiss, the facts alleged in the Complaint are to be accepted as true. *Ashcroft v. Iqbal,* 556 U.S. 662, 667 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). By not complying with the Court's Local Rule 7(n), the Department has waived any legal argument based on documents outside the administrative record presented by the Complaint with exhibits. The Plaintiffs' presentation of the administrative record is uncontested by the Department.

[7] Dept. Memo. to Dismiss at 1-2 (citations omitted).

ignored under the standards for a motion to dismiss. Here, we highlight some of core facts which are critical to our opposition legal arguments.

In 1863, the United States acknowledged by a Congressional Act that it "became bound by treaty stipulations to the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of the Dakota or Sioux Indians to pay large sums of money and annuities…." Act of Feb. 16, 1863, Ch. 37, 12 Stat. 652.[8] The Act of February 16, 1863, Ch. 37, 12 Stat. 652 has not been repealed.[9] Under the Act of February 16, 1863, the United States abrogated and annulled all treaties with the bands of the Sisseton, Wahpaton, Mdewakanton, and Wahpakoota Indians[10] However, the same Act of February 16, 1863 did not terminate the Sisseton, Wahpaton, Mdewakanton, and Wahpakoota as tribes or bands of Sioux or Dakota Indians.[11]

Today, the Sisseton-Wahpeton Reservation in South Dakota and the Santee Sioux Reservation in Nebraska exist for those American Indians who were removed from Minnesota.[12] Whereas, in Minnesota, the Mdewakanton Sioux Indian of Minnesota (MSIM) band existed under federal jurisdiction on June 18, 1934, the day the Indian Reorganization Act was enacted, and has ever since.[13]

Consequently, thousands of people identify as MSIM because of lineal descent.[14] Today, the MSIM has a decentralized organizational structure along family lines, meeting annually or more frequently, and maintains a list of eligible lineal descendants.[15] Additional statutory references specific to MSIM include the Congressional 1888-1890 Appropriation Acts and the 1980 Act. The

[8] Complaint at ¶ 7.
[9] *Id.* at ¶ 8.
[10] *Id.* at ¶ 9.
[11] *Id.* at ¶ 10.
[12] 80 Fed. Reg. 1942 (Jan. 14, 2015).
[13] Complaint at ¶ 16.
[14] *Id.* at ¶ 24, Ex. A.
[15] *Id.* at ¶ 13.

three "1888-1890 Appropriation Acts" refer to the 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; and the Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349. The "1980 Act" refers to Act of Dec. 19, 1980, Pub. L. 9-557, 94 Stat. 326. All of these statutes – along with the 1934 IRA – are unrepealed and have current legal effect.[16]

II. Congress has never statutorily terminated the Mdewakanton Sioux Indian of Minnesota band.

The MSIM band existed and was under federal jurisdiction on June 18, 1934, the day the Indian Reorganization Act was enacted.[17]

The MSIM consists of those American Indians and lineal descendants who remained or returned to Minnesota in or about 1863 whom Congress identified as bands of Indians as reflected in the Act of February 1863.[18] Later, under the Appropriation Acts, the United States purchased lands in Minnesota at localities known as Lower Sioux, Prairie Island and Shakopee. For example, the Appropriation Act of June 29, 1888, 25 Stat. at 228 stated

> For the support of the full-blood Indians in Minnesota, belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, A.D. eighteen hundred and eighty-six, and severed their tribal relations …to be expended by the Secretary of the Interior in the purchase … of …lands[19]

The lands were assigned to Mdewakanton Sioux Indians of Minnesota under rules and regulations issued by the Secretary of the Interior.[20]

Notably, there were insufficient lands to accommodate or otherwise assign to all members of the Mdewakanton Sioux Indians of Minnesota.[21] According to an April 1934 census of

[16] *Id.* at ¶ 14.
[17] *Id.* at ¶ 27.
[18] *Id.* at ¶ 33.
[19] *Id.* at ¶ 34.
[20] *Id.* at ¶ 35.
[21] *Id.* at ¶ 36.

Mdewakanton Sioux Indians of Minnesota then under Pipestone School jurisdiction, not all members of the band were located at Lower Sioux, Prairie Island and Shakopee.[22] Those Mdewakanton Sioux Indians of Minnesota who did not reside or have land assignments in the localities at Lower Sioux, Prairie Island, and Shakopee *did not severe tribal relations* as required under the Appropriation Acts for land assignments there.

As previously referenced, the MSIM band was under the Pipestone School jurisdiction, which included, but not exclusively, three groups located at Lower Sioux, Prairie Island, and Shakopee on lands appropriated under the Appropriation Acts.[23] As a *whole*, as MSIM, including the three groups, they voted and accepted the provisions of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984.[24] Eventually, Prairie Island and Lower Sioux communities were given articles of incorporation and constitutions in 1936.[25]

Again, not all MSIM band members were part of those groups who were located on assigned lands located at Lower Sioux, Prairie Island, and Shakopee and as such, did not severe tribal relations.[26] Regardless, those who resided on the assigned reservation lands obtained by the United States through the Appropriation Acts had to severe tribal relations to organize under the IRA.[27]

Because the Indians located at Lower Sioux and Prairie Island had severed tribal relations, they were not privileged to organize as a tribe over those reservation lands.[28] Their only basis of organization was as Indians residing on a reservation.[29] In short, severance of tribal relations ran

[22] *Id.* at ¶ 37, Ex. B.
[23] *Id.* at ¶ 39, Ex. B.
[24] *Id.*
[25] *Id.*
[26] *Id.* at ¶ 40.
[27] *Id.* at ¶ 41.
[28] *Id.* at ¶ 42.
[29] *Id.* at ¶ 43.

with the land.[30] Therefore, those Indians residing on reservation lands at Prairie Island and Lower Sioux organized as separate communities under the provisions of the Indian Reorganization Act.[31] Eventually, in 1936, both communities would receive articles of incorporation and a constitution.[32]

Notably, the Prairie Island and Lower Sioux Constitutions provide for an annual conference of the *whole* Mdewakanton Sioux Indians of Minnesota on matters of common interest, including these separate communities organized under the IRA.[33]

Today, the MSIM has identified over 7,000 eligible MSIM lineal descendants.[34] A majority of those eligible are not members of the three communities.[35] Meanwhile, as previously referenced, the Prairie Island Indian Community Constitution contains multiple references to the MSIM including annual meetings and a land assignment system.[36] Similarly, the Lower Sioux Indian Community Constitution contains multiple references to the MSIM including annual meetings and a land assignment system. [37] Hence, to this day, the respective constitutions of these communities identified the existence of the MSIM.

Nevertheless, no Congressional act has terminated the MSIM as a tribe. There is no Act of Congress that has terminated the Sisseton, Wahpaton, Mdewakanton, and Wahpakoota as tribes or bands of Sioux or Dakota Indians, including members of those bands that remained in Minnesota who had "exerted [themselves] in rescuing the whites from the late massacre of said Indians" that had occurred in 1862.[38]

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[30] *Id.*
[31] *Id.* at ¶ 44.
[32] *Id.*
[33] *Id.* at ¶ 45.
[34] *Id.* at ¶ 60, Ex. C.
[35] *Id.*
[36] *Id.* at ¶ 61, Ex. E.
[37] *Id.* at ¶ 62, Ex. F.
[38] Act of February 16, 1863; Compl. ¶ 32.

However, as the Department treats the current three Minnesota Sioux communities as having the same powers and rights as recognized tribes, federally-acknowledged American Indian groups, tribal and non-tribal, cannot be legally terminated by the Department without Congressional statutory termination.[39] In other words, the Department cannot ignore the MSIM. No federal statute supports the Department's present policies, customs, and practices treating the MSIM, a federally-acknowledged Indian tribe, as legally terminated without express and unambiguous statutory termination.[40] The MSIM has a federally-acknowledged legal identity as a "tribe" under the Indian Reorganization Act which precedes and is separate and apart from the three Minnesota Sioux communities.[41]

And, only Congress can terminate Indian tribes acknowledged under the IRA.[42]

III. The Department of the Interior's policies, customs, and practices fail to recognize MSIM's legal identity as a "tribe" under the Indian Reorganization Act separate and apart from the three communities.

The Department's policies, customs, and practices fail to recognize MSIM's legal identity as an acknowledged "tribe" under the Indian Reorganization Act separate and apart from the three communities – acting as if the MSIM and its concomitant rights are terminated.[43] For example, the Department under newly established agency rules, Federal Register, Vol. 80, No. 201, p. 63094, is considering approving a Secretarial Election for Prairie Island Indian Community in the State of

[39] *Id.* at ¶ 73.
[40] *Id.* at ¶ 74.
[41] *Id.* at ¶ 75.
[42] *Id.* at ¶ 46. Termination of federal agency responsibility for an Indian tribe requires "plain and unambiguous" action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941); *United States v. Nice,* 241 U.S. 591, 599 (1916). *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton***,** 528 F.2d 370 (1st Cir. 1975).
[43] *Id.* at ¶ 76.

Minnesota to amend its constitution to eliminate all references to the Mdewakanton Sioux Indians of Minnesota.[44]

Under the newly-adopted rules, the Department did not consult with the MSIM band about termination of its rights, including the termination of the federal land assignment system and the annual meetings for the MSIM; the Department only consulted with the communities.[45] The Plaintiff representatives in 2016 have attempted to communicate with the Department on these matters; in response, the Department has refused and directed the Plaintiff representatives to communicate only with the community.[46] Yet, the communities cannot and do not represent the interests of the MSIM.

IV. The Department, after Congressional revocation of the Prairie Island Indian Community corporate charter in 1996, must make land assignments to the Mdewakanton Sioux Indians of Minnesota.

