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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 SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

BACKGROUND 4

I. The Department's regulations require that the Department provide technical assistance prior to the secretarial election that the constitutional amendments are not contrary to federal law. 4

II. The Interior Secretary authorized the PIIC June 14, 2017 Secretarial Election after concluding proposed Community constitutional provisions were not contrary to federal law, however doing so, without consideration of the effect upon the MISM and its reservations. 6

III. The June 14, 2017 proposed constitution deletes references to MSIM as a tribe with the 1886 Lands Reservation. 7

IV. The Department denies that the MSIM is a tribe having three reservations in Minnesota -- Lake Pepin Reservation; 12 Square Mile Reservation and the 1886 Lands Reservation – and surplus land claims. 9

A. The Act of February 16, 1863 did not terminate the MSIM. 9

B. The MSIM's "Lake Pepin Reservation" implemented by the Act of July 17, 1854 is not terminated by the Act of February 16, 1863. 11

C. Section 9 of the unrepealed Act of February 16, 1863 statutorily establishes the Secretary's 1865 set apart lands as an MSIM "12 Square Mile Reservation" "forever." 16

D. Under the unrepealed 1888-1890 Appropriation Acts, the land the Department acquired was for MSIM members and are MSIM's "1886 Lands Reservation." 19

E. The MSIM has a right to purchase at equitable prices surplus Dakota reservation land in Minnesota under the Minnesota Public Lands Improvement Act of October 18, 1990. 21

ARGUMENT 22

I. Legal Standard 22

II. MSIM is likely to succeed on the merits. 23

A. The D.C. Circuit in Cherokee Nation of Oklahoma v. Babbitt held that the federal listing of a tribe is not legally determinative; the Article III judicial branch gets the final word. 24

B. Under *Carcieri,* the Secretary of the Interior's authority under the IRA to take land into trust for Indians is limited to Indian tribes that were under federal jurisdiction when the IRA was enacted; the MSIM was under federal jurisdiction when the IRA was enacted. 25

C. Statutory canons require 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. 25

D. MSIM is a tribal ward acknowledged by the Department under the 1934 IRA which has not been terminated by Congress; as such, the Department is MSIM's guardian with a legal obligation to inform the MSIM what it knows or should know. 27

E. The Department's former legal analysis of MSIM in 1935 and 1936 failed to reflect existing MSIM reservations. 29

F. The June 14, 2017 proposed constitution is consistent with the Department's vigorous interpretation of 25 U.S.C. 5123 (f) and (g) as applied to the three communities which terminates MSIM as an acknowledged tribe and diminishes the MSIM's three reservations, but is legally null and void by the IRA's three savings clauses at 25 U.S.C. §5121, 25 U.S.C. § 5123(h) and 25 U.S.C. §5128. 36

G. The proposed June 14, 2017 PIIC constitution is consistent with the Department's misapplication of the 1980 Act in violation of the IRA's savings clauses resulting in the communities being agent-representatives of the Department – not tribes as the Department argues -- which is contrary to federal law. 40

H. The June 14, 2017 proposed constitution fails to address the 1886 Lands situation at PIIC after the 1996 statutory dissolution of its corporate charter. 42

III. MSIM is likely to suffer irreparable harm in the absence of preliminary relief. 43

IV. The balance of equities tips in MSIM's favor. 44

V. An injunction requiring court review prior to future Secretarial Elections is in the public interest. 44

CONCLUSION 45

CERTIFICATE OF SERVICE 47

TABLE OF AUTHORITIES

Cases

Aamer v. Obama, 742 F.3d 1023 (D.C.Cir.2014) 23

Abdullah v. Obama, 753 F.3d 193 (D.C.Cir.2014) 23

Brewer v. Acting Deputy Assistant Sec'y-Indian Affairs, 10 I.B.I.A. 110 (1982) 33

Carcieri v. Salazar, 555 U.S. 379 (2009) 25

Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997) 24

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 28

Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288 (D.C.Cir.2009) 23

Johnson v. McIntosh (21 U.S. (8 Wheat.) 543 (1823)) 19

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) 27

Jt. Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 669 (D. Me. 1975) 25

Jt. Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) 25

Lincoln v. Vigil, 508 U.S. 182, 194 (1993) 28

Lower Sioux Indian Cmty. in Minnesota v. United States, 231 Ct. Cl. 1037, 1037 (1982) 11

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 26

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 26, 27

Nebraska v. Parker, 136 S. Ct. 1072 (2016) 26, 27

Reinhard v. Johnson, 209 F.Supp.3d 207 (D.D.C., 2016) 23

Save Jobs USA v. U.S. Dep't of Homeland Sec., 105 F.Supp.3d 108 (D.D.C.2015) 23

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Shakopee Mdewakanton Sioux (Dakota) Cmty v. Babbitt, 906 F. Supp. 513 (D. Minn. 1995) 11

Sherley v. Sebelius, 644 F.3d 388 (D.C.Cir.2011) 23

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U.S. v. 2,005.32 Acres of Land, More or Less, Situate in Corson County, S.D., 160 F. Supp. 193 (D.S.D. 1958) 26

U.S. v. Drummond, 42 F. Supp. 958 (W.D. Okla. 1941) 26

U.S. v. Kagama, 6 S.Ct. 1109 (1886) 28

United States v. Mitchell, 463 U.S. 206 (1983) 28

United States v. Nice, 241 U.S. 591 (1916) 26

United States v. Santa Fe R. Co., 314 U.S. 339 (1941) 26

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 26

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) 23

Wolfchild v. U.S., 96 Fed.Cl. 302, 311, n. 5 (Fed.Cl.,2010) 4

Wolfchild v. United States, 731 F.3d 1280 (Fed. Cir. 2013) 19

Statutes

10 Stat. 304 ..... 2, 9, 12, 13

12 Stat. 652 ..... passim

183 U.S. 602 13

25 Stat. 217 ..... passim

25 Stat. 980 ..... passim

25 U.S.C. § 5121 ..... 2, 3, 37

25 U.S.C. § 5123 ..... 2, 3, 36, 37

25 U.S.C. § 5128 ..... 2, 3, 37, 38

26 Stat. 336 ..... passim

86 Stat. 1168 32

P.L. 101-442, 104 Stat. 1020 (Oct. 18, 1990) 2, 21

P.L. 73-383, 48 Stat. 984 (Jun. 18, 1934) 2

P.L. 96-557, 94 Stat. 3262 (Dec. 19, 1980) 2

P.L. 100-581, title I, Sec. 101, Nov. 1, 1988, 102 Stat. 2938 30

P.L. 104-261, 110 Stat. 3176 43

Restatement of Trusts, 2d § 170 (1959) 28

Other Authorities

44 Fed. Reg. 7235 (Feb. 6. 1979) 10

47 Fed. Reg. 151 ..... 42, 43

47 FED. REG. 53133 (Nov. 24, 1982) 10

53 FED. REG. 52829 (Dec. 29, 1988) 10

58 FED. REG. 54364 (Oct. 21, 1993) 10

60 FED. REG. 9250 (Feb. 16, 1995) 10

61 FED. REG. 58211 (Nov. 13, 1996) 10

62 FED. REG. 55270 (Oct. 23, 1997) 10

63 FED. REG. 71941 (Dec. 30, 1998) 10

65 FED. REG. 13298 (Mar. 13, 2000) 10

67 Fed. Reg. 46328 (Jul. 12, 2002) 11

68 FED. REG. 68180 (Dec. 5, 2003) 11

70 FED. REG. 71194 (Nov. 25, 2005) 11

72 FED. REG. 13648 (Mar. 22, 2007) 11

73 FED. REG. 18553 (Apr. 4, 2008) 11

74 FED. REG. 40218 (Aug. 11, 2009) 11

75 FED. REG. 60810 (Oct. 1, 2010) 11

75 FED. REG. 66124 (Oct.27, 2010) 11

77 FED. REG. 47868 (Aug. 10, 2012) 11

77 FR 59963 (Oct. 1, 2012) 32

78 FED. REG. 26384 (May 6, 2013) 11

79 FED. REG. 4748 (Jan. 29, 2014) 11

80 F.R. 1942 (Jan. 14, 2015) 11

Federal Register, vol. 80, no. 201, p. 63094 (Oct. 19, 2015) 5

Federal Register, Volume 80, Number 9, p. 1946 (January 14, 2015) 10

Act of 1887 33

Act of Aug. 19, 1890 ..... passim

Act of August 19, 1890 ..... 20, 41

Act of December 19, 1980 ..... 2, 21

Act of February 16, 1863 ..... passim

Act of July 17, 1854 ..... passim

Act of June 18, 1934 ..... 2, 38

Act of June 29, 1888 ..... passim

Act of Mar. 2, 1889 ..... passim

Act of March 2, 1889 ..... 20, 41

Act of October 18, 1990 ..... 2, 21

Act of October 9, 1996 43

House Report No. 138, 33rd Congress (April 28, 1854) 12

https://www.blm.gov/press-release/blm-finalizes-return-nearly-60000 acres-land-red-lake-band-chippewa-indians-minnesota 28

R. Billington, Introduction, in Soldier and Brave xiv (1963) 26

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

INTRODUCTION

The MSIM is a tribe, acknowledged under the IRA, with existing reservations in Minnesota. With this upcoming election, the Department both ignores the MSIM acting as if it does not exist and acting to terminate the MSIM and its reservation — actions only Congress by congressional Act can do.

