UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CITY OF DULUTH,

Plaintiff,

v.

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA,

Defendant.

Civ. No. 14-912-SRN/LIB
Related Case Nos.: 5-89-163, 5-94-82 and 09-cv-2668

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA'S OPPOSITION TO THE CITY OF DULUTH'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The City of Duluth seeks a preliminary injunction to order the Fond du Lac Band of Lake Superior Chippewa to "request" that the Secretary of Interior stay further consideration of an application that the Band submitted to the Secretary in November 2011—more than two years ago—to have a parcel of land owned in fee by the Band and located within the City, placed into trust. Proposed P.I. Order ¶3. The proposed Order would also bar the Band from taking "any action" which authorizes the Secretary to take the land into trust. *Id*. ¶2. The City's claim for injunctive relief is based on its contention that under section 10 of a 1986 Agreement between the City and the Band, the Band cannot submit a fee-to-trust application to the Secretary without the City's prior consent.

The City's request for a preliminary injunction should be denied because the City faces no imminent threat of irreparable harm. The Band's trust application has been pending for more than two years in an administrative proceeding before the Interior Department, in which the City has been an active participant. While an initial first-level decision may be issued later this year (although the timing is uncertain), the City has a right to two levels of administrative appeal, and then judicial review, if that initial decision is favorable to the Band. The Band's property will not be taken into trust by the Secretary pending the administrative appeals, which typically take well over a year. Thus

the status quo will be maintained for the foreseeable future and no injunction is necessary to do so.

Additionally, the City's motion should be denied because the City has no likelihood of success on the merits of this claim. The Band has already moved to dismiss the City's complaint for failure to state a claim. Docs. 10-14 (June 2, 2014). That motion demonstrates that the City's section 10 argument is without merit, for two reasons.

First, section 10 does not require the City to consent to the Band's submission of a fee-to-trust application; it requires City consent (if at all) only to the "creation of additional Indian Country, as defined herein." And "Indian Country" as defined in the 1986 Agreement is land that is both taken into trust by the Secretary and proclaimed by the Secretary to be part of the Band's Reservation. Here, the Band has not even requested the Secretary to issue a Reservation proclamation, and the Band may never do so. Thus, the Band has not taken the necessary steps to "creat[e] additional Indian Country, as defined herein" so the City's complaint is, at best, premature.

Second, the Band's fee-to-trust application did not violate section 10 when it was submitted because that provision of the 1986 contract had been made dormant "and of no force or effect" by the terms of a subsequent 1994 Agreement between the parties. And as matters currently stand, the 1986 Agreements as a whole, including section 10, are illegal under federal law.

In sum, the City fails to demonstrate either a threat of immediate irreparable harm or any merit to its claim. Either failure is fatal to its motion for preliminary injunctive relief. That motion should, accordingly, be denied.

II. STATEMENT OF FACTS.

The Band incorporates by reference the Statement of Facts set forth in its Memorandum in Support of the Band's Motion to Dismiss the underlying complaint. Doc. 12.

III. THE STANDARD FOR A PRELIMINARY INJUNCTION.

The Supreme Court has stated that "a preliminary injunction is an extraordinary and drastic remedy," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003), and this Court has similarly observed that a preliminary injunction "'is an extraordinary remedy never awarded as a matter of right.'" *Edin v. Assoc'd Bank, N.A.*, 2013 WL 4494128, at *2 (D. Minn. Aug. 21, 2013) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)); *Ellis v. Minn. Dep't of Human Servs.*, 2011 WL 6004015, at *4 (D. Minn. Nov. 30, 2011); *Bazil v. Wells Fargo Bank N.A.*, 2011 WL 2619095, at *1 (D. Minn. July 1, 2011); *Brady v. NFL*, 779 F.Supp.2d 992, 1033 (D. Minn. 2011) *rev'd on other grounds*, 644 F.3d 661 (8th Cir. 2011).