There is a factual basis for our allegations that the Department, after Congressional revocation of the Prairie Island Indian Community corporate charter in 1996, must make land assignments to the MSIM.[47] Under the 1888-1890 Appropriation Acts, the Secretary of the Interior purchased approximately 1.5 square miles of lands for the MSIM.[48] The lands were purchased at Lower Sioux, Shakopee and Prairie Island.[49]

The Plaintiff individuals in this lawsuit have a particular interest in lands purchased under the 1888-1890 Appropriations Act at Prairie Island – specifically a 30 acre parcel within those lands which were purchased.[50] Nevertheless, from the approximate 1891 purchase of the 1.5 square miles

[44] *Id.* at ¶ 77, Ex. H. A copy of the new proposed constitution for Prairie Island Indian Community is attached to Compliant as Exhibit I.
[45] *Id.* at ¶ 80.
[46] *Id.* at ¶ 81.
[47] *Id.* at ¶ 87.
[48] *Id.* at ¶ 88.
[49] *Id.* at ¶ 89.
[50] *Id.* at ¶ 90.

of lands under the 1888-1890 Appropriation Acts until the enactment of the 1980 Act, the Department of the Interior assigned parcels to Mdewakanton Sioux Indian of Minnesota lineal descendants.[51] The 1980 Act, section 1, placed the parcels at Prairie Island in trust for the "Prairie Island Indian Community" which was a corporation established by the Prairie Island Indian Community in the State of Minnesota in 1937.[52] However, section 3 of the 1980 Act preserved the property rights of MSIM assignees:

> Sec. 3. Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.[53]

The Department of the Interior explicitly states in the 1982 Federal Register that the 1980 Act beneficial interest under Section 1 was for the "Prairie Island Indian Community" – the corporation — not the Community — which is of significant legal importance. 47 Fed. Reg. 151 at 34050 states:

> Lands transferred and declared to be part of the reservation of the Prairie Island Indian Community…[54]

The "Prairie Island Indian Community in the State of Minnesota" is not mentioned in the 47 Fed. Reg. 151 at 34050 – nor in the 1980 Act upon which it is based[55] as explained below.

According to the list of recognized tribes, the federally-recognized community at the time was called "Prairie Island Indian Sioux Community, Prairie Island Reservation, Minnesota." 44 F.R. 7235.[56] In 1996, Prairie Island residents voted to revoke the charter of the "Prairie Island Indian

[51] *Id.* at ¶ 103.
[52] *Id.* at ¶ 104.
[53] *Id.* at ¶ 105.
[54] *Id.* at ¶ 106.
[55] *Id.* at ¶ 107.
[56] *Id.* at ¶ 108.

Community."[57] Congress then enacted the 1996 Act – Act of October 9, 1996, P.L. 104-261, 110 Stat. 3176 -- to accept the revocation of the corporate charter of "Prairie Island Indian Community."[58]

The legal consequence of the 1996 Act was dissolution of the corporation "Prairie Island Indian Community."[59] Accordingly, the corporation's beneficial interest under section 1 of the 1980 Act was terminated.[60] Congress made no provision in the 1996 Act to amend the 1980 Act as to that beneficial interest which had been for the corporation "Prairie Island Indian Community."[61]

"Prairie Island Indian Community in the State of Minnesota" -- which has been, since 2002, the federally-recognized entity — can point to no statute establishing its beneficial interest over certain lands within the Community's boundaries.[62] Since the beneficial interest the 1980 Act established for the corporation is terminated by the 1996 Act, the beneficial interest of those lands now belongs to the MSIM generally.[63]

After the 1996 Act revoking the corporate charter of the Prairie Island Indian Community, the Prairie Island Indian Community in the State of Minnesota, a federally-recognized non-tribal community, has no beneficial interest, directly or indirectly, in the lands purchased under the 1888-1890 appropriation acts.[64] That beneficial interest remains generally with the MSIM.[65]

Since Indian lands were set apart or purchased or held under the 1863 Act, 1888-1890 Appropriation Acts and the 1980 Act, *the Defendants have a legal duty* to Plaintiffs as MSIM regarding these lands because the Plaintiffs are statutory beneficiaries of those unrepealed statutes with current

[57] *Id.* at ¶ 109.
[58] *Id.* at ¶ 110.
[59] *Id.* at ¶ 111.
[60] *Id.* at ¶ 112.
[61] *Id.* at ¶ 113.
[62] *Id.* at ¶ 114.
[63] *Id.* at ¶ 115.
[64] *Id.* at ¶ 116.
[65] *Id.* at ¶ 117.

legal effect.[66] The Department of the Interior performed this duty to MSIM from 1890 through the 1980 Act by making land assignments at Prairie Island, Lower Sioux and Shakopee available to MSIM and since 1980 by honoring such previously-issued land assignments.[67]

Since at least the time of enactment of the 1996 Act, regarding the Prairie Island lands purchased under the 1888-1890 appropriation acts, the Defendants have violated their legal responsibilities to Plaintiff by failing to ensure that new land assignments regarding these lands at Prairie Island are assigned to MSIM lineal descendants.[68] Specifically, in this case, the Defendants continue to violate their legal duty to individual Plaintiffs by failing to assign certain lands to them.[69] Instead, the Defendants did nothing to protect the individual Plaintiffs and their rights as MSIM.[70]

V. The Department is applying its new rules, adopted on October 19, 2015, to exclude consultation with MSIM regarding its federal rights and entitlements.

The Department under newly established agency rules, 80 Federal Register 201 at 63094 ("New Rules") is considering approving a Secretarial Election for Prairie Island Indian Community in the State of Minnesota to amend its constitution to eliminate all references to the MSIM and its rights including the federal land assignment system for the MSIM at Prairie Island Indian Community.[71] As previously noted, the Department does not consult with the MSIM prior to the approval of the constitutional amendments affecting the rights of MSIM.[72]

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[66] *Id.* at ¶ 118.
[67] *Id.* at ¶ 119.
[68] *Id.* at ¶ 120.
[69] *Id.* at ¶ 121.
[70] *Id.* at ¶ 122.
[71] *Id.* at ¶ 123.
[72] *Id.* at ¶ 124.

The Department's policies, practices, and customs violate the rights of MSIM by not consulting directly with it regarding all matters affecting the MSIM as a tribe acknowledged under the 1934 IRA with rights under unrepealed statutes with current legal effect.[73]

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

In February 2016, Mr. Childs received from Prairie Island Indian Community in the State of Minnesota a Notice Regarding Proposed Revisions to Constitution and Bylaws.[74] The proposed revisions to the bylaws and bylaws purport to change the Community's federal legal status under the Indian Reorganization Act from Mdewakanton Sioux Indians of Minnesota "residing on reservation" status to "tribal" status.[75] The legal consequence of the proposed amendments for the MSIM and its rights is MSIM's purported legal termination under the Indian Reorganization Act.

Since MSIM was an acknowledged tribal entity under federal jurisdiction at the time of the enactment of the Indian Reorganization Act on June 18, 1934, it was likewise recognized to have reservation boundaries at Prairie Island, Lower Sioux and Shakopee.[76] Department of the Interior correspondence and a 1938 Solicitor Opinion confirm that fact.[77] The communities were recognized later not as tribal entities, but with non-tribal status of "Indians residing on reservation land" of the MSIM – hence, the name "communities" and the phrase "land assignment" and other references to MSIM throughout the community constitutions. [78]

The 1936 lands at Prairie Island and Lower Sioux were held in trust by the United States for their respective corporations after the 1980 Act as indicated in the 1982 Federal Register.[79] In 1996,

[73] *Id.* at 125,
[74] *Id.* at 126, Ex. K.
[75] *Id.* at 127.
[76] *Id.* at 130.
[77] *Id.* at 131, Exs. C, D.
[78] *Id.* at 132.
[79] *Id.* at 133.

Congress at the community's request revoked the corporate charter of Prairie Island Indian Community.[80] The Prairie Island Indian Community in the State of Minnesota is not a beneficiary of the 1980 Act as it relates to the 1886 lands at Prairie Island.[81] From the Indian Reorganization enactment on June 18, 1934 through the 1980 Act, the federal understanding of the relationship between the MSIM and the three communities was consistent.[82]

The Department maintained tribal trust accounts for the MSIM from the 1940's through 1982.[83] In *Wolfchild I,* judgment was entered by the U.S. Court of Federal Claims against the United States – later vacated for lack of jurisdiction – that these MSIM tribal trust accounts were mal-distributed by the Department to the communities when the trust accounts were for the exclusive benefit of MSIM.[84]

Importantly, the Department of the Interior's 1979 listing specifically referenced the now-revoked corporation "Prairie Island Indian Community" and the Mdewakanton Sioux Indians of Minnesota's reservation: Prairie Island Indian Community, Prairie Island Reservation, Minnesota.[85] From 1982 through 2000, the Department of the Interior specifically referenced the "Prairie Island Indian Community" as "of" the MSIM band and of the MSIM's reservation:

> Prairie Island Indian Community of Minnesota Mdewakanton Sioux Indians of the Prairie Island Reservation in Minnesota.[86]

Then in 2002, inexplicably, although suspected as a response to other federal legal actions,[87] the Department of the Interior deleted the references to the MSIM band in the 2002 list:

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[80] *Id.* at 134.
[81] *Id.* at 135.
[82] *Id.* at 136.
[83] *Id.* at 137.
[84] *Wolfchild v. United States,* 101 Fed.Cl. 54 (Aug. 05, 2011), as corrected (Aug 18, 2011), *rev'd on jurisdictional grounds*, 731 F.3d 1280 (Fed.Cir. 2013).
[85] 44 Fed. Reg. 7235 (Feb. 6. 1979).
[86] 65 Fed. Reg. 13298 (Mar. 13, 2000); 63 Fed. Reg. 71941 (Dec. 30, 1998); 62 Fed. Reg. 55270 (Oct. 23, 1997); 61 Fed. Reg. 58211 (Nov. 13, 1996); 60 Fed. Reg. 9250 (Feb. 16, 1995); 58 Fed. Reg. 54364 (Oct. 21, 1993); 53 Fed. Reg. 52829 (Dec. 29, 1988); 47 Fed. Reg. 53133 (Nov. 24, 1982).