The Department's policy toward the MSIM, its reservations, and the Communities has created a legally convoluted and nearly incomprehensible situation. On June 14, 2017, the Secretary has authorized an election to vote on PIIC constitutional changes which, on the one hand, purport to make the PIIC a tribe and purport to terminate MSIM as a tribe and its reservations forever, and, on the other hand, substitute PIIC as a tribal successor of the original MSIM tribe (along with the two other communities, Lower Sioux Mdewakanton Indian Community and the Shakopee Mdewakanton Sioux (Dakota) Community).

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[1] The reference to MSIM includes all Plaintiffs.

[2] For the sake of brevity, all brief references to "preliminary injunction" include the motion for temporary restraining order.

To the contrary, the MSIM statutes and administrative history show that only one tribe exists: MSIM. The MSIM is a tribe having three statutorily-established reservations in Minnesota: Lake Pepin Reservation by the Act of July 17, 1854;[3] 12 Square Mile Reservation by section 9 of the Act of February 16, 1863;[4] and the 1886 Lands Reservation by the 1888-1890 appropriation acts.[5] Further, the MSIM has a right to purchase and transfer of any surplus Dakota reservation lands under the Minnesota Public Lands Improvement Act of October 18, 1990.[6]

The Department's policy of interpreting the Indian Reorganization Act of June 18, 1934 (IRA),[7] particularly its vigorous, but questionable interpretation of 25 U.S.C. 5123 (f) and (g) and of the Act of December 19, 1980,[8] to establish each Community[9] as a separate tribal sovereign terminating MSIM, its three reservations and surplus reservation land claims violates the IRA's savings clauses at 25 U.S.C. § 5121, 25 U.S.C. § 5123(h), and 25 U.S.C. § 5128. Notably, the Department violates the principal legal standard that *only Congress* can terminate a tribe and diminish reservations.

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[3] Act of July 17, 1854, 10 Stat. 304. App. 21.
[4] Act of Feb. 16, 1863, 12 Stat. 652. App. 126-128.
[5] 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. App. 165-172.
[6] P.L. 101-442, 104 Stat. 1020 (Oct. 18, 1990)
[7] P.L. 73-383, 48 Stat. 984 (Jun. 18, 1934).
[8] P.L. 96-557, 94 Stat. 3262 (Dec. 19, 1980).
[9] The other two communities are Lower Sioux Indian Community in the State of Minnesota (1936) and Shakopee Mdewakanton Sioux Community (1969). All three are collectively referred to as "Communities" in this memorandum.

The Department's policy undermines existing court principles as applied to tribes. The Department will argue that its governing policies affecting PIIC have effectively transformed the Community into a tribe; to the contrary, the Department's policies have created communities that are acting in a manner contrary to federal law. The Department's actions, contrary to law, have granted the Communities with apparent authority, but not actual authority, to be the exclusive legal tribal successors of the MSIM. In turn, the Communities act as legally unauthorized agent-representatives of the Department's violative policy proclaiming that the Communities are the exclusive tribal successors of the MSIM.

The present situation, should the Secretarial election be allowed to proceed, will effectively terminate the MSIM without congressional Act. For instance, since the enactment of the IRA in 1934, Department memoranda in 1935 and 1936 failed to include legal analysis of the MSIM as a tribe with three reservations. Currently, the Department's legal analysis similarly fails to include legal analysis of the MSIM as a tribe with three reservations and surplus reservation land claims.

Additionally, the Department failed to analyze whether its vigorous interpretation of the Indian Reorganization Act, particularly 25 U.S.C. 5123 (f) and (g), and the Act of 1980, to create each Community's independent tribal sovereignty terminating MSIM, its three reservations, and surplus reservation land claims, violates the IRA's savings clauses at 25 U.S.C. § 5121, 25 U.S.C. § 5123(h) and 25 U.S.C. § 5128 and violates the legal standard that only Congress can terminate a tribe and diminish reservations.

If the preliminary injunction is granted, then the Court can assure that the proper legal analysis of MSIM and of the Communities is completed and implemented prior to any future Secretarial Election occurring. Additionally, the preliminary injunction will preserve the administrative status quo for legal adjudication of the MSIM's claims.

BACKGROUND[10]

By this motion, the MISM again communicates with the Department its concerns about the June 14, 2017 Secretarial Election and PIIC's uses of the 1886 Lands Reservation there.[11]

I. The Department's regulations require that the Department provide technical assistance prior to the secretarial election that the constitutional amendments are not contrary to federal law.

The U.S. Department of Interior' regulations governing tribal secretarial elections establishes that it has a legal duty to ensure proposed constitutional changes, as here, regarding the PIIC Constitution, are not "contrary to federal law"

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[10] The "Background" section, unlike a typical statement of facts, includes "legal inferences" drawn from the historical documents which have no authenticity objection by the Department. As noted by U.S. Court of Federal Claims, "Thousands of pages of historical documents have been filed in connection with the pending motions and the prior motions dating back to 2004 in this litigation. The court has drawn upon that historical record in developing the recitation of facts which follows. Unless otherwise noted, the facts set out are undisputed. No authenticity objection has been raised to any of the historical documents. The arguments of the parties focus on the inferences to be drawn from the resulting record." *Wolfchild v. U.S.,* 96 Fed.Cl. 302, 311, n. 5 (Fed.Cl.,2010), *rev'd in part,* 731 F.3d 1280 (2013). In a way, the Background section is intended to be Plaintiffs' guide for the Court to read the Department's documents in the appendix.

[11] Per the local rules, Plaintiffs' counsel contacted government counsel on May 30, 2017 to meet and confer. There is nothing additional to report to the Court. Additionally, see, e.g., App. 830. (Plaintiff March 30, 2017 letter to Department).

as stated under section 81.7:

> What technical assistance will the Bureau provide after receiving a request for election? After receiving a tribal request for election under § 81.6, the Bureau will provide the following technical assistance.
>
> (a) The Local Bureau Official will review and make a recommendation on the proposed document or amendment, prepare background information on the tribe, and submit to the Authorizing Official.
> (b) The Authorizing Official must do all of the following:
> (1) Review the proposed document or amendment and offer technical assistance to the tribe (and spokesperson, for petitions);
> (2) Consult with the Office of the Solicitor to determine whether any of the provisions of the proposed document or amendment may be contrary to applicable law; and
> (3) Notify the tribe (and spokesperson, for petitions) in writing of the results of the review.
> (i) If the review finds that a provision is or may be contrary to applicable law, the notification must explain how the provision may be contrary to applicable law and list changes to the document that would be required to allow the Authorizing Official to approve the document as not contrary to applicable law. [12]

Notably, the regulations do not provide for the Department to sua sponte propose provisional changes, but to review a tribe's or community's request for changes and to ensure the proposed changes are not contrary to applicable law prior to any election on those proposed changes. Accordingly, under this section, the Department, prior to the secretarial election, is required to provide a legal review so that the constitutional amendments are *not contrary to federal law.*

[12] Federal Register, vol. 80, no. 201, p. 63094 (Oct. 19, 2015) (Secretarial Election Procedures). App. 449-470.

II. The Interior Secretary authorized the PIIC June 14, 2017 Secretarial Election after concluding proposed Community constitutional provisions were not contrary to federal law, however doing so, without consideration of the effect upon the MISM and its reservations.

On February 18, 2016, the PIIC provided Notice Regarding Proposed Revisions to Constitution and Bylaws.[13] The Notice did not reach all MSIM members. On May 20, 2016, the Department provided its legal review of the proposed amendments to the PIIC Constitution.[14] The Department's letter also authorized the election.[15] The Department stated that "the proposed amendments are not contrary to federal law."[16] The letter made no mention of the MSIM and its reservations.

On October 13, 2016, the Department provided further legal review indicating that the proposed amendments do not appear "contrary to federal law."[17] Once again, there was no reference to the MSIM and its reservations. Then, on April 26, 2017, the Department provided notice of the Secretarial Election on the constitutional amendments with the election to be concluded on June 14, 2017.[18] The Notice did not reach all MISM members.