In determining whether to grant a preliminary injunction, a court in this Circuit considers four factors: "'(1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party [will] succeed on the merits; and (4) the effect on the public interest.'" *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 729 n.3 (8th Cir. 2008) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d

864, 870 (8th Cir. 2012) (en banc); *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601 (8th Cir. 1999). Because it is "an extraordinary remedy," the movant bears the burden of proving that a preliminary injunction should be issued. *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995). *See also Watkins*, 346 F.3d at 844 ("the burden of establishing the propriety of an injunction is on the movant"); *Brady*, 779 F.Supp.2d at 1034; *Ellis*, 2011 WL 6004015 at *5.

The City here has not met its burden of demonstrating that it satisfies the four factors for this Court to issue the "extraordinary remedy" of a preliminary injunction.

IV. ARGUMENT

A. The City Has Not Demonstrated A Threat Of Imminent Irreparable Harm.

"Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." *Watkins*, 346 F.3d at 844. As this Court has noted repeatedly, "lack of irreparable harm will preclude preliminary injunctive relief regardless of the other factors." *1-800-411-Pain Referral Serv., LLC v. Tollefson*, 915 F.Supp.2d 1032, 1056 (D. Minn. 2012), *aff'd sub nom. 1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045 (8th Cir. 2014); *Brady*, 779 F.Supp.2d at 1034; *Bazil*, 2011 WL 2619095 at *1; *Ellis*, 2011 WL 6004015 at *4; *Reuter v. Jax Ltd.*, 2011 WL 1193415, at *3 (D. Minn. Mar. 29, 2011) (all quoting *Dataphase*, 640 F.2d at 114 n.9 ("[T]he absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction.")). Indeed, "a likelihood of actual irreparable harm remains

essential and the movant's burden on that factor may not be diminished based on a strong showing of the other three factors." *Brady*, 779 F.Supp.2d at 1033 n.53.

1. There is no threat of irreparable harm that is "imminent."

"'In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) (quoting *Iowa Util. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996)) (emphasis added). "Threat of irreparable harm requires more than a possibility of remote future injury; it requires a presently existing actual threat of injury." *Sempris, LLC v. Watson*, 2012 WL 5199582 at *2 (D. Minn. Oct. 22, 2012) (citing *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982)) (preliminary injunction denied where "anticipation of future harm is speculative").

The City alleges that it will suffer harm from the proposed trust acquisition in loss of taxing and regulatory authority over the property. City P.I. Br. (Doc. 23) at 24-29. But those harms will result only if and only when the property is taken into trust. And the possibility of that trust acquisition is, at this point, purely speculative because it depends entirely on the outcome of the Secretary's trust acquisition decision, and then on the outcome of any subsequent appeals. *See St. Croix Chippewa Indians of Wis. v. Kempthorne*, 535 F. Supp. 2d 33, 36-37 (D.D.C. 2008) (no irreparable harm when plaintiff's position "is based entirely on pure speculation about how the Department will rule on the Part 151 [fee-to-trust] determination, and ultimately, its application"). In short, if the Superintendent denies the Band's fee-to-trust application, or if any ruling by

the Superintendent in favor of the Band is overturned on administrative appeal, the Carter Hotel parcel will not be taken into trust and the City will never suffer any of the harms it is alleging.

And even if the prospect of harm here was not entirely speculative, there is no possibility that it is imminent. Indeed, as a practical matter, and without any order from this Court, the City can unilaterally forestall the Carter Hotel parcel trust acquisition for an indefinite period that extends at least for months, and likely for years.

Under the Department's regulations, any acquisition of the land into trust will not happen—it cannot happen—until there is final agency action.[1] So far, there has not been even an initial agency decision, much less a final one. The Band's fee-to-trust application is still pending before the BIA Superintendent for the Minnesota Agency—the first level Departmental decision-maker—as it has been since November 2011. Affidavit of Joseph Halloran ¶¶12, 29. For the past 31 months, the BIA has been conducting the review mandated by the Department's regulations. *Id*. ¶¶12, 15-26; 25 C.F.R. pt. 151. *See Cnty. of Charles Mix v. U.S. Dep't of Interior*, 674 F.3d 898, 900 (8th Cir. 2012) (describing Part 151 procedures). It is not certain when the Agency Superintendent will make her initial decision. Halloran Aff. ¶26.