> Prairie Island Indian Community in the State of Minnesota (previously listed as the Prairie Island Indian Community of Minnesota Mdewakanton Sioux Indian of the Prairie Island Reservation in Minnesota).)[88]

Since 2002, the Department of the Interior has listed "Prairie Island Indian Community in the State of Minnesota" without reference to MSIM, to the dissolved corporation nor to the possessed lands.[89]

The 2016 proposed changes to the Constitution and Bylaws with the post-2002 federal tribal listings appear to be a Department effort to "officially" terminate the MSIM without a Congressional Act.[90]

However, according to the D.C. Circuit, the Department's federal listings are not determinative of tribal claims; instead, the judicial branch may get the final word as part of its administrative oversight per the Administrative Procedures Act.[91] The D.C. Circuit in *Cherokee Nation of Oklahoma v. Babbitt*[92] 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 Cherokee had been relinquished by an 1867 Agreement.[93] The D.C. Circuit concluded "that by entering into the 1867 Agreement the Delaware Tribe of Indians relinquished its tribal identity or sovereignty in

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[87] *See, e.g., Lower Sioux Indian Cmty. in Minnesota v. United States*, 231 Ct. Cl. 1037, 1037 (1982); *Shakopee Mdewakanton Sioux (Dakota) Cmty v. Babbitt*, 906 F. Supp. 513 (D. Minn. 1995), *affirmed*, 107 F.3d 667 (8th Cir. 1997); *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996).
[88] 67 Fed. Reg. 46328 (Jul. 12, 2002).
[89] 80 Fed. Reg.1942 (Jan. 14, 2015); 79 Fed. Reg. 4748 (Jan. 29, 2014); 78 Fed. Reg. 26384 (May 6, 2013); 77 Fed. Reg. 47868 (Aug. 10, 2012); 75 Fed. Reg. 60810 (October 1, 2010) with supplemental listing 75 Fed. Reg. 66124 (Oct.27, 2010); 74 Fed. Reg. 40218 (Aug. 11, 2009); 73 Fed. Reg. 18553 (Apr. 4, 2008); 72 Fed. Reg. 13648 (Mar. 22, 2007); 70 Fed. Reg. 71194 (Nov. 25, 2005); 68 Fed. Reg. 68180 (Dec. 5, 2003).
[90] Complaint at ¶ 142.
[91] *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997).
[92] *Id.*
[93] *Id.* at 1501.

relation to the Cherokee Nation."[94] Similarly, the legal history of the Mdewakanton Sioux Indians of Minnesota, 1863 through present, demonstrates that the Prairie Island Indian Community in the State of Minnesota and the other communities are not "separate sovereigns;" therefore, the Department's listing is not determinative.[95]

None of the Communities were organized as tribal under federal jurisdiction on June 18, 1934 when the IRA was enacted; only the MSIM was recognized as "tribal" and under federal jurisdiction on June 18, 1934.[96] Further, the United States Supreme Court in *Carcieri* wrote:

> [F]or purposes of [IRA] § 479, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, § 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust.[97]

The communities were non-tribal organized based on Mdewakanton Sioux Indians of Minnesota "residing on reservation land" after June 1934 – not as tribes separate and apart from MSIM federally acknowledged in June 1934.[98] Consistent with these facts is the contemporaneous Department of the Interior correspondence and the 1938 Solicitor's Opinion which confirms each community as non-tribal without inherent tribal powers.[99]

Under these facts and circumstances, the Department's application of 25 U.S.C. § 5123(f) and (g) does not terminate the acknowledged tribal status of MSIM.[100] Both the 1863 Act, in section 9, and the 1888-1890 Appropriation Acts provided the Secretary of the Interior legal authority to

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[94] *Id.* at 1503.
[95] Complaint at ¶ 147.
[96] Complaint at ¶ 148.
[97] *Carcieri v. Salazar,* 555 U.S. 379, 382-383 (2009)
[98] Complaint at ¶ 150.
[99] *Id.* at ¶ 151.
[100] *Id.* at ¶ 152.

provide possession of land to the MSIM as a tribe which was done after the 1888-1890 Acts. [101] The administrative treatment of the reservation communities as non-tribal prior to 1994 is legally understandable because the 1888-1890 Appropriation Acts required "severance of tribal relations" – a provision which ran with the land.[102] However, the Department's policies, practices and customs treating the MSIM as if it was not an acknowledged tribe is in legal error.[103]

VII. Under the 1994 amendments to the IRA, the Department's policies, practices and customs treating MSIM not as an acknowledged tribe violates the MSIM's rights and entitlements under federal law.

The 1994 amendments, 25 U.S.C. § 5123 (f) and (g) to the Indian Reorganization Act, provide that the Department of the Interior can no longer enforce "non-tribal" and other designations against federally-recognized Indian tribes:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations**
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
> (g) Privileges and immunities of Indian tribes; existing regulations
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.[104]

Under paragraphs (f) and (g), any past or future Department regulations, administrative decisions or determinations regarding the reservation communities being non-tribal 1888-1890 Appropriation Act's severance of tribal provisions has "no force or effect."[105]

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[101] *Id.* at ¶ 153.
[102] *Id.* at ¶ 154.
[103] *Id.* at ¶ 155.
[104] *Id.* at ¶ 156.
[105] *Id.* at ¶ 157.

Importantly, the Department after the 1934 Indian Reorganization Act recognized the reservation communities under the IRA, but as non-tribal based on the severance of tribal relations provisions in the 1888-1890 Appropriation Acts.[106] Consequently, the Department only approved the reservation communities at Prairie Island, Lower Sioux, and Shakopee as non-tribal Indians residing within the MSIM's reservation boundaries – a unique method of organization under the IRA available until the 1988 amendments to the IRA occurred.[107]

The 1988 amendments deleted this type of organization from the IRA on a going-forward basis, but preserved non-tribal "Indians residing on reservation" constitutions previously approved, including the three communities' constitutions, which had been based on this type of organization.[108] The MSIM objects to the Department's policies, practices and policies treating the MSIM and its rights as terminated because of an overly robust application of 25 U.S.C. § 5123(f) and (g) to the reservation communities.[109]

The MSIM's modern function as a tribe is to determine status under the Indian Reorganization Act, to litigate and secure tribal benefits and maintain a list of eligible Minnesota Mdewakanton Sioux Indian lineal descendants.[110] The Department-approved Prairie Island and Lower Sioux Constitutions reflect that the MSIM meets annually with delegates appointed by the respective communities.[111] All three community constitutions reference rights of the MSIM.[112] Per their respective constitutions, none of the three communities are legally entitled to act on behalf of MSIM nor are they legally entitled to sue the United States on behalf of MSIM.[113]

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[106] *Id.* at ¶ 158.
[107] *Id.* at ¶ 159.
[108] *Id.* at ¶ 160.
[109] *Id.* at ¶ 161.
[110] *Id.* at ¶ 162.
[111] *Id.* at ¶ 163.
[112] *Id.* at ¶ 164.
[113] *Id.* at ¶ 165.

In other words, each community is organized under the IRA as Indians residing on reservation land and is entitled to act and sue on behalf of those residents not on behalf of MSIM.[114]

The MSIM in this lawsuit pursues two different land claims which the communities could not bring against the United States.[115] The first MSIM land claim is for federal land assignments for MSIM at Prairie Island since Congress in 1996 revoked the Prairie Island Indian Community corporate charter terminating any beneficial interest the corporation had under the 1980 Act.[116] The second MSIM land claim is for the 12 square miles or legal equivalent set apart for MSIM by the Secretary of the Interior in 1865 under section 9 of the February 16, 1863 Act.[117] As to the Prairie Island federal land assignment claim, the communities have no stake in that claim because the beneficial interest under the 1980 Act was to the Prairie Island Indian Community corporation which was revoked in 1996 by Congress.[118] Second, similarly, as to the 12 square mile or legal equivalent claim, the lands were set apart for the MSIM in 1865 not for any of the communities recognized in 1936 and thereafter.[119]

VIII. The Department of Interior refuses to acknowledge the Mdewakanton Sioux Indians of Minnesota.

Plaintiff MSIM representatives in 2016 attempted to contact and discuss matters related to the claims made in this Complaint with the Department of the Interior.[120] Agents and representatives of the Department of the Interior refuse to acknowledge the MSIM.[121] Under the IRA, 25 U.S.C. § 5130(1), the term "Indian tribe" means "any Indian … tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe."

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[114] *Id.* at ¶ 166.
[115] *Id.* at ¶ 167.
[116] *Id.* at ¶ 168.
[117] *Id.* at ¶ 169.
[118] *Id.* at ¶ 170.
[119] *Id.* at ¶ 171.
[120] *Id.* at ¶ 221.
[121] *Id.* at ¶ 222.