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[13] App. 471-496.
[14] App. 497-499.
[15] App. 499. In the May 20, 2016 letter, the BIA Regional Director states, "Such authorization does not carry with it the presumption of Secretarial approval should the amendments be adopted." *Id.*
[16] App. 497.
[17] App. 500.
[18] App. 501-532.

III. The June 14, 2017 proposed constitution deletes references to MSIM as a tribe with the 1886 Lands Reservation.[19]

As our argument explains below, the MSIM was *the* acknowledged tribe at the time of the passage of the Indian Reorganization Act in 1934. In 1934, MSIM tribal members, as a tribe, voted to organize under the IRA, not to terminate the MSIM tribe. Nevertheless, some 83 years later, the June 14, 2017 PIIC Constitutional amendments delete references to the MSIM and its 1886 Lands Reservation.[20] The drafted preamble introduces the conundrum of the Department's attempt to terminate — through IRA amendments to the PIIC constitution — the MISM and effectively *create* a tribe; the Department is acting administratively without the required Congressional Act. While PIIC may some powers similar to other acknowledged or recognized tribes, it cannot be a tribe "unto itself." In other words, the PIIC is *not* the MISM tribe that existed at the time the MISM voted upon the IRA in 1934.

First, the first sentence of the Preamble changes the name of the community entity from "Prairie Island *Indian Community in* the State of Minnesota" to "Prairie Island *Mdewakanton Dakota Tribe* in the State of Minnesota."[21]

Second, the first sentence of the Preamble rewrites history. The original, pre-amended text is historically correct as to how the Community was created as we later explain. But the proposed language, while on its face the changes appear

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[19] The phrase "1886 Lands Reservation" includes lands subsequently added including the so-called IRA lands purchased in the late 1930's and the later-added trust lands. App. 175.
[20] App. 520-525 (red-lined version of proposed constitutional amendments).
[21] App. 520. Emphasis added.

minor, has significant legal consequences. "We the members of the Minnesota Mdewakanton Sioux who established the Prairie Island Mdewakanton Dakota Tribe in the State of Minnesota…"[22] suggests a 1934 disassociation with the MSIM tribe in 1934 which did not happen.

Third, the last sentence of the Preamble extinguishes legal rights preserved under the Constitution for the benefit of the MSIM, whenever it may take effect: "This Constitution and Bylaws shall supersede the Constitution and Bylaws of the Prairie Island Indian Community in Minnesota adopted on May 23, 1936 and approved by the Secretary on June 20, 1936, as amended on March 7, 1991, October 3, 1997 and May 15, 2006."[23]

Fourth, Article I refers to the community as a "tribe."[24] Again, as noted above and argue below, the Department cannot administratively create or terminate a "tribe."

Fifth, Article II regarding reservation and territory fails to reference that MSIM is the only Dakota tribe acknowledged with reservation(s) in Minnesota.[25]

Sixth, Article V, section 1(q) deletes the powers involved in the community participating in the conferences of the "Minnesota Mdewakanton Sioux Indians."[26]

Seventh, Article IX deletes the section indicating that the 1886 Lands Reservation "was purchased by the United States for the Mdewakanton Sioux

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] App. 522.

residing in the State of Minnesota on May 20, 1886 and their descendants."[27]

Eighth, Article IX deletes the federal land assignment system where eligible MSIM receive land assignments on the 1886 Lands Reservation.[28]

IV. The Department denies that the MSIM is a tribe having three reservations in Minnesota -- Lake Pepin Reservation; 12 Square Mile Reservation and the 1886 Lands Reservation – and surplus land claims.

The Department denies that the MSIM is a tribe having three reservations in Minnesota. Yet, there has been no Congressional Act that terminated the MSIM. Moreover, because there has been no termination, there remains MSIM reservation lands, which the Department seeks to ignore by ignoring MSIM. The existing reservation lands of the MSIM include three statutorily-established reservations in Minnesota: Lake Pepin Reservation established by the Act of July 17, 1854[29]; 12 Square Mile Reservation established by section 9 of the Act of February 16, 1863[30]; and the 1886 Lands Reservation established with the 1888-1890 appropriation acts.[31]

A. The Act of February 16, 1863 did not terminate the MSIM.

The Act of February 16, 1863 abrogated and annulled Sisseton, Wahpeton, Medawakanton and Wahpakoota bands' treaties and reservation lands, but did not

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[27] App. 523.
[28] App. 524.
[29] Act of July 17, 1854, 10 Stat. 304. App. 21.
[30] Act of Feb. 16, 1863, 12 Stat. 652. App. 126-128.
[31] 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. App. 165-172.

terminate the Sisseton, Wahpeton, Medawakanton and Wahpakoota bands.[32]

Section 1 of the Act contains no reference to terminating the bands:

> That all treaties heretofore made and entered into by the Sisseton, Wahpeton, Medawakanton and Wahpakoota bands of Sioux or Dakota Indians, or any of them, with the United States are hereby to be declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.[33]

In fact, the Department's list of federal tribes includes the Sisseton-Wahpeton as a federally-recognized tribe:

> Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota[34]

Similarly, the MSIM band continues in Minnesota. However, the Department's tribal listings since 1979 have not made MSIM's existence as clear as Sisseton-Wahpeton's existence.[35] For example, from 1982 through 2000, the Department of the Interior specifically referenced the "Prairie Island Indian Community" as "of" the Minnesota Mdewakanton Sioux Indians":

> Prairie Island Indian Community of Minnesota Mdewakanton Sioux Indians of the Prairie Island Reservation in Minnesota.[36]

Then in 2002, inexplicably, although suspected as a response to other federal legal

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[32] 12 Stat. 652. App. 126-128.
[33] 12 Stat. 652. App. 126.
[34] Federal Register, Volume 80, Number 9, p. 1946 (January 14, 2015).
[35] 44 Fed. Reg. 7235 (Feb. 6. 1979).
[36] 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).

actions,[37] the Department deleted the references to the Minnesota Mdewakanton Sioux Indians in the 2002 list:

> Prairie Island Indian Community *in* the State of Minnesota [previously listed as the Prairie Island Indian Community *of Minnesota Mdewakanton Sioux Indians* of the Prairie Island Reservation in Minnesota].[38]

Since 2002, the Department has listed "Prairie Island Indian Community in the State of Minnesota" without reference to the MSIM.[39] Notably, the regulatory change was done without notice to the MSIM, although the change apparently did not require review and comment. Moreover, if it did, MSIM members received no notice.

B. The MSIM's "Lake Pepin Reservation" implemented by the Act of July 17, 1854 is not terminated by the Act of February 16, 1863.

The unrepealed Act of July 17, 1854 statutorily codified the MSIM's "Lake

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[37] There is no documented rationale we could find for the Departments change of course. Nevertheless, there were several legal actions that identified Department's own conundrum regarding tribal acknowledgement of the MSIM. *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).

[38] 67 Fed. Reg. 46328 (Jul. 12, 2002). The Department in 2002 changed the name of LSIC too, "Lower Sioux Indian Community in the State of Minnesota (previously listed as the Lower Sioux Indian Community of Minnesota Mdewakanton Sioux Indians of the Lower Sioux Reservation in Minnesota)." *Id.* Emphasis added.

[39] 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).

Pepin Reservation" identified in the Treaty of Prairie du Chien of July 15, 1830.[40] The reservation belonged to the MSIM under the Treaty of Prairie du Chien of July 15, 1830 because the Dakota bands sought to further protect their fellow Indians, by ensuring additional aboriginal lands be established for their mixed-blood lineal descendants as a reservation.[41] On January 16, 1854, Minnesota Territorial Delegate Henry M. Rice introduced a bill, H.R. 338, regarding the Sioux half-breed reservation on Lake Pepin, in the Territory of Minnesota" into the House of Representatives.[42] After passage by both houses, on July 17, 1854, President Franklin Pierce signed an act "to cause to be surveyed the tract of land in the territory of Minnesota belonging to the half-breeds, or mixed bloods, of the Dakota or Sioux nation of Indians."[43] The Lake Pepin Reservation was surveyed in 1855 consisting of 320,000 acres – 500 square miles.[44]

Section 2 of the Act of July, 1854 authorized the President to "cause to be ascertained the number and names of the half-breeds or mixed bloods who are entitled to participate in the benefits of the said grant or reservation as aforesaid, before the issues of certificates or scrip provided for in the preceding section."[45] In 1856, the government completed a "Register of the Names of Half Breeds or Mixed Bloods, now living, of the Medanwahkaton, Wahjpacouta, Wahpteton, and Sisseton

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[40] 10 Stat. 304, App. 21
[41] House Report No. 138, 33rd Congress (April 28, 1854). App. 9-20 at 15. The treaty proclaimed on February 24, 1831 can be found in 7 Stat. 328. App. 1-8.
[42]Squires, Rod, "The Boundary Lines of the Half-Breed Reservation in Minnesota Territory," *Minnesota Surveyor,* vo. 18, no. 2, p. 133 (Summer 2010). App. 115.
[43] *Id.* App. 115.
[44] *Id.* App. 117.
[45] Act of July 17, 1854, 10 Stat. 304. App. 21.