[1] 25 C.F.R. §151.12(d)(2)(iv), *as amended* by Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67,929, 67,938 (Nov. 13, 2013) (transfer of title into trust is only after final agency action following exhaustion of administrative appeals); *id.* §151.12(d) (decision by a BIA official to approve the trust application is not a final agency action).

Once the Superintendent makes her initial decision, the regulations require her to provide notice of it to the City.[2] If the decision is in favor of the Band, the City will have the right to appeal to the BIA Regional Director of the Midwest Region.[3] The land will not be taken into trust pending that appeal. *See* n.1, *supra*; Halloran Aff. ¶¶7, 8, 28. If the Regional Director affirms the decision on appeal—after a period of uncertain duration, but likely to take at least several months— notice of that decision will also be provided to the City.[4] The City will then have the right to appeal that decision to the Interior Board of Indian Appeals (IBIA).[5] Although there is no set time for the disposition of an IBIA appeal, such appeals typically take at least a year, and frequently even longer.[6] Again, the land will not be taken into trust pending that appeal. Only if the Superintendent rules

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[2] 25 C.F.R. §151.12(d)(2)(ii)(B) (as amended) (notice shall be provided to "[t]he State and local governments having regulatory jurisdiction over the land to be acquired").

[3] 78 Fed. Reg. at 67,929 n.1 (appeal is to the Regional Director from Superintendent's fee-to-trust decision).

[4] 25 C.F.R. §151.12(d)(2)(ii)(B) (as amended).

[5] 78 Fed. Reg. at 67,929 (appeal of decision by BIA official is to the IBIA); 25 C.F.R. §151.12(d)(2)(ii) (as amended).

[6] *E.g, Vill. of Hobart v. Acting Midwest Reg'l Dir.*, 57 IBIA 4 (2013) (Regional Director's decisions made November 2010; IBIA decision on appeal issued May 9, 2013) (30 months); *Thurston Cnty. v. Great Plains Reg'l Dir.*, 56 IBIA 296 (2013) (Regional Director's decisions made February 2011; IBIA decision issued April 30, 2013) (26 months); *Kansas v. Acting S. Plains Reg'l Dir.*, 36 IBIA 152 (2001) (Regional Director's decision made May 2000; IBIA decision issued May 2001) (12 months); *Cnty. of San Diego v. Pac. Reg'l Dir.*, 58 IBIA 11 (2013) (Regional Director's decision made May 2011; IBIA decision issued September 2013) (28 months); *Kansas v. Acting S. Plains Reg'l Dir.*, 56 IBIA 220 (2013) (Regional Director's decision made December 2010; IBIA decision issued March 2013) (27 months); *Bd. of Supervisors v. Acting E. Reg'l Dir.*, 56 IBIA 194 (2013) (Regional Director's decision made December 2010; IBIA decision issued February 2013) (26 months).

in favor of the trust acquisition, and if the Regional Director sustains that ruling on appeal, and if the IBIA sustains that ruling on further appeal, would there then a "final" agency decision to acquire the land in trust, and only then would the Secretary act on the trust acquisition. 25 C.F.R. §151.12(d)(2)(iv) (as amended). *See* n.1 *supra*.