(Underline added.)[122] The Department has repeatedly acknowledged the MSIM as a tribe under the 1934 IRA.[123] So, the MSIM is an "Indian tribe" under the IRA, even though it is not yet "recognized" for purposes of the Department's list.[124]

Under the IRA, 25 U.S.C. § 5130 (2), "the term 'list' means the list of recognized tribes published by the Secretary pursuant to section 5131 of this title."[125] Under 25 U.S.C. § 5131(a), the Secretary of the Department of the Interior is to publish "a list of all Indian tribes which the Secretary *recognizes* to be eligible for special programs and services provided by the United States to Indians because of their status as Indians." (Emphasis added.)[126] Thus, the "list" referenced under 25 U.S.C. § 5130(2) does not include acknowledged, not recognized, Indian tribes in the United States.[127] In other words, the federal list of recognized tribes under 25 U.S.C. § 5131 does not include all Indian tribes the Secretary of the Interior has acknowledged as Indian tribes on June 18, 1934.[128]

The MSIM is not on the list of Indian tribes which is published under 25 U.S.C. § 5131.[129] The lack of the Secretary's recognition of the tribe does not preclude a judicial determination that the MSIM is acknowledged as a tribe as it existed on June 18, 1934 under federal jurisdiction. The MSIM remains in existence because Congress has not passed an act to terminate the tribe and may exercise any rights under unrepealed statutes with current legal effect.[130]

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[122] *Id.* at ¶ 223.
[123] *Id.* at ¶ 224.
[124] *Id.* at ¶ 225.
[125] *Id.* at ¶ 226.
[126] *Id.* at ¶ 227.
[127] *Id.* at ¶ 228.
[128] *Id.* at ¶ 229.
[129] *Id.* at ¶ 230.
[130] *Id.*

ARGUMENT

The MSIM is an acknowledged tribe and has been before and since the 1934 IRA[131] — a fact the Department of Interior fails to address. Historically, courts take such silence as consent.[132] The United States has never expressly terminated its relationship with MSIM as a tribe acknowledged under the 1934 IRA. Moreover, the Department fails to address that certain Congressional acts relevant to MSIM's claims are unrepealed statutes with current legal effect. The Department's failure to address the complaint's two fundamental factual premises undermines the Department's legal defenses for dismissal of the case. The Department's motion to dismiss should be denied.

I. The Department's memorandum has omissions.

A. The Department's memorandum omits that the APA's standard of review for agency decisions "not in accordance with law," which are legal issues subject to de novo review.

The Department's memorandum at pages 6 to 7 omits that the APA's standard of review for agency decisions "not in accordance with law," which are legal questions subject to de novo review. The APA, a waiver of sovereign immunity for lawsuits against federal agencies, provides that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). An APA reviewing court may set aside agency actions, findings, or conclusions that are "not in accordance with law." 5 U.S.C. § 706(2)(A). A federal agency's determination that statutes are wholly inapplicable to the Department's actions regarding the MSIM, as the Defendants argue in the instant case, is "'not entitled to the deference that courts must accord to an agency's

[131] *Carcieri v. Salazar,* 555 U.S. 379 (2009) (Secretary of the Interior's authority under the 1934 IRA to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when the 1934 IRA was enacted).

[132] The Latin legal maxim is "qui tacet consentire videtur ubi loqui debuit ac potuit" (thus, silence gives consent when he ought to have spoken when he was able to).

interpretation of its governing statute' and is instead 'a question of law, subject to de novo review.'"[133]

B. The Department's memorandum omits the administrative record which the APA, case law and Court's Local Rule 7(n) require the Court to consider; nonetheless, the Department cherry-picks administrative records in the Argument section.

The Department's memorandum at pages 1 through 6 omits the administrative record which the APA, case law, and this Court's Local Rule 7(n) require the Court to consider. Under the APA, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. "The record consists of the order involved, any findings or reports on which that order is based, and 'the pleadings, evidence, and other parts of the proceedings before the agency.'"[134] "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."[135] Otherwise, the reviewing court would consider *de novo* material not included in the agency record and "reach its own conclusions based on such an inquiry."[136] Local Rule 7(n), which incorporates the APA's standard of review, states, "In cases involving the judicial review of administrative agency actions, 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."

Here, the Department has not filed an administrative record; nor has the Department moved for relief from Local Rule 7(n).[137] The Department's proposal of a *de novo* inquiry, based on no administrative record, is inconsistent with applying the applicable legal standard, where "the focal

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[133] *Mineral Policy Ctr. v. Norton,* 292 F.Supp.2d 30, 54–55 (D.D.C.2003) (quoting *Citizens Against Rails–to–Trails v. Surface Transp. Bd.,* 267 F.3d 1144, 1150–51 (D.C.Cir.2001)).
[134] *Am. Wildlands v. Kempthorne,* 530 F.3d 991, 1002 (D.C.Cir.2008) (quoting Fed. R. App. P. 16(a)).
[135] *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–744 (1985).
[136] *Id.* at 744.
[137] *People for the Ethical Treatment of Animals, Inc. v. United States Fish and Wildlife Service,* 59 F.Supp.3d 91, 94 n.2 (D.D.C. 2014).

point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[138] Hence, "[i]t is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made."[139] Instead, in a startling move, the Department simply refuses to follow the standard of review embedded in the APA, case law, and this Court's Local Rule 7(n). The Department's memorandum in its opening explicitly encourages the Court to resolve this case on a de novo basis without reference to the 150 year administrative record.[140] The importance of the Department's administrative record is significant as it would substantiate and expand the facts as expressed in MISM's underlying Complaint to further expose the Department's misguided dismissal or refusal to accept MISM as an acknowledged tribe and appreciate the significance of those unrepealed Congressional acts statutes with current legal effect.

Nonetheless, in a complete contradiction of the Department's position that no administrative record is necessary for the court to consider, the Department cherry-picks administrative records in the Argument section of its memorandum. For example, the Department's memorandum at pages at pages 13, 19 and 23 refers to publication of a tribal list, acknowledgement procedures and a tribal roll, respectively, in the Federal Register. So, it is true that the Department cherry-picks references to the administrative record, but will not present the Court the complete administrative record because it shows the Department has acknowledged the MSIM before and since the 1934 IRA and Congress has not terminated the MSIM since.

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[138] *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).
[139] *IMS, P.C. v. Alvarez,* 129 F.3d 618, 623 (D.C.Cir.1997); *see also Hill Dermaceuticals, Inc. v. FDA,* 709 F.3d 44, 47 (D.C.Cir.2013) ("[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.' " (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler,* 749 F.2d 788, 792 (D.C.Cir.1984)).
[140] Dept. Memo. at 1, n. 1.

C. The Department's memorandum omits statutory canons interpreting statutes in favor of American Indians, including those requiring clear and unambiguous Congressional Acts to terminate tribes acknowledged under the 1934 IRA and to diminish reservation boundaries of acknowledged tribes.

The Defendants' memorandum omits statutory canons interpreting statutes in favor of American Indians, including those requiring clear and unambiguous Congressional acts to terminate tribes[141] acknowledged under the 1934 IRA and to diminish reservation boundaries of acknowledged tribes.[142] The statutory canons favoring American Indians are embedded in the fact that "[f]ew conquered people in the history of mankind have paid so dearly for their defense of a way of life."[143] MSIM is one of those "conquered people" who paid dearly for its defense of its way of life. The federal courts follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'"[144] Statutes concerning Indian rights are to be construed in their favor.[145] Statutes relating to Indians are construed in such a manner to give the greatest protection possible to Indians.[146]

Accordingly, clear and unambiguous acts of Congress are required to terminate tribes and diminish reservation boundaries.[147] Termination of federal agency responsibility for an acknowledged Indian tribe requires "plain and unambiguous" action evidencing a clear and

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[141] *Jt. Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 669 (D. Me. 1975), *aff'd sub nom. Jt. Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (1st Cir. 1975); *United States v. Santa Fe R. Co.*, 314 U.S. 339, 346 (1941); *United States v. Nice,* 241 U.S. 591, 599 (1916). *See also Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-413 (1968).
[142] *Smith v. Parker*, 996 F. Supp. 2d 815, 834 (D. Neb. 2014), *aff'd,* 774 F.3d 1166 (8th Cir. 2014), *aff'd sub nom. Nebraska v. Parker,* 136 S. Ct. 1072 (2016).
[143] *United States v. Sioux Nation of Indians,* 448 U.S. 371, 423 n. 33 (1980) (quoting R. Billington, Introduction, *in* Soldier and Brave xiv (1963)).
[144] *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973).
[145] *U.S. v. 2,005.32 Acres of Land, More or Less, Situate in Corson County, S.D.,* 160 F. Supp. 193, 201 (D.S.D. 1958).
[146] *U.S. v. Drummond,* 42 F. Supp. 958, 961 (W.D. Okla. 1941), *aff'd*, 131 F.2d 568 (10th Cir. 1942).
[147] *See supra* n. 10.

unequivocal evidence of Congress to terminate its relationship with the tribe.[148] Similarly, the intent of Congress must be clear and unambiguous to diminish reservation boundaries. The U.S. Supreme Court recently in *Nebraska v. Parker,* 136 S.Ct. 1072 (2016) summarized the statutory interpretative framework:

> "[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."[149]

The Department cannot point to any Congressional Act that terminated the U.S. relationship with the acknowledged MSIM tribe, identified at the very least since 1934 at the time of the passage of the IRA. Other Sioux communities within Minnesota have since been "recognized," but there is a distinct difference between an "acknowledged tribe" and a "recognized tribe." A recognized tribe receives certain federal benefits; whereas, an acknowledged tribe does not. Only Congress can terminate acknowledged and recognized tribes. Significantly, MSIM does not have to apply to the Department to be "recognized" prior to seeking its right of consultation as an "acknowledged" tribe.