Bands of Sioux Indians who claim Interests in the half breed reservation on Lake Pepin…"[46] The federal register included 642 Dakota names.[47]

The statutory method of assigning lands within the Lake Pepin Reservation to the eligible Dakota involved scrip.[48] The Act authorized the President to exchange the interest each half blood, or mixed blood, possessed in the land under the 1830 treaty for scrip entitling them to acquire title to land within the boundaries of the reservation.[49] According to the available records, seven hundred and ninety-two scrip were issued beginning in 1857 and continuing through 1868.[50]

The U.S. Supreme Court in *Midway Co. v. Eaton* summarized the Department's administrative history through 1902 regarding the issuance and administration of scrip under the Act of July 17, 1854.[51] The Department's first circular of instructions was issued on March 21, 1857.[52] The circular stated that the scrip "must be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian."[53] The Department's 1857 circular further stated, "You will observe that this scrip is *not assignable*, transfers of the same being held void; consequently,

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[46] App. 22-40.
[47] App. 24-40.
[48] Act of July 17, 1854, 10 Stat. 304. App. 21.
[49] *Id.* A partial legible copy of a "Sioux Half-Breed Reserve of Lake Pepin" scrip has been included in the appendix at App. 93-94. *See, generally,* William Millikan, "The Great Treasure of the Fort Snelling Prison Camp," *Minnesota History,* vol. 62/1, p. 4 (Spring 2010). App. 95-110.
[50] Tract Book, Sioux H.B. [Half Breed] Scrip Location nos. 1 through 792 (1857-1868), Minnesota History Center. App. 49-92.
[51] 183 U.S. 602, 609–11 (1902)
[52] *Id.* at 610.
[53] *Id.*

each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificate or scrip are not to be treated as money, but located acre for acre."[54]

The Department issued another circular on February 22, 1864.[55] The instructions were repeated, and the following added. "When not located by the reservee in proper person the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee."[56]

The Department in 1872 issued a special circular[57] which contained the following direction and identified the purpose of the issued scrip within the Lake Pepin Reservation:

> That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.[58]

The Department in 1878 issued a new circular which repeated the provisions of the circulars of 1864 and 1872.[59] Later, the Secretary of the Interior, Vilas, made determinations in *Allen v. Merrill*, 8 Land Dec. 207, and in *Hyde v. Eaton*, 12 Land

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* (1 C. L. L. 723).
[58] *Id.* at 611.
[59] *Id.* (2 C. L. L. 1355; 5 C. L. O. 126).

Dec. 157, regarding Lake Pepin Reservation scrip.[60] These decisions were later affirmed on review by Secretary Noble.[61]

The U.S. Supreme Court in its *Midway Co. v. Eaton* decision shows that the Department administered the MSIM's Lake Pepin Reservation from the Act of July 17, 1854 through at least 1902.[62] Since the Department was still administering the MSIM's Lake Pepin Reservation forty years after the Act of February 16, 1863, the Department's actions affirm the Act of February 16, 1863 abrogating all previous treaties between the MSIM and the United States (and hence, all previously established reservations), did not terminate the MSIM as a tribe nor, notably, the MSIM's Lake Pepin Reservation.[63] Moreover, while most of the reservation land has been sold by scrip, the reservation's boundary and, hence, the reservation itself still exists.

Importantly, since 1902, there has not been a Congressional Act diminishing the MSIM's Lake Pepin Reservation statutorily codified in the Act of July 17, 1854.[64]

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[60] *Id.*
[61] *Id.*
[62] *Id.* at 609-611.
[63] *Id.*
[64]The U.S. Supreme Court recently stated, "'[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.'" *Nebraska v. Parker,* 136 S.Ct. 1072, 1078-1079 (2016) (citations omitted).

C. Section 9 of the unrepealed Act of February 16, 1863 statutorily establishes the Secretary's 1865 set apart lands as an MSIM "12 Square Mile Reservation" "forever."

The Act of February 16, 1863 statutorily established the Secretary's 1865 set apart lands as an MSIM "12 Square Mile Reservation" "forever."[65] Section 9 states:

> Sec. 9. And be it further enacted, That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the above-named bands who exerted himself in rescuing whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs *forever*.[66]

In 1865, the Secretary used his authority under Section 9 to set apart a 12 square mile reservation for the MSIM.[67] The Secretary set apart the 12 square mile (also 12 sections or 7,680 acres) reservation for the MSIM on March 17, 1865.[68]

The Secretary in a letter dated March 17, 1865, authorizes "Revd. S.D. Hinman, Missionary … to designate twelve sections in a reasonably compact body and I will direct the local land offices to reserve the same from settlement or sale as soon as they are notified of Mr. Hinman's selection."[69] In response, Reverend Hinman responded to the Secretary's directive by identifying 12 sections of land and he wrote the 12 sections down on the same Secretary letter of March 17, 1865.[70] The 12 sections Reverend Hinman wrote down were in Redwood, Renville, and Sibley

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[65] Act of Feb. 16, 1863, 12 Stat. 652. App. 126-128.
[66] *Id.* App. 128. (Emphasis added).
[67] App. 129-146.
[68] App. 129-130.
[69] *Id.*
[70] *Id.* at 130.

Counties (Minnesota): Sections 1, 2, 3, 11 and 12, T. 112 N., R. 35; Section 35, T. 113 N., R. 35; Section 5, 6, 7, 8 and 9, T. 112 N., R. 34; Section 31, T. 113 N., R. 31.[71] The Secretary of Interior *initialed* Reverend Hinman's selection – thereby setting the 12 sections apart for MSIM.[72]

Six days later, on March 23, 1865 the Commissioner of Indian Affairs wrote to Rev. Hinman confirming the "decision of the Secy of the Interior already in your hands will be sufficient to authorize you to proceed to collect and establish the friendly Sioux upon the lands designated by you in your letter of the 17th instant."[73] The Commissioner also noted that "Supt. Thompson has been authorized to expend a sum not exceeding eight hundred dollars for plowing land and for the purchase of farming tools and seeds for the Indians in question."[74]

In a letter written on the same date, March 23, 1865, Rev. Hinman wrote to Bishop Whipple that "upwards of 10,000 acres of land [are] set apart for Taopi & friendly Sioux located at Redwood and including our dear little church. The Indians are to have 80 acres each – i.e., heads of families – in fees simple and unalienable. Clark Thompson, Supt, has agreed to furnish seed & plough the land for me…."[75]

However, in an undated letter written by Rev. Hinman to Bishop Whipple he would note white resistance to the Mdewakanton:

> The Sec. of the Interior, at our request, withdrew from sale, by Ex. Order, 10,000 acres for this purpose & located it at & near

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[71] *Id.*
[72] *Id.*
[73] App. 134.
[74] *Id.*
[75] App. 135-136.

> the old Lower Sioux Agency. Gen. Pope refuse[d] to let these Indians locate there, but Gen. Grant overruled Pope and order Sibley to allow the settlement to be made as we attempted. This was however prevented by the feeling at New Ulm and on the border generally consequent upon a recent cold blooded murder by the renegade Indians near Mankato. This 10,000 acres was being withheld from sale for some years, but finally restored for sale.[76]

The white resistance would reach the Secretary through a report dated April 29, 1866 confirming Rev. Hinman's own assessment: "Action was taken by the department, about one year ago, to select for them eighty acres of land each upon the old reservation, but the feeling among the whites is such as to make it impossible for them to live there in safety."[77]

The Department in a May 18, 1869 letter acknowledged the lands had been set apart by the Secretary in 1865.[78] Nonetheless, the Commissioner recommended selling the land to the public because the MSIM were difficult to find and impractical to locate:

> It appears from the papers on file on file on this subject that the lands with-held are all or nearly all occupied by settlers and that they are surrounded by settlements[.] I am therefore of opinion that it would be better to restore these lands to market as it will probably be impracticable to locate Indians on the same.[79]

The Department later sold to the public the MSIM's set-apart 12 square miles of

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[76] App. 137-139.
[77] Report of the Secretary of the Interior (April 20, 1866). App. 141.
[78] Letter dated 18 May 1869 from Commissioner to Secretary. App. 143-146.
[79] *Id.* App. 145.

public lands.[80]

Section 9 states that such "land so set apart… shall be an inheritance to said Indians and their heirs forever."[81] Accordingly, the lands so set apart are the MSIM's 12 Square Mile Reservation "forever."[82] Any subsequent title is subject to Section 9's statutory restriction in favor of the MSIM forever.