II. The six year statute of limitations period of 28 U.S.C. § 2401(a) and laches do not bar this action.

A. 28 U.S.C. § 2401(a) applicable to APA claims, similar to 28 U.S.C. § 2401(b) applicable to Federal Tort Act claims, is not jurisdictional which is different from 28 U.S.C. § 2501 applicable to Tucker Act claims which is jurisdictional.

The Defendants' statute of limitations analysis is based on 28 U.S.C. § 2401(a), which explicitly provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. §

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[148] *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941); *United States v. Nice,* 241 U.S. 591, 599 (1916). *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968) ; *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

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

2401(a) is a *generally applicable statute, not specific to APA claims*. A recent Supreme Court case has ruled that the statute of limitations in 28 U.S.C. § 2401(b), applicable to Federal Tort Claims Act suits, is not jurisdictional, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015). This Circuit has yet to apply the analysis of *Wong* to the limitations provision of 28 U.S.C. § 2401(a); but, it should.[150] Under the *Wong* analysis, 28 U.S.C. § 2401(a), similar to 28 U.S.C. § 2401(b), is not jurisdictional.

By way of comparison, the U.S. Supreme Court in *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130 (2008) resolved that Tucker Act claims under 28 U.S.C. § 2501 were jurisdictional only because it was a precondition on the government's waiver of sovereign immunity for Tucker Act claims in the U.S. Court of Federal Claims. Under 28 U.S.C. § 2501, the court's "jurisdiction" is limited:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

The same limitation found under § 2501 cannot be said as found under 28 U.S.C. § 2401(a):

> [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

Unlike 28 U.S.C. § 2501, the limitations period of section 2401(a) does not refer to the district court's jurisdiction nor any particular claims against the United States. Instead, section 2401(a) is a "run-of-the-mill statute of limitations."[151] Section 2401(a) is not a precondition on the waiver of sovereign immunity. Section 2401(a) is not jurisdictional. If Congress had intended the APA to be a jurisdictional statute of limitations, Congress would have included a statute of limitations within the APA as it did for Tucker Act claims brought in the U.S. Court of Federal Claims -- 28 U.S.C. § 2501.

Finally, APA claims are different than Tucker Act and Federal Tort Claims Act claims in one important respect. Tucker Act and Federal Tort Act claims are generally about money. Whereas, APA claims are limited to prospective and injunctive relief. So, as to the APA, Congress never

[150] *In re Navy Chaplaincy*, 2016 U.S. Dist. LEXIS 15294, at *8 (D.D.C. Feb. 9, 2016).
[151] *Wong*, 135 S. Ct. at 1633.

intended Section 2401(a), a generally-applicable statute of limitation, to be a jurisdictional statute of limitations like 28 U.S.C. § 2501.

B. The application of the six year statute of limitations period of 28 U.S.C. § 2401(a) and the doctrine of laches in this case do not supersede the application of the Indian Nonintercourse Act (INIA) and 28 U.S.C. § 2415(c) as interpreted in *Oneida II*.

The six year statute of limitations period of 28 U.S.C. § 2401(a) and the doctrine of laches do not apply. The Defendants' memorandum at pages 11 to 13 omits discussion of the Indian Nonintercourse Act (INIA), 28 U.S.C. § 2415(c), and its interpretation in *Oneida II*[152] regarding the application of the six year statute of limitations of 28 U.S.C. § 2401(a). Since implicit repeals are disfavored,[153] the Defendants' application of six year statute of limitations period of 28 U.S.C. § 2401(a) and the doctrine of laches do not supersede the Indian Nonintercourse Act (INIA) and 28 U.S.C. § 2415(c) as interpreted by the Supreme Court in *Oneida II*.

The case law makes plain that statute of limitations and laches[154] cannot bar recovery of Indian lands in a suit brought to recover statutorily protected lands. In *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the Supreme Court upheld the claim of individual Indians to allotted lands against defenses of statute of limitations and laches. The Court held that:

> The purchase by Ewert, being prohibited by the statute, was void… He still holds the legal title to the land, and the equitable doctrine of laches, developed and designed to protect goodfaith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.

259 U.S. at 138.

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[152] *County of Oneida v. Oneida Indian Nation of N. Y.,* 470 U.S. 226 *(Oneida II).*

[153] "Implicit repeals, however, are disfavored and should be found only when two statutes are irreconcilable." *McKelvey v. Turnage*, 792 F.2d. 194, 206 (D.C. Cir. 1986), c*iting Morton v. Mancari,* 417 U.S. 535, 549–50 (1974).

[154] Laches is a peculiarly inapposite defense since plaintiffs seek relief of a legal, not equitable nature. *See Sun Oil Company v. Fleming*, 469 F.2d 211 (10th Cir. 1972).

As the result in *Ewert* indicates, the inapplicability of statute of limitations and laches extends to suits by American Indians and is not solely a product of the sovereign immunity of the United States. The determination that the 28 U.S.C. § 2401(a) does not apply to Indian land claims is rooted in the language and purpose of federal protective statutes like the INIA and 28 U.S.C. § 2415(c).[155] The INIA, currently codified at 25 U.S.C. § 177, provides:

> [N]o purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant the constitution.[156]

Section 2415(c), in part, addresses the statute of limitations as applied to the United States for bringing statutory land claims on behalf of a tribes. In so doing, Congress exempted Indian land claims from the general statute of limitations:

> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

In other words, the Department's statute of limitations argument based on the 28 U.S.C. § 2401(a) is contradicted by the INIA which voids any illegal transfer of Indian rights based on an unrepealed statute with current effect and is contradicted by 28 U.S.C. § 2415(c) as it applies to tribal land claims brought by the United States on behalf of tribes. The Department's application of 28 U.S.C. § 2401(a) would effectively repeal the INIA nullifying legal and adverse possession claims on tribal lands without Congressional approval and would effectively repeal 28 U.S.C. § 2415(c) as it applies to tribal land claims brought by the Department.

The reasoning in *United States v. 7,405.3 Acres of Land,* 97 F.2d 417, 422-23 (1938), is illustrative. The Court reasoned that the federal-tribal guardianship made Indian lands "an

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[155] *Schaghticoke Tribe of Indians v. Kent School Corp., Inc.*, 423 F.Supp. 780, 783-785 (1976) (analyzing the relationship between statute of limitations and Indian claims based on statutory use restrictions).
[156] Act of June 30, 1834, Pub. L. No. 23-161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2006)).

instrumentality" of the federal government, partaking of that government's historic immunity. The court then explained that:

> a statute of the United States expressly forbids the acquisition of lands of any Indian tribe by purchase, grant, lease or other conveyance, except by treaty or convention... Certainly, if the land was not alienable by the Indians, title could not be obtained against them by adverse possession.

Relying on the *7,405.3 Acres of Land* decision, the court in *United States v. Ahtanum Irrigation District,* 236 F.2d 321, 334 (1956)*,* noted that, "(I)n respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This . . . arises out of the provisions of Title 25 U.S.C.A. s 177, R.S. s 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention."[7]

The Department's interpretation of 28 U.S.C. § 2401(a) would also abrogate the Supreme Court's reasoning in *Oneida II*. The U.S. Supreme Court in *Oneida II* held, "There is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." In so doing, the Supreme Court analyzed 28 U.S.C. § 2415. The Supreme Court noted that section 2415(c) excluded from the limitations period all actions "to establish the title to, or right of possession of, real or personal property." The Supreme Court also noted that the legislative history indicated that the proponents and opponents of the amendments to 28 U.S.C. § 2415 assumed that the "Indians' right to sue was not otherwise subject to any statute of limitations":

> In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians. **The legislative history of the 1972, 1977, and 1980 amendments demonstrates that Congress did not intend § 2415 to apply to suits brought by the Indians themselves, and that it assumed that the Indians' right to sue was not otherwise subject to any statute of limitations.**

Oneida II at 1255-1256 (emphasis added).

"(I)t would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws, and treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee."[157] It is beyond dispute that were the United States suing as a party plaintiff for the benefit of the tribal members, none of the defenses would have legal merit.[158] The only question here is whether a different result should be reached in this case where the MSIM sues the Department under the APA on their own behalf instead of the Department suing on behalf of the MSIM.

However, it would be anomalous to achieve a different result on the statute of limitations if the Department refuses to bring the lawsuit that the Department is obligated to bring on behalf of the MSIM; "'the interests sought to be protected by Congress are the same, no matter who the plaintiff may be.'"[159] The Department is not restricted by a statute of limitations in bringing a claim on behalf of the MSIM; nonetheless, the Department claims 28 U.S.C. § 2401(a) should be interpreted as a six year statute of limitations on the MSIM suing the Department for failing to sue on MSIM's behalf.

But, American Indians have no assurance that their claims will ever be pursued with sufficient speed and efficiency by the government – even within the Department's purported six year statute of limitations -- because of the immense administrative burden involved.[160] Relying on

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[157] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473 (1976).
[158] *Board of Commissioners v. United States*, 308 U.S. 343, 351 (1939); *United States v. Schwarz*, 460 F.2d 1365, 1371-72 (7th Cir. 1972); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied,* 352 U.S. 988(1957); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422-23 (4th Cir. 1938); *Walker River Paiute Tribe v. Southern Pacific Transportation Company*, Civil No. R-2707 (D.Nev. May 28, 1974), *aff'd in part, rev'd in part, sub nom., United States v. Southern Pacific Transportation Company*, 543 F.2d 676 (9th Cir. 1976); *United States v. McGugin*, 31 F.Supp. 498, 505 (D.Kan.1940); *United States v. Raiche*, 31 F.2d 624, 628 (W.D.Wis.1928).
[159] *Narragansett Tribe of Indians*, 418 F.Supp. 798, 806 (1976), *quoting Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465, 471 (9th Cir. 1975).
[160] *Capitan Grande Band of Mis. Indians v. Helix Irrigation District*, 514 F.2d 465, 470-71 (9th Cir.), cert. denied, 423 U.S. 874 (1975).

the strong federal policy in favor of vindication of such Indian claims, the Supreme Court in *Oneida I* recognized that the tribe suing on its own behalf independent of the United States may invoke federal jurisdiction to regain possession of aboriginal lands allegedly taken in violation of the INIA. That same federal policy should lead this Court to conclude that the 28 U.S.C. § 2401(a) statute of limitations can not bar recovery on the part of MSIM bringing APA claims against the Department on statutory land restrictions because no statute of limitations applies under 28 U.S.C. § 2415(c) if the Department were suing on behalf of the MSIM based on the same statutory land restrictions.

C. The statute of limitations period under 28 U.S.C. § 2401(a) for de facto termination claims against the Department would commence with notice of termination of the tribe which the Department has acknowledged under the 1934 IRA – which has not occurred here.

Termination of federal agency responsibility for an acknowledged Indian tribe requires "plain and unambiguous" action evidencing a clear and unequivocal intention of Congress to terminate its relationship with the tribe.[161] The Defendants point to no statute which terminates the MSIM. So, the Defendant commits legal error by not acknowledging the MSIM consistent with its administrative record. Once acknowledged, the MSIM may exercise rights under the 1934 IRA, the 1863 Act, the 1888-1890 Acts, and the 1980 Act.

There is nothing in any current Department regulation that requires MSIM — as an existing acknowledged tribe since 1934 — to re-establish its existence as a tribe. Moreover, no Department regulation requires an existing acknowledged tribe to become a "recognized" tribe. The so-called "recognition" merely means that a recognized tribe would be entitled to other federal benefits. It does not mean that failure to become a "recognized tribe" terminates the existence of an existing

[161] *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941); *United States v. Nice,* 241 U.S. 591, 599 (1916). *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

acknowledged tribe. Under the facts of this case, the Department refused in 2016 to concede MSIM as an acknowledged tribe.

Hence, MSIM's claim as an acknowledged tribe is not subject to dismissal under Rule 12(b)(6). Moreover, the reason that the MSIM claim is timely is because all of the statutes that the MSIM relies upon – namely, the 1934 IRA, February 1863 Act, 1888-1890 Appropriation Acts, and 1980 Act – are unrepealed and have current legal effect. For example, the APA claim is, in part, based on the Department violating the 1934 IRA by not consulting with MSIM as an acknowledged tribe. Once the MSIM representatives contacted the Department in 2016 requesting consultation regarding the PIIC constitutional amendments and the 30 acre land assignments at PIIC, the six year statute of limitations began.

Nothing previous to 2016 would have triggered the statute of limitations. The Department has never given notice of termination to MSIM because the Department does not have the power to terminate. Only Congress has the power to terminate a tribe acknowledged by the Department under the 1934 IRA.

Similarly, Plaintiffs' rights under the 1934 IRA, February 1863 Act, 1888-1890 Appropriation Acts and 1980 Act – all unrepealed statutes with current legal effect – have not been exercised. Once the MSIM is acknowledged, then the Department will have to legally accommodate MSIM under these statutes. First, the Department would have to legally accommodate under the 1934 IRA an MSIM application for tribal recognition, if desired by the MSIM. Likewise, the Department would have to legally accommodate any MSIM exercising of rights under the February 1863 Act, the 1888-1890 appropriation acts and 1980 Act. The statute of limitations periods on these claims have not begun to run because the Department has not given notice of tribal termination to MSIM. Therefore, MSIM has yet to exercise its rights under these unrepealed statutes with current legal

effect. Once MSIM is acknowledged (since the Department has refused to do so) and the MSIM exercises its rights under these statutes, the six-year statute of limitations will begin to run.

The Defendants' reliance on the Federal Circuit opinion in *Wolfchild v. United States*, 731 F.3d at 1290–91 is misplaced. The Federal Circuit was applying *the jurisdictional six-year statute of limitations applicable to the U.S. Court of Federal Claims, 28 U.S.C. § 2501, not the general statute of limitations found at 28 U.S.C. § 2401(a)*. The former is jurisdictional; the latter is not jurisdictional. Further, the Federal Circuit was not adjudicating whether the Department had failed in 2016 to consult with MSIM as an acknowledged tribe under the 1934 IRA. Prior to 2016, the Department never gave notice of termination of the MSIM because the Department does not have the power to terminate a tribe acknowledged under the 1934 IRA.

The Department cites to the principal that "[A] cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured."[162] However, the Department's own administrative record reveals that the MSIM is currently acknowledged under the 1934 IRA. Only Congress can terminate an acknowledged tribe and only Congress can diminish reservation boundaries. Therefore, the Department does not have the legal authority to give notice of termination to MSIM nor to diminish its reservation boundaries.[163]

Nonetheless, the Department asserts the MSIM, effectively terminating it as an acknowledged tribe, that "the Plaintiffs were on notice in 1980 that the beneficial interest in the contested lands had been transferred to the three federally recognized tribes, and no later than 1981 or 1982 that monies generated by the 1886 lands were being paid to others."[164] However, the Department's actions in transferring beneficial interest to the communities' corporations by deed

[162] *Sprint Commc'ns Co., L.P. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) (citations omitted).
[163] MSIM's claims to reservation boundaries are delineated in its Complaint.
[164] Defendants' Memo. at 12.

and wrongly distributing the MSIM's tribal trust accounts to the communities in 1980, 1981 and 1982 did not legally terminate MSIM because only Congress can terminate the MSIM. Therefore, the statute of limitations period did not commence then.

Similarly, the Defendants argue that "[t]o the extent that Plaintiffs complain that they do not appear on the list of federally recognized tribes published under 25 U.S.C. § 5131, any such claim is also time-barred. The Department of the Interior published the first tribal list in 1979, and that list did not include the [MSIM]." The Department's argument is without merit.

First, the 1979 and subsequent lists include only recognized tribes receiving federal benefits, not acknowledged tribes who have not applied for recognition for certain federal benefits. So, the MSIM should not be on the list of recognized tribes because MSIM is an acknowledged tribe, not a recognized tribe.

Second, the Department's listing of recognized tribes can not act as a Departmental substitute for a Congressional act terminating an acknowledged tribe. The statute of limitations period would not be triggered by the 1979 nor by any subsequent Department listing.

Finally, the statute of limitations period would not be triggered by the 1895 sale of lands set apart under the February 1863 Act because the February 1863 Act is an unrepealed law with current effect. Irregardless of the patenting and sale of the 12 square miles of set apart land, the MSIM, once acknowledged by the Department, has rights under the February 1863 Act to prospectively exercise. In turn, the actual effect of the judicial implementation of the statute of limitations against MSIM's land and reservation boundaries claim would be an unconstitutional violation of Congress' Article I legislative prerogatives regarding Indian lands.

III. MSIM's claims are properly brought under the APA because the Department is violating unrepealed statutes with current legal effect.

The APA provides a cause of action for MSIM to sue the government refusing to consult with the MSIM as an acknowledged tribe under the 1934 IRA with powers to exercise rights under

unrepealed statutes with current legal effect – IRA, February 1863 Act, 1888-1890 Appropriation Acts, etc. – including land rights and reservation boundaries based on statutory restrictions. The APA, 5 U.S.C. § 702, provides the court with such subject matter jurisdiction:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[165]

In order to obtain judicial review of agency action under the APA, a plaintiff must identify a final agency action governed by other 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.[166]

A. The APA , 5 U.S.C. § 706(1), allows the MSIM to sue to "compel agency action unlawfully withheld"; MSIM's right as an acknowledged tribe under the 1934 IRA to consultation with the Department is being unlawfully withheld.

The APA , 5 U.S.C. § 706(1), allows the MSIM to sue to "compel agency action unlawfully withheld." MSIM's right as an acknowledged tribe under the 1934 IRA to consultation with the Department is being unlawfully withheld. 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.[167] The Complaint satisfies these requirements because the Complaint alleges that the Department has unlawfully withheld the MSIM's right to consultation and because the Complaint alleges that once the MSIM is acknowledged by the Department, it will

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[165] *Califano v. Sanders*, 430 U.S. 99, 105–07 (1977); *Gallucci v. Chao*, 374 F. Supp. 2d 121, 128 (D.D.C. 2005); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 360 F. Supp. 2d 64, 66 (D.D.C. 2004).
[166] *See S. Utah Wilderness Alliance*, 542 U.S. at 55, 62–65 (2004).
[167] *Id.*.at 62-65 (quoting 5 U.S.C. § 551(13)).

exercise its rights under unrepealed statutes with current legal effect – namely the 1934 IRA, February 1863 Act, 1888-1890 appropriation acts and the 1980 Act.

The Department's arguments that the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 and the federal question statute, 28 U.S.C. § 1331, do not apply because there is no allegation of violation of an independent source of substantive law lack merit. The same arguments regarding an independent source substantive law argued above apply here. Essentially, the Declaratory Judgment Act and the federal question statute apply because the Complaint alleges that the Department has unlawfully withheld the MSIM's right to consultation and because the Complaint alleges that once the MSIM is acknowledged by the Department, it will exercise its rights under unrepealed statutes with current legal effect – IRA, February 1863 Act, 1888-1890 appropriation acts and the 1980 Act.