Again, Congress has never enacted a law diminishing the MSIM's 12 Square Mile Reservation.[83]

D. Under the unrepealed 1888-1890 Appropriation Acts, the land the Department acquired was for MSIM members and are MSIM's "1886 Lands Reservation."

The unrepealed 1888-1890 Appropriation Acts and the land the Department acquired thereunder is MSIM's "1886 Lands Reservation."[84] In October 1979, the Department produced a "Portfolio of Information" summarizing the MSIM's 1886

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[80] *Wolfchild v. United States*, 731 F.3d 1280, 1293 (Fed. Cir. 2013) (referring to the public sale occurring no later than 1895). Notably, the Department under the 1888-1890 appropriation acts repurchased in 1889-1891 purchased about 623 acres, a small fraction of the 12 square miles, for the MSIM's 1886 Lands Reservation at Lower Sioux which the Department had sold previously after the Secretary had set it apart for the MISM "forever." App. 246.

[81] Act of Feb. 16, 1863, 12 Stat. 652. App. 128.

[82] *Id.*

[83] *See* n. 64, *supra*. While the Act appears to represent the lands "shall not be aliened or devised, except by the consent of the President of the United States," and the lands were later sold, once the lands were set aside, the sale had to have the MSIM approval before any "consent" could be granted. There is no evidence in any record that MSIM approved the sale to others to the Tribe's lands, hence, there was never any "consent." *See e.g. Johnson v. McIntosh* (21 U.S. (8 Wheat.) 543 (1823)) where Chief Justice Marshall ruled for the Court that Indian tribes could not convey land to private parties without the consent of the federal government.

[84] 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. App. 165-172.

Lands Reservation.[85] The Portfolio's collection of relevant documents regarding these lands, does not identify a Congressional termination act for MSIM's 1886 Lands Reservation.[86]

The Department's Portfolio of Information affirms the acquired 1886 lands as MSIM's 1886 Lands Reservation.[87] However, in 1979, similar to the 1934 to1936 memoranda discussed below, the Portfolio of Information did not address the Lake Pepin Reservation under the Act of July 17, 1854, nor the Twelve Square Mile Reservation under section 9 of the Act of February 16, 1863. Instead, unfortunately, the Portfolio of Information was limited to "[a] comprehensive search of the 'Statutes at Large of the United States Congress'… between July 4, 1884 and August 19, 1890."[88] If it had not been so limited, the 1979 Portfolio of Information would have included the MSIM's Lake Pepin Reservation and 12 Square Mile Reservation identified in the Act of July 17, 1854 and in section 9 of the Act of February 16, 1863, respectively. App. 21; 126-128. The result would have been a more complete legal analysis including MSIM and its reservations.

Nonetheless, the Portfolio of Information does have information about the 1886 Lands Reservation. In Section I, the relevant acts of Congress – Act of June 29, 1888; Act of March 2, 1889; and Act of August 19, 1890 are included.[89] In

[85] App. 147-401.
[86] *See* n. 64, *supra*.
[87] *Id.*
[88] App. 153.
[89] App. 152-173.

Section II, a copy of the Indian Reorganization Act of 1934 is included.[90] In Section III, copies of the relevant tribal roll for the MSIM: the "McLeod and Henton Rolls."[91] In Section IV, copies of the deeds and expenditures for the 1886 Lands are included.[92] In Section V, maps of the 1886 Lands are included.[93] In Section VI, population estimates of the MSIM are included.[94] In Section VII, the Communities' organizational documents are included.[95] In Section VIII, land use documents are included including the land assignment documents for MSIM.[96]

Nothing in the Department's Portfolio of Information identifies a Congressional termination act prior to 1979 for MSIM's 1886 Lands Reservation.[97] A separate discussion of the 1980 Act is provided below.[98]

E. The MSIM has a right to purchase at equitable prices surplus Dakota reservation land in Minnesota under the Minnesota Public Lands Improvement Act of October 18, 1990.

The MSIM has a right to purchase at equitable prices any surplus Dakota reservation land in Minnesota under the Minnesota Public Lands Improvement Act of October 18, 1990.[99] Section 205 of the Act allows the Department to resolve claims regarding surplus lands in Minnesota including equitable pricing:

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[90] App. 174-177.
[91] App. 190-222
[92] App. 223-247.
[93] App. 248-264.
[94] App. 265-267.
[95] App. 268-325.
[96] App. 325-341.
[97] *See* n. 64, *supra*.
[98] Act of Dec. 19, 1980, 94 Stat. 3262.
[99] P.L. 101-442, 104 Stat. 1020 (Oct. 18, 1990)

> SEC. 205. RESOLUTION OF CLAIMS. (a) SALES.—In accordance with the provisions of this section, the Secretary is authorized to sell and issue a patent to a tract of public land located in Minnesota to an applicant for such sale where the Secretary determines that— (1) such tract does not exceed one thousand five hundred acres and, because of its location or other characteristics, is difficult and uneconomic to manage as part of the public lands and is not suitable for management by another Federal department or agency, and (2) such sale would not be inconsistent with land use plans, if any, developed in accordance with section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712). (b) PRICE ADJUSTMENTS.—Notwithstanding any other provision of law, following adjudication of any claims the Secretary may, at the Secretary's discretion, convey land pursuant to this section at fair market value, less equities presented by an applicant for such conveyance and less the value of any improvements that the applicant or the applicant's predecessors in interest have placed on the land. Such equities may include but are not limited to (1) the amount paid for the land by the applicant; (2) longevity of applicant's claim; (3) taxes paid on the land; and (4) other equities as the Secretary may determine relevant.[100]

For example, in 2002, the Department sold and patented a small parcel within the former Dakota reservation along the Minnesota River – not far from the 12 Square Mile Reservation.[101] The Department as guardian of MSIM failed in 2002 to notify the MSIM of its potential claim to the parcel and the possibility of equitable pricing by the Secretary.

ARGUMENT

I. Legal Standard

"A preliminary injunction is 'an extraordinary remedy that may only be

[100] *Id.*
[101] App. 831-832.

awarded upon a clear showing that the plaintiff is entitled to such relief."[102] "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." [103] "'When seeking a preliminary injunction, the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.' "[104] "The four factors have typically been evaluated on a 'sliding scale.'"[105] Under this sliding-scale framework, "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.[106]

II. MSIM is likely to succeed on the merits.

The Plaintiffs are likely to succeed on the merits for the following reasons.

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[102] *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C.Cir.2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

[103] *Aamer v. Obama,* 742 F.3d 1023, 1038 (D.C.Cir.2014) (quoting *Sherley,* 644 F.3d at 392 (quoting *Winter,* 555 U.S. at 20, 129 S.Ct. 365) (alteration in original; quotation marks omitted)).

[104] *Abdullah v. Obama,* 753 F.3d 193, 197 (D.C.Cir.2014) (quoting *Davis v. Pension Benefit Guar. Corp.,* 571 F.3d 1288, 1292 (D.C.Cir.2009)).

[105] *Davis,* 571 F.3d at 1291 (citation omitted).

[106] *Id.* at 1291–92. The Plaintiffs acknowledge that it is not clear whether this Circuit's sliding-scale approach to assessing the four preliminary injunction factors survives the Supreme Court's decision in *Winter. See Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F.Supp.3d 108, 112 (D.D.C.2015). Several judges on the United States Court of Appeals for the D.C. Circuit have "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.' " *Sherley,* 644 F.3d at 393 (quoting *Davis*, 571 F.3d at 1296 (concurring opinion)). *See also Reinhard v. Johnson*, 209 F.Supp.3d 207, 214 (D.D.C., 2016).

A. The D.C. Circuit in Cherokee Nation of Oklahoma v. Babbitt[107] held that the federal listing of a tribe is not legally determinative; the Article III judicial branch gets the final word.

According to the D.C. Circuit, the Department's federal listings are not determinative of tribal claims; instead, the Article III judicial branch may get the final word as part of its administrative oversight per the Administrative Procedures Act.[108] The D.C. Circuit in *Cherokee Nation of Oklahoma v. Babbitt*[109] 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.[110] The D.C. Circuit concluded "that by entering into the 1867 Agreement the Delaware Tribe of Indians relinquished its tribal identity or sovereignty in relation to the Cherokee Nation."[111] 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.[112]

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[107] *Id.*
[108] *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997).
[109] *Id.*
[110] *Id.* at 1501.
[111] *Id.* at 1503.
[112] Complaint at ¶ 147.