Finally, the Department argues that MSIM acknowledgment under the IRA is not a final agency action. An action is "final" only insofar as it is not a "preliminary, procedural, or intermediate agency action or ruling." *See* 5 U.S.C. § 704. Actions that do not constitute final agency action are not independently reviewable.[168] An agency action will be considered final if it (1) "mark[s] the consummation of the agency's decision-making process," and (2) is "one by which rights or obligations have been determined or from which legal consequences will flow."[169] Here, Plaintiffs have identified a final agency action from which rights and obligations have been determined and from which legal consequences flow. The Plaintiffs identified the Department's acknowledgement of MSIM under the 1934 IR. Now, the Plaintiffs complain of the Department of the Interior's "policies, practices, and customs" of withholding the right of consultation from the MSIM as an

[168] *S. Utah Wilderness Alliance*, 542 U.S. at 61–62; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (2005) (citing *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001) ("finality" is a jurisdictional requirement)).

[169] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotations marks and citations omitted); *see also Stauffer Chemical Co. v. FDA*, 670 F.2d 106, 108 (9th Cir. 1982) ("In general, action by subordinate agency officials is not final agency action subject to judicial review.") (citations omitted).

acknowledge tribe under the 1934 IRA. In this way, Plaintiffs challenge discrete agency action, rather than broad policies and practices that are not subject to judicial review.[170] Once the Department consults with the MSIM as an acknowledged tribe under the 1934 IRA, MSIM also complains of the Department's failure to provide them rights to the 12 square miles of land. (Compl. ¶¶ 237, 252, 258). On that claim, the Plaintiffs identify a statutory mandate in the February 1863 Act, section 9, that would prospectively require the Department to protect the 12 square mile land and reservation boundaries of the MSIM. The INIA would nullify any agency action or deed that would purport to terminate the MSIM's rights under section 9 of the February 1863 Act without a Congressional Act. Once the Department consults with the MSIM as an acknowledged tribe under the 1934 IRA, MSIM also complains of the Department's failure to provide them rights to the 1886 lands at Prairie Island Indian Community since the corporation-beneficiary of the 1980 Act was statutorily dissolved in 1996. On that claim, the Plaintiffs identify a statutory mandate in the 1888-1890 appropriation act that would prospectively require the Department to protect the 1886 lands and reservation boundaries of the MSIM. The INIA would nullify any agency action or deed that would purport to terminate the MSIM's rights under the 1888-1890 appropriation acts.

B. The Department, by refusing to consult with MSIM as tribe acknowledged under the 1934 IRA, violates substantive law such as the IRA, February 1863 Act and 1888-1890 Appropriation Acts.

The Defendants' memorandum errs in arguing that the MSIM's complaint does not assert that the Department engaged in substantive law violations. The complaint details that the Department under the 1934 acknowledged the MSIM. As an acknowledged tribe, the MSIM has land and reservation boundary rights under the IRA, the February 1863 Act, the 1888-1890 appropriation acts and the 1980 Act which it will exercise. As an acknowledged tribe under the 1934

[170] *S. Utah Wilderness Alliance*, 542 U.S. at 66–67; *Lujan*, 497 U.S. at 891–92.

IRA, the Department does not have the power to terminate the MSIM or diminish its reservation boundaries. The Department, in violation of this Court's Rule 7(n), conceals the administrative record which shows that the Department acknowledged the MSIM under the 1934 IRA; meanwhile, the Department cherry-picks administrative documents when it thinks it supports the idea that the MSIM is not an acknowledged tribe under the 1934 IRA. For example, inconsistent with the government's concealment of the administrative record, the Department claims that a document titled "Indian Tribal Entities That Have A Government-To-Government," published in 44 Fed. Reg. 7235 (Feb. 6, 1979) somehow means the end of MSIM as an acknowledged tribe when the Department knows a Congressional act is required to terminate MSIM as an acknowledged tribe under the 1934 IRA. Consistently, the Department's memorandum in other places references agency actions claiming to result in the end of MSIM and the diminishment of its reservation boundaries; yet, as stated above, the Department's actions can not terminate an acknowledged tribe or diminish its land and reservation boundaries, a Congressional act is required.

C. MSIM is not required to exhaust further administrative remedies because they are legally inadequate as to the Department withholding the right of consultation from the MSIM as an acknowledged tribe under the 1934 Act.

MSIM is not required to exhaust further administrative procedures because the Department's identified administrative procedures are legally inadequate as to the Department withholding the right of consultation from the MSIM as an acknowledged tribe under the 1934 Act. The Defendants assert that the Plaintiffs must exhaust two procedures before bringing their APA claim. First, the Defendants assert Plaintiffs must file administrative appeals under 25 C.F.R. § 2.8 (appeal from inaction of official), based on the failure of an Department of Interior official to consult with MSIM as an acknowledged tribe under the 1934 IRA. Second, the Defendants assert that MSIM even though previously acknowledged by the Department under the 1934 IRA – and not terminated by Congress – must apply for acknowledgement under the Department's

acknowledgment regulations at 25 C.F.R. Part 83. Both procedures are legally inadequate as to the Department withholding the right of consultation from the MSIM as an acknowledged tribe under the 1934 Act. The Supreme Court has recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. All three factors weigh in favor of not requiring MSIM to engage in more administrative procedures.

First, the Supreme Court has recognized that requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action.[171] Even where the administrative decision-making schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.[172] Here, the Department has spent many years taking positions in the U.S. Court of Federal Claims against the MSIM. Similarly, any Department administrative procedure would likely stretch out for years with zero likelihood of the Department changing its current legal position that the MSIM is not a tribe acknowledged under the 1934 IRA. Meanwhile, the MSIM is a tribe acknowledged under the 1934 IRA, but the Department withholds the right of consultation.

Second, an administrative remedy may be inadequate "because of some doubt as to whether the agency was empowered to grant effective relief."[173] For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence

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[171] See *Gibson v. Berryhill,* 411 U.S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate "[m]ost often ... because of delay by the agency"). *See also Coit Independence Joint Venture v. FSLIC,* 489 U.S. at 587 ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern R. Co.,* 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary).

[172] *Bowen v. City of New York,* 476 U.S. at 483 (disability-benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); *Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 773 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

[173] *Gibson v. Berryhill,* 411 U.S., at 575, n. 14.

to resolve the particular type of issue presented, such as the constitutionality of a statute.[174] In a similar vein, exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that " 'the question of the adequacy of the administrative remedy ... [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.' " [175] Here, the Department does not have the power or procedures to grant effective relief. The Department has already irrevocably used its power to recognize three communities and, on that basis, has refused to consult in 2016 with the acknowledged MSIM tribe. Further, the Department's administrative appeal process and acknowledgement procedure is legally inadequate to resolve whether the right of consultation should be granted to MSIM as an acknowledged tribe over the objections of three recognized communities. The Department is not legally equipped to resolve such federal questions.

Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.[176] For example, the D.C. Circuit in *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997) noted in a Rule 19 context that the Department would have a conflict of interest in representing two sides in an apparent intra-tribal dispute when the Department had already taken sides, "the Department cannot adequately represent the Delawares." *Id.* The Department has a similar conflict of interest and bias here. The Department's conflict of interest and bias against MSIM as an acknowledged tribe under the 1934 IRA is known from the *Wolfchild I* litigation. For example, the Department mal-distributed

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[174] See, *e.g., Moore v. East Cleveland,* 431 U.S., at 497, n. 5; *Mathews v. Diaz,* 426 U.S. 67, 76 (1976).
[175] *Barry v. Barchi,* 443 U.S. 55, 63, n. 10, 99 (1979) (quoting *Gibson v. Berryhill,* 411 U.S., at 575).
[176] *Gibson v. Berryhill,* 411 U.S., at 575, n. 14;*Houghton v. Shafer,* 392 U.S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"); *Association of National Advertisers, Inc. v. FTC,* 201 U.S.App.D.C. 165, 170–171, 627 F.2d 1151, 1156–1157 (1979) (bias of Federal Trade Commission chairman), cert. denied, 447 U.S. 921 (1980). See also *Patsy v. Florida International University,* 634 F.2d 900, 912–913 (5th Cir. 1981) (en banc) (administrative procedures must "not be used to harass or otherwise discourage those with legitimate claims"), *rev'd on other grounds*, *sub nom. Patsy v. Board of Regents of Florida,* 457 U.S. 496 (1982).

$673,944 of MSIM trust funds (with calculated interest) to the communities in 1981 and 1982 on the basis MSIM is not acknowledged under the 1934 IRA – when it is.[177] In order to illegally distribute the funds, the Department pre-determined legal issues against the MSIM without consultation. Here, the Department has a long-standing history of agency prejudice and pre-determination of legal issues without tribal consultation with the MSIM; so, any administrative proceedings in this regard would be legally inadequate and futile.

D. The Defendants err by suggesting that the APA plus the substantive law of the February 1863 Act and 1888-1890 appropriation acts are jurisdictionally insufficient to bring the lawsuit.

The Defendants' memorandum at pages 20 through 21 suggest that the APA plus the substantive law of the February 1863 Act and 1888-1890 appropriation acts are jurisdictionally insufficient to bring the APA claim based on no private cause of action. However, as explained above, the APA provides the waiver of sovereign immunity and jurisdiction. An APA prerequisite is alleging the government violated its legal duties under substantive law independent of the APA. It is not an APA prerequisite that the substantive law imposing the duty also have a private cause of action. The APA – similar to the Tucker Act and Federal Tort Claims Act -- provides the cause of action against the federal government. The Tucker Act is distinguishable in this regard in that the U.S. Court of Claims jurisdictionally analyzes statutes for a money-mandating duty before applying jurisdiction. But, no parallel inquiry occurs under the APA. The plaintiff in an APA claim must merely show that the substantive source of law creates an agency duty to plaintiff which has been violated. Here, the MSIM has brought an APA claim based on violations of various statutes. The statutes create Departmental duties to MSIM. The statutes do not necessarily create private causes

[177] *Wolfchild v. United States,* 101 Fed.Cl. 54, 92 (Aug. 05, 2011), as corrected (Aug 18, 2011), *rev'd on jurisdictional grounds*, 731 F.3d 1280 (Fed.Cir. 2013).

of action. But, the substantive statutes in this case don't have to create a private cause of action because the APA provides the plaintiffs with the cause of action against the government.