B. Under *Carcieri,* the Secretary of the Interior's authority under the IRA to take land into trust for Indians is limited to Indian tribes that were under federal jurisdiction when the IRA was enacted; the MSIM was under federal jurisdiction when the IRA was enacted.

The United States Supreme Court in *Carcieri v. Salazar* held that Secretary of the Interior's authority under the Indian Reorganization Act (IRA) to take land into trust for Indians was limited to Indian tribes that were under federal jurisdiction when the IRA was enacted.[113] The MSIM was under federal jurisdiction when the IRA was enacted in 1934; the Department acknowledged the MISM to organize under IRA.[114] On November 17, 1934, the MSIM voted favorably at a Secretarial Election to be organized under the IRA.[115] The Department approved the MSIM's Communities later in 1936 and 1969.[116] So, under *Carcieri,* the Secretary has the authority under the IRA to take land into trust for MSIM because it was under federal jurisdiction when the IRA was enacted.

C. Statutory canons require 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.

Statutory canons require interpreting statutes in favor of American Indians, including those requiring clear and unambiguous Congressional acts to terminate tribes[117] acknowledged under the 1934 IRA and to diminish reservation boundaries

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[113] *Carcieri v. Salazar*, 555 U.S. 379 (2009).
[114] App. 404.
[115] App. 404.
[116] App. 411-434.
[117] *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

of acknowledged tribes.[118] 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."[119] 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.'"[120] Statutes concerning Indian rights are to be construed in their favor.[121] Statutes relating to Indians are construed in such a manner to give the greatest protection possible to Indians.[122]

Accordingly, clear and unambiguous acts of Congress are required to terminate tribes and diminish reservation boundaries.[123] Termination of federal agency responsibility for an acknowledged Indian tribe requires "plain and unambiguous" action evidencing a clear and unequivocal intent of Congress to terminate its relationship with the tribe.[124] Similarly, the intent of Congress must

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(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).

[118] *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).

[119] *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)).

[120] *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174 (1973).

[121] *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).

[122] *U.S. v. Drummond,* 42 F. Supp. 958, 961 (W.D. Okla. 1941), *aff'd*, 131 F.2d 568 (10th Cir. 1942).

[123] *See* n. 10, *supra*.

[124] *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*

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."[125]

The Department cannot point to any Congressional Act that terminated the U.S. relationship with the MSIM tribe acknowledged at the very least since 1934 at the time of the passage of the IRA. The Communities 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 with three reservations.

D. MSIM is a tribal ward acknowledged by the Department under the 1934 IRA which has not been terminated by Congress; as such, the Department is MSIM's guardian with a legal obligation to inform the MSIM what it knows or should know.

The Department has always maintained a federal guardianship-tribal ward relationship with tribes. As early as 1831, the Supreme Court recognized that the relationship between Indians and the federal government was like "that of a ward

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States, 391 U.S. 404, 412-413 (1968) ; *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

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

to his guardian."[126] Half a century later, in upholding a statute placing certain crimes between Indians under federal jurisdiction, the Court again noted that "Indian tribes are the wards of the nation" and reaffirmed that the federal government owes Indians a "duty of protection."[127] The fiduciary nature of the government's duty was made explicit in *Seminole Nation v. United States,* 316 U.S. 286 (1942), in which the Court applied the "most exacting fiduciary standards" of the common law in assessing the government's discharge of its duties. In *United States v. Mitchell,* 463 U.S. 206 (1983), the Court reiterated the existence of a "general trust relationship" which imposes "distinctive obligation[s]" in addition to those established by statute. Those distinctive obligations include the right of consultation where the Department tells the tribal ward what the Department knows or should know.[128]

A recent example of federal and tribal cooperation in Minnesota was reached on January 17, 2017. The federal Bureau of Land Management (BLM) finalized the return of nearly 60,000 acres to the Red Lake Nation.[129] The BLM stated in its press release:

The action represents a significant milestone in meeting the

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[126] *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.) (Indians' "relation to the United States that of a ward to his guardian"), *cited* in *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993).
[127] *U.S. v. Kagama*, 6 S.Ct. 1109, 1114 (1886).
[128] Restatement of Trusts, 2d § 170 (1959) ("The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.").
[129] https://www.blm.gov/press-release/blm-finalizes-return-nearly-60000 acres-land-red-lake-band-chippewa-indians-minnesota.

> requirements of a decades-old Secretarial Order signed in 1945 that mandated the return of lands to tribal ownership. "The restoration of these lands to the Red Lake Band of Chippewa Indians is an example of the Department of the Interior working in collaboration with Tribal Nations to restore tribal homelands, which are the foundation of their cultures, livelihoods and sovereignty," said Lawrence S. Roberts, Principal Deputy Assistant Secretary for Indian Affairs. "Congratulations to the Red Lake Band leadership for their commitment to working collaboratively with the Department to restore nearly 60,000 acres of land."[130]

Similarly, the MSIM is entitled to cooperation from its federal guardian in restoring its tribal homelands: the Lake Pepin Reservation; the 12 Square Mile Reservation and the 1886 Lands Reservation.

E. The Department's former legal analysis of MSIM in 1935 and 1936 failed to reflect existing MSIM reservations.

The Department's former legal analysis of MSIM in 1935 and 1936 to support the initial two communities[131] noted that "these Indians cannot be recognized as tribes." The statute as providing for land purchased for these Indians expressly restricted the use of such lands to Indians who have abandoned their tribal relations."[132] The analysis appears incomplete since it neglects MSIM as if non-existent. Notably, there is no evidence that all MSIM members severed "tribal relations." Further, it failed to consider the MSIM's existing three reservations which have not been diminished by Congressional Act and the IRA's three savings

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[130] *Id.*

[131] The third community, the Shakopee Mdewakanton Sioux (Dakota) Community, was not established until 1969. However, the same analysis would likely support the Department's rationale for Shakopee since no other documents have yet been found to indicate any different legal analysis.

[132] App. 403.

clause preserving MSIM as a tribe and preserving MSIM's three reservations.

The Department in 1934 through 1936 acknowledged the MSIM as organizing under the IRA.[133] On November 17, 1934, the MSIM – also known as the "Indians under the Pipestone School Jurisdiction" – "accepted the Indian Reorganization Act by a vote of 94 to 2, the total vote case, 96, amounting to more than 30% of the eligible voters 271."[134] "These Indians originally presented for consideration one constitution, the jurisdiction of which would have extended over all Mdewakanton Sioux Indians of Minnesota."[135]

Four other memoranda dated in 1935 and 1936, included in the appendix, exist showing the Department's acknowledgement of the MSIM as organizing under the IRA, but are also an incomplete legal analysis because the memoranda do not address the MSIM's three reservations.[136]

The first memorandum is dated December 2, 1935 and written by Commissioner John Collier.[137] Commissioner Collier's memorandum states that the MSIM can organize under the IRA as Indians residing on a reservation.[138] However, Collier notes that "[t]hese Indians cannot be recognized as a tribe" because of the "severance of tribal relations" provision in the 1888-1890

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[133] App. 402-410.
[134] App. 404.
[135] *Id.*
[136] App. 402-410.
[137] App. 402-403.
[138] *Id.* Public Law 100-581, title I, Sec. 101, Nov. 1, 1988, 102 Stat. 2938 deleted from section 16 of the IRA the "residing on same reservation" text, but had a savings clause at Sec. 103: "Nothing in this Act is intended to avoid, revoke or affect any tribal constitution, bylaw or amendment ratified and approved prior to this Act."

appropriation acts.[139] While the Tribe voted to accept the IRA to create the communities, the tribal members did not sever tribal relations — except possibly those who accepted land assignments. Hence, Collier's legal conclusion that MSIM is not a tribe with reservations based on "severance of tribal relations" is legally incorrect for many reasons.[140] First, the memorandum omits any legal analysis of the MSIM's Lake Pepin Reservation and 12 Square Mile Reservation.[141] Again, there is no evidence all MSIM members have severed trial relations.

Second, for the sake of argument, even if the Commissioner's legal analysis of the "severance of tribal relations" provision is correct, it would not affect MSIM's acknowledged tribal status because MSIM still has two other reservations without such restriction.

Third, the Commissioner's argument begs the question of which tribe the MSIM individuals were severing from in 1888-1890?[142] The tribe in 1888-1890 would have to be the MSIM, of course; at that time, the Department was administering MSIM's Lake Pepin Reservation.

Fourth, the 1888-1890 appropriation acts do not state that MSIM as a tribe has to sever tribal relations; only that individuals receiving land assignments do.[143]

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[140] *Id.*
[141] *Id.*
[142] App. 403.
[143] Act of June 28, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.

Accordingly, the 1888-1890 appropriate acts do not terminate MSIM.[144] MSIM's tribal status is unaffected by the 1888-1890 appropriation acts.[145]

Fifth, federal and other census data reflect that thousands of MSIM reside off the 1886 Lands.[146] In early 2017, the Department issued a Notice of Final Payment under the Act of October 25, 1972[147], which included a judgment roll that specifically identified thousands of MSIM lineal descendants who were not members of the three communities.[148] The Department's 1934 census of Mdewakanton Sioux Indians of Minnesota show about one-half of the five hundred and fifty-two MSIM living off the 1886 Lands Reservation.[149] The Plaintiffs' Complaint exhibit A contains the names of over 7,000 MSIM lineal descendants sought after in the "Department's Preliminary Plan of Distribution of Judgment Funds to Loyal Mdewakanton" arising from earlier litigation.[150]

Sixth, the "severance of tribal relations" provisions in the 1888-1890 appropriation acts became legally obsolete after the 1924 Indian Citizenship Act.[151] Section 6 of the 1887 General Allotment Act or "Dawes Act" – enacted a year before the 1888-1890 appropriation acts – provided that Indian allottees who have separated themselves apart from the tribe qualify for U.S. citizenship:

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144 *Id.*
145 *Id.*
146 App. 552-829.
147 86 Stat. 1168. App. 549-551.
148 App. 552-573.
149 App. 574-616.
150 77 FR 59963 (Oct. 1, 2012); App. 617-829 (list of MSIM lineal descendants).
151 43 Stat. 253 (1924).

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence ***separate and apart from any tribe of*** *Indians* therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.[152]

Thus, the Dawes Act created a statutory framework for allotting lands to Indians and for Indians receiving allotments "who have severed tribal relations" to establish citizenship.[153]

Consistently, one year later, the 1888-1890 appropriation acts – which are appropriation acts— not public laws modifying the Dawes Act -- authorized appropriations for the Department to purchase land for the Mdewakanton Sioux Indians of Minnesota.[154] However, the lands purchased by the Department with the appropriated funds were never allotted under the Dawes Act.[155] Thus, the "severance of tribal relations" provisions found in the 1888-1890 appropriation acts were never relied on by the individual Indians to obtain citizenship under the 1924 Indian Citizenship Act because the individual Indians never received an allotment

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[152] Dawes Act of 1887, 24 Stat. 387.
[153] *Id.*
[154] Act of June 28, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.
[155] *See Brewer v. Acting Deputy Assistant Sec'y-Indian Affairs,* 10 I.B.I.A. 110, 118-119 (1982) ("[t]he Department's position concerning these lands has ... consistently been that they were not made available by Congress for allotment, were never allotted …").

from the Department.[156] Thus, the 1924 Indian Citizenship Act[157] which granted all Indian tribal members citizenship had the legal consequence of rendering the "severance of tribal relations" provisions in the 1888-1890 appropriation acts legally obsolete.[158]

The second memorandum is dated March 11, 1936, and written by Assistant Commissioner William Zimmerman, Jr.[159] Assistant Commissioner Zimmerman wrote a letter calling for special elections on the Lower Sioux and Prairie Island Constitutions.[160] Assistant Commissioner Zimmerman identified the MSIM as being the Indians proposing the Constitution, as having "prior tribal ties" and as being entitled to land assignments at the different localities:

> The Indians offering the proposed constitutions and bylaws are Mdewakanton Sioux in Minnesota, who are descendants of certain Santee Sioux Indians who remained in Minnesota at the time of the removal of the main body of the Santee Sioux to Nebraska. At the time of the removal there was no reservation land for these Indians. Since 1886, however, lands have been purchased for them under various appropriation acts…These lands are in three localities, more than one hundred miles apart, but in each locality they are quite compact. They were assigned to the Mdewakanton Sioux Indians of Minnesota under rules and regulations of the Secretary of the Interior. Any Indians of the Mdewakanton Sioux Indians of Minnesota is eligible for an assignment in any one of the localities provided land is available.
>
> These Indians originally presented for consideration one constitution, the jurisdiction of which would have extended over

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[156] *Id.*
[157] Act of June 28, 1888, ch. 503, 25 Stat. 217, 228-29; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980, 992-93; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336, 349.
[158] *See* Sutherland Statutory Construction, § 23:26 Repeal by desuetude, obsolescence, and non-enforcement.
[159] App. 404-405.
[160] *Id.* at 404.

> all Mdewakanton Sioux Indians of Minnesota. Study in the field, however, resulted in a determination by the Indians to organize on the basis of each locality….
>
> The proposed constitution and by-laws are practically identical. This is due to the fact that the Indians desired to have the same provisions not only because they are bound together by prior existing tribal ties, but also because any Mdewakanton Sioux Indian in Minnesota is entitled to an assignment in any one of the localities.[161]

Again, this memorandum acknowledges the MSIM can organize under the IRA, but without analyzing the Lake Pepin Reservation and the 12 Square Mile Reservation.[162]

The third document is the Solicitor's opinion written on April 15, 1935.[163] The Solicitor issued an opinion stating the limited powers of the community governments because "neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence on reserved land."[164] Again, this document acknowledges the MSIM can organize under the IRA, but without analyzing the Lake Pepin Reservation and the 12 Square Mile Reservation.[165]

The fourth document is a memorandum from Assistant Solicitor Westwood and Chief J.R. Vanning which confirms the discussion above:

> The constitution submitted in October for the Mdewakanton Sioux proposed a single organization of all the Mdewakanton Sioux communities. On the legal side, however, it was subsequently determined (see office memoranda referred to) that

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[161] App. 405.
[162] App. 404-405.
[163] App. 406-407. It appears that some Department archives have the Solicitor's opinion inaccurately dated as April 15, 1938.
[164] *Id.*at 406.
[165] App. 406-407.

> these Indians had under the land purchase acts abandoned tribal relations and therefore were not privileged to organize as a tribe over various reservations. Their only basis of organization was as Indians residing on a reservation.[166]

Again, this document acknowledges the MSIM can organize under the IRA, but without complete legal analysis of the Lake Pepin Reservation and the 12 Square Mile Reservation.[167] The memorandum's legal conclusion on "severance of tribal relations" is incorrect for the same reasons given above.

Since enactment of the IRA, the Department maintained for MSIM a tribal trust account for MSIM from the 1940's through about 1981 and continued the federal land assignment system for the 1886 Lands Reservation. Until about 1969, when SMSC was approved by the Department, LSIC was responsible for recommending land assignments to the Department for 1886 Lands at SMSC. All MSIM lineal descendants were entitled to land assignments at any of the Communities.

F. The June 14, 2017 proposed constitution is consistent with the Department's vigorous interpretation of 25 U.S.C. 5123 (f) and (g) as applied to the three communities which terminates MSIM as an acknowledged tribe and diminishes the MSIM's three reservations, but is legally null and void by the IRA's three savings clauses at 25 U.S.C. §5121, 25 U.S.C. § 5123(h) and 25 U.S.C. §5128.

The June 14, 2017 proposed constitution is consistent with the Department's robust interpretation of 25 U.S.C. 5123 (f) and (g) as applied to the three communities which terminates MSIM as an acknowledged tribe or diminishes the

[166] App. 409.
[167] App. 408-410.

MSIM's three reservations, but is legally null and void by the IRA's three savings clauses at 25 U.S.C. § 5121, 25 U.S.C. § 5123(h) and 25 U.S.C. § 5128.

The IRA has three "savings" provisions preserving the tribal status of the MSIM and preserving the MSIM's three reservations. First, 25 U.S.C. § 5123(h) states itself that, notwithstanding any provision in the IRA, that a tribe such as MSIM retains its inherent sovereign powers:

> (H) TRIBAL SOVEREIGNTY
> Notwithstanding any other provision of this Act— (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

The June 14, 2017 proposed Constitution violates the savings clause of 25 U.S.C. § 5123(h) because it violates MSIM's "inherent sovereign power."

Second, 25 U.S.C. §5121 states that, notwithstanding any provision in the IRA, no claim or suit of an Indian tribe or its rights are impaired:

> Claims or suits of Indian tribes against United States; rights unimpaired
>
> Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States…

The June 14, 2017 proposed Constitution violates the savings clause of 25 U.S.C. § 5121 because it impairs or prejudices MSIM's claims and suits against the United States.

Third, 25 U.S.C. § 5128 expressly preserves all laws, general and specific, concerning reservation land as continuing after the IRA, which would include those

statutes which create rights and entitlements for the MSIM:

> Application of laws and treaties
>
> All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 5101 et seq.], shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.