IV. Res judicata and collateral estoppel do not apply to the earlier *Wolfchild* decisions because they were dismissed for lack of subject-matter jurisdiction and they involved different parties, different claims and different legal issues.

Res judicata and collateral estoppel do not apply to the earlier *Wolfchild I* and *Wolfchild II* decisions because they were dismissed for lack of subject-matter jurisdiction and they involved different parties, different claims and different legal issues. First, the U.S. Court of Appeals for the District of Columbia Circuit held in *Prakash v. American University,* 727 F.2d 1174, 1182 (D.C. Cir. 1984) that "A dismissal for lack of subject-matter jurisdiction, on the other hand, is not a disposition on the merits and consequently does not have res judicata effect."[178] The Department places great reliance on the prior *Wolfchild* litigation in the U.S. Court of Federal Claims being without merit and implying that the resolution of those issues had preclusive effect in the instant case. However, those cases under *Prakash* have no preclusive effect because there was no subject-matter jurisdiction.

As the Department knows, in order for Indian groups to sue the United States under the Tucker Act for violation of a federal statute, the Court must first find that the statutory violation on which the Indians are suing created a "money mandating duty" on the Government which would support a damage claim against the Government. *Wolfchild v. United States,* 731 F.3d 1280, 1288-89 (Fed. Cir. 2013) ("*Wolfchild I*"). This "money mandating duty" defense is unique to actions against the United States. The issue under the "money mandating duty defense" is not whether the Government official complied with a statutory directive. The issue is whether the statutory directive created a money mandating duty for the official to comply with the directive. Thus, because the Federal Circuit held that the first sentence of Section 9 of the 1863 Act did not create a "money

[178] *See Media Techs. Licensing, LLC v. Upper Deck Co.,* 334 F.3d 1366, 1369–70 (Fed.Cir.2003).

mandating duty" for the Secretary to "set apart" the lands at issue, the Federal Circuit dismissed the plaintiffs' claim based on this first sentence.

To be clear: the issue in *Wolfchild IX* was whether the 1863 Act created a "money mandating duty" on the Secretary of the Interior to "set apart" the lands ***regardless*** of whether the Secretary ***in fact*** "set apart" the lands. More importantly, with respect to the second sentence of the 1863 Act stating that the lands are "unalienable" and "cannot be transferred" once "set apart," the Federal Circuit further found that even if the Secretary had "set apart" the lands at issue, the Secretary had later "terminated" the process and sold the "set apart" lands to others. As a result, even if the Secretary "set apart" the lands for the Mdewakanton Band but later sold them to private parties, *Wolfchild IX* held the statute of limitations with respect to any "money mandating duty" claim under the second sentence had long since run:

> Claimants fare no better in their attempt to make out a claim ***based on the more absolute rights set forth in the statute's second sentence***. Because those rights attach only to land that was "set apart" under the authority granted in the provision's first sentence, any such claim must be premised on affirmative actions taken under that authority. Act of Feb. 16, 1863, § 9, 12 Stat. at 654. Claimants contend that the Secretary did in fact take the necessary steps to set apart land under the Act, focusing our attention on certain events in 1865. Specifically, they contend that the Secretary identified 12 sections of land for the loyal Sioux and withdrew them from public sale, which sufficiently "set apart" those lands to make the section's second sentence applicable.
> ***
> Those 1865 actions, however, cannot support a timely claim for relief, regardless of whether they could qualify as having "set apart" land under the Act.

Wolfchild v. U.S. 731 F.3d 1280, 1292-93 (Fed. Cir. 2013)("*Wolfchild X*") (emphasis added).

This analysis is critical here for two reasons. First, the U.S. Court of Federal Claims does not have ***subject matter jurisdiction*** over a claim against the United States unless the Court first finds that the statute at issue creates a "money mandating duty" and that the claim is within the statute of limitations:

> If the court's conclusion is that the [statutory] source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a

> Rule 12(b)(1) dismissal—the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act.

Fisher v. U.S., 402 F.3d 1167, 1173 (Fed. Cir. 2005).

> This six-year statute of limitations is jurisdictional in nature. *John R. Sand & Gravel Co. v. United States,* 552 U.S. 130 (2008). Accordingly, the Court of Federal Claims lacks jurisdiction over claims that are not brought within the limitations period.

Hyde v. U.S., 336 Fed. Appx. 996, 998 (Fed. Cir. 2009). Second, while Plaintiffs argue that the money mandating duty and statute of limitations issues are unique to Tucker Act suits against the United States in the U.S. Court of Federal Claims and thus do not logically lend themselves to have any preclusive effect on APA claims brought in the U.S. District Court relating to similar subject matters, the dismissal of *Wolfchild I* in the U.S. Court of Federal Claims on subject matter jurisdiction legally means that the *Wolfchild I* decisions in the U.S. Court of Federal Claims have no res judicata or collateral estoppel effect in this case.

Similarly, the Eighth Circuit and U.S. District Court decisions in *Wolfchild II* have no preclusive effect because the claims were dismissed for lack of subject matter jurisdiction. *Wolfchild v. Redwood County,* 824 F.3d 761 (8th Cir. 2016) ("*Wolfchild II*"). The Eighth Circuit affirmed the district court decision dismissing the case based on the 1863 Act not providing a private remedy to and no common law remedy for Plaintiff Sheldon Wolfchild, et al., against the non-federal defendants. *Id.* at 767-770. Thus, *Wolfchild II,* like *Wolfchild I*, was dismissed for lack of subject-matter jurisdiction and has no preclusive effect on this litigation.

Moreover, the earlier *Wolfchild* litigation involved different parties, different claims and different legal issues. The APA claim here involves plaintiffs that were not involved in *Wolfchild I* and *Wolfchild II.* The defendant here, the United States, was not a defendant in *Wolfchild II.* The APA claim brought here was not brought in *Wolfchild I* and *Wolfchild II.* *Wolfchild I* was a Tucker Act claim against the United States. *Wolfchild II* was an attempted federal common law and private cause of action against non-federal defendants. The Complaint's legal issues brought under the APA claim

here were not present in *Wolfchild I* and *Wolfchild II*. And, to the extent some of the legal issues were raised, they were not adjudicated by the courts involved because the respective cases were dismissed for lack of subject-matter jurisdiction. Thus, under *Prakash,* such decisions in *Wolfchild I* and *Wolfchild II* have no preclusive effect. So, neither res judicata nor collateral estoppel apply.

A. In light of the APA remedies Plaintiff seeks, 28 U.S.C. § 2415 authorizing the Department to sue third parties on MSIM's behalf, and that the Plaintiffs having no Article III case or controversy with any third parties, Rule 19 does not require joinder of any third parties.

The Defendants' memorandum at page 25 erroneously asserts the case should be dismissed under Rule 19 for lack of necessary parties because the "Plaintiffs seek recovery of land owned by other parties." However, the Defendants' legal argument errs because the APA complaint merely seeks an APA court order against the Department regarding the MSIM's right of consultation as an acknowledged tribe under the 1934 IRA and the MSIM's rights to land and reservation boundaries based on statutory restrictions. The only necessary parties under Rule 19 for that type of claim is MSIM and the Department. The Department exercises a guardianship-ward relationship with tribes; so, the Indian tribal ward only sues the federal guardian. Neither the APA nor Rule 19 requires the Indian tribal ward in an APA claim against the Department to sue all third parties incidentally benefitting from the Department's violations of law. Consistently, no other party under Rule 19 has a right to intervene in MSIM's lawsuit against the Department because the APA claim is limited to the rights and obligations of that specific guardianship-ward relationship. Further, after an APA order is issued against the Department, it is only the Department under 28 U.S.C. § 2415 which has the authority to sue third parties on behalf of the MSIM. The Eighth Circuit in *Wolfchild II* affirmed the district court decision dismissing the case based on the 1863 Act not providing a private remedy to and no common law remedy for Plaintiff Sheldon Wolfchild, et al., against the non-federal defendants. *Id.* at 767-770. Thus, the MSIM has no common law or other private remedy against third party defendants. Only the Department, not the MSIM, can sue the non-federal defendants.

Moreover, under the APA claim, no Article III case or controversy exists with any third parties to the MSIM's guardianship-ward relationship with the Department. This legal issue was previously analyzed in *Wolfchild v. United States*, 77 Fed.Cl. 22, 26-31 (2007). The Court there issued summons to the three communities. The communities moved to quash them. The Court agreed and quashed the summons based on lack of an Article III case or controversy. The Court reasoned that the Plaintiffs under their Tucker Act claim had no direct claim against the communities. Any claim against the communities was contingent or hypothetical – including any federal 28 U.S.C. § 2415 claims against the communities. Similarly, here, the Plaintiffs under their APA claim have no direct claim against any third parties. Any claims against third parties would be contingent or hypothetical.

Finally, if the Court determines additional parties are necessary under Rule 19, in lieu of dismissal, the Plaintiffs request for additional time to amend their complaint and add them.

DATED: March 17, 2017.

/s/Erick G. Kaardal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 17, 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: March 17, 2017.

/s/Erick G. Kaardal

Erick G. Kaardal