The June 14, 2017 proposed Constitution violates the savings clause of 25 U.S.C. § 5128 because MSIM's rights under all laws, general and special, to its three reservations – per the Act of July 17, 1854, section 9 of the Act of February 16, 1863 and the 1888-1890 appropriations acts – are being violated by the Department in the name of the IRA despite the IRA provision that such laws "shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934."

To be sure, 25 U.S.C. 5123 (f) and (g), 1994 amendments 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.

Accordingly, under paragraphs (f) and (g), the Department regulations, administrative decisions or determinations made in 1935, or before or since 1935, regarding the reservation's communities being non-tribal because of interpreting the 1888-1890 Appropriation Acts "severance of tribal relations" provision as running with land have "no force or effect." Thus, under paragraphs (f) and (g), the Department in future regulations, administrative decisions or determinations must regard the reservations' communities as "MSIM-tribal" under the IRA – notwithstanding any text in the 1888-1890 Appropriation Acts suggesting non-tribal.

The Department's policies, practices and customs err, in violation of the IRA's savings clauses, when the Department vigorously interprets paragraphs (f) and (g) as a legal basis to treat the three communities which were organized as "non-tribal Indians on a reservation" as three separate sovereign tribes resulting in the MSIM and MSIM's reservations being terminated without a Congressional act. Accordingly, any robust interpretation of 25 U.S.C. 5123 (f) and (g) as applied to the

three communities which terminates MSIM as an acknowledged tribe or diminishes the MSIM's three reservations is legally null and void by the IRA's three savings clauses.

With the June 14, 2017 proposed constitution, the Department's legal analysis goes too far, contrary to federal law, converting the Communities, not into tribes as the Department argues, but into legally unauthorized agent-representatives of the Department declaring, contrary to federal law, that the MSIM as a tribe is terminated.

G. The proposed June 14, 2017 PIIC constitution is consistent with the Department's misapplication of the 1980 Act in violation of the IRA's savings clauses resulting in the communities being agent-representatives of the Department – not tribes as the Department argues -- which is contrary to federal law.

If anything, the proposed June 14, 2017 PIIC constitution is consistent with the Department's misapplication of the 1980 Act in violation of the IRA's savings clauses. Hence, the proposed PIIC constitutional provisions mirror the Department's policy and, accordingly, seemingly solidifies administrative acts which cannot be done without Congressional Acts. The mirroring by the Community and resultant repercussions and consequences to the MSIM effectively makes PIIC an agent-representative of the Department. The constitutional changes embrace that which the Department cannot do without Congressional acts; hence, the Department acts contrary to federal law.

Due to the IRA's savings clauses, any Department interpretation of the 1980 Act diminishing the MSIM's 1886 Lands Reservation turns the communities into

agent-representatives of the Department. The Department's organization of the communities (in 1936, PIIC and the Lower Sioux Indian Community; in 1969, the Shakopee Mdewakanton (Dakota) Community) under the IRA can not terminate the MSIM as a tribe or diminish the three reservations.

Thus, the 1980 Act did not terminate the MSIM nor does it diminish the MSIM's 1886 Lands Reservation because to do so would be to violate the IRA's savings clauses as explained above:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States--, (1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;
> (2) with respect to the some 572.5 acres of such lands located within Redwood County, Minnesota, in trust for the Lower Sioux Indian Community of Minnesota; and (3) with respect to the some 120 acres of such lands located in Goodhue County, Minnesota, in trust for the Prairie Island Indian Community of Minnesota.
> Sec. 2. The Secretary of the Interior shall cause a notice to be published in the Federal Register describing the lands transferred by section 1 of this Act. The lands so transferred are hereby declared to be a part of the reservations of the respective Indian communities for which they are held in trust by the United States.
> 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.

The best reading of the 1980 Act is that the MSIM is the one tribe and LSIC, PIIC and SMSC are communities of the MSIM tribe. The Department's vigorous reading of the 1980 Act and 25 U.S.C. 5123 (f) and (g) to create three separate tribes with three separate reservations, terminating the MSIM and its 1886 Lands Reservation, violates the IRA's savings clauses as explained above. Congress never intended the 1980 Act to transform the Communities into three separate sovereign tribes to terminate MSIM as a tribe and to diminish the MSIM's three reservations and surplus lands; otherwise, Congress would have enacted a statute that said so. The Department is in legal error to argue that the IRA and the 1980 Act terminate MSIM as a tribe and diminish the MSIM's three reservations and surplus lands. The June 14, 2017 proposed Constitution continues the Department's legal error interpreting the IRA and the 1980 Act.

H. The June 14, 2017 proposed constitution fails to address the 1886 Lands situation at PIIC after the 1996 statutory dissolution of its corporate charter.

The June 14, 2017 proposed constitution fails to address the 1886 Lands situation at PIIC after the 1996 statutory dissolution of PIIC's corporate charter.

The Department, after Congressional revocation of the Prairie Island Indian Community corporate charter in 1996, must make land assignments to the MSIM. The 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. 47 Fed. Reg. 151 at 34050 states:

> Lands transferred and declared to be part of the reservation of the Prairie Island Indian Community: ….

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. 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."[168] In 1996, Prairie Island residents voted to revoke the charter of the "Prairie Island Indian Community."

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." The legal consequence of the 1996 Act was dissolution of the corporation "Prairie Island Indian Community." Accordingly, the corporation's beneficial interest under section 1 of the 1980 Act was terminated. MSIM is exclusively entitled now. But, the Department has not taken action under applicable federal statutes, including possibly under the Minnesota Public Lands Improvement Act of 1990, to benefit MSIM. Since 1996, the Defendants have done nothing to protect the MSIM and its rights to the 1886 Lands Reservation at PIIC. Revising the June 14, 2017 proposed constitution could be the place for the Department to start.

III. MSIM is likely to suffer irreparable harm in the absence of preliminary relief.

MSIM is likely to suffer irreparable harm in the absence of preliminary relief preventing more Secretarial Elections without prior Court legal review. Due to the actions of the federal guardian leaving the MSIM without resources, the cost of the

[168] 44 F.R. 7235.

litigation is being borne by the Plaintiffs. The Plaintiffs' resources are limited. If the Plaintiffs' resources are exhausted by litigation expense, the litigation will end – an irreparable injury. Preserving the legal status quo reduces the cost of this litigation and makes it more likely the Plaintiffs will cross the litigation finish line.

IV. The balance of equities tips in MSIM's favor.

The balance of equities tips in the MSIM's favor. MSIM is an acknowledged tribe. The preliminary relief sought is limited to preventing more Secretarial Elections without prior Court legal review to prevent the harm complained of here. The Department's interpretation of the statutes favors PIIC over the MSIM. MSIM contends the June 14, 2017 proposed Constitution is contrary to federal law. Without preliminary relief, if the June 14, 2017 Secretarial Election and future secretarial elections occur, the Constitutions of the Communities will become more skewed toward the Communities furthering violating the rights of the MSIM. If the preliminary relief is granted, the Department would be required to obtain prior approval of the Court which is not a significant burden because the Department has to give its approval of Secretarial Elections anyway. Therefore, the balance of equities tips in MSIM's favor.

V. An injunction requiring court review prior to future Secretarial Elections is in the public interest.

An injunction requiring court review prior to future Secretarial Elections is in the public interest. Governmental agencies seek to execute acts of Congress. However, whenever agencies execute a scheme to avoid Congressional oversight or to circumvent the province of Congress *and* federal court principles, it is in the

public interest to correct that course of action. It has been a principle of law that tribes cannot be terminated, nor their lands diminished, without an act of Congress. Here, the Department cannot seek to avoid the instant dispute by forsaking the MSIM through administrative schemes that are contrary to federal law. It cannot be done and should not be done. It is not in the public interest to allow executive branch agencies to ignore the legislative or judicial branches of government.

Here, the June 14, 2017 and future secretarial elections are based on the Department's vigorous interpretation of the IRA and the 1980 Act to terminate the MSIM, its reservations and its surplus lands. The Plaintiffs contend that the Department's interpretation of the IRA and the 1980 Act violates the IRA's savings clauses protecting MSIM, its reservations and its surplus lands -- resulting in the Department converting the Communities, not into tribes as it argues, but into legally unauthorized agent-representatives of the Department. The legal issues presented to the Court are of massive interest to the public; as such, they deserve from the Court the closest attention. Accordingly, the public interest requires the preliminary relief to preserve the legal status quo allowing the Court and the parties to adjudicate the legal issues presented.

CONCLUSION

The requirements for a preliminary injunction have been met. The order enjoining the Department from conducting future Secretarial Elections including the June 14, 2017 PIIC Secretarial Election without prior court approval should issue.

DATED: May 30, 2017.

/s/Erick G. Kaardal

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 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: May 30, 2017.

/s/Erick G. Kaardal
Erick G. Kaardal