And at that point, the City would be able to seek judicial review of the final agency decision. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). *See also* 78 Fed. Reg. at 67,929. Of course, at that point (many months and likely several years from now)—when the trust acquisition of the Carter Hotel parcel would, for the first time, be truly "imminent"—the City would be free to seek a preliminary injunction to forestall it.[7]

Under these circumstances, a preliminary injunction is obviously not warranted because there is nothing even remotely "imminent" here. This Court's decision in *Bazil* is instructive by analogy. There, the Court denied the plaintiff's request for a preliminary injunction to prevent a foreclosure sale of a property. The Court noted that state law permits a defaulting mortgagor to redeem his property within six months after the foreclosure sale. 2011 WL 2619095 at *1. "Thus, unless and until that six-month period passes without redemption by the mortgagor, no irreparable injury by loss of title to

[7] Although even then, the City would not be "irreparably" harmed because, under the Supreme Court's recent ruling in *Patchak*, the City could continue to challenge the trust acquisition even after the land has gone into trust, and could seek an order to vitiate the trust acquisition. *See Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 81-83 (D.D.C. 2013) (no irreparable harm even if Secretary takes land into trust because "the Court sees no cognizable limit to its jurisdiction that would preclude a future order vacating the trust transfer").

residential property has occurred." *Id.* Therefore, the Court concluded, "Plaintiff may not presently obtain preliminary injunctive relief precluding a foreclosure sale because no imminent threat of irreparable injury exists." *Id.*

So too here. Unless and until the Superintendent decides to grant the Band's fee-to-trust application, and until the City has exhausted its administrative appeals through the Regional Director and then the IBIA, there will be no change in title to the Band's property and thus, no change to the status quo. Until then, as in *Bazil*, "no imminent threat of irreparable injury exists."[8]

2. There is no irreparable harm because the City has an adequate remedy at law.

"When there is an adequate remedy at law, a preliminary injunction is not appropriate." *Watkins*, 346 F.3d at 844. *See also Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)).

[8] In addition, as this Court has noted, "[A] moving party's delay in seeking a preliminary injunction is a consideration in determining the propriety of relief." *Edin*, 2013 WL 4494128 at *5(delay of six weeks in seeking injunctive relief). Here, the City received notice of the Band's application in December 2011. It waited four months, until April 2012, to file suit in state court (where it sought, but failed, to obtain preliminary relief from the state trial court). Ultimately, the Minnesota Supreme Court dismissed the City's complaint in March 2014 for lack of jurisdiction. The City waited another three weeks (from March 12, 2014 until April 2, 2014) to initiate suit in this forum, and then another ten weeks (from April 2, 2014 until June 12, 2014) to seek a preliminary injunction. The City's own delay in seeking preliminary injunctive relief undermines its argument about the imminence of any harm. *See Hubbard Feeds*, 182 F.3d at 603 (delay in moving for preliminary injunction negates claim of irreparable harm); *Control Data Sys. Inc. v. Infoware, Inc.*, 903 F.Supp. 1316, 1325 (D. Minn. 1995) (delay of "several months" in making motion showed there was no threat of immediate harm).

Here, the City seeks a preliminary injunction to stay "further consideration of the trust application" by the Secretary. Ironically, by seeking this injunction, the City is trying to stop the very process of agency decision-making, administrative appeal and judicial review by which its objections are presently being heard, and can continue to be heard and adjudicated. In other words, the City is trying to stop the very process that can provide the relief it seeks. Indeed, State and local governments on multiple occasions have successfully opposed tribal trust applications through this process of administrative consideration and judicial review. [9]

Thus, the proceeding the City here seeks to enjoin is, in itself, an adequate remedy at law that warrants denial of a preliminary injunction. Two decisions by this Court illustrate the point. In *Breaker v. United States*, 977 F. Supp. 2d 921, 943 (D. Minn. 2013), this Court denied a preliminary injunction to order the Forest Service to issue a permit for "motorized road access" that would allow plaintiffs to gain access to their property. Even though the Court found that plaintiffs had demonstrated a likelihood of success on the merits, the Court concluded that the agency's normal administrative

[9] *See, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 382-83 (2009) (reversing trust acquisition decision challenged by State of Rhode Island because agency decision exceeded the Secretary's statutory authority); *South Dakota v. U.S. Dep't of Interior*, 787 F. Supp. 2d 981, 996-99 (D.S.D. 2011) (remanding trust acquisition decision following appeal by state, county and city where BIA violated due process by failing to provide documents to plaintiffs); *Vill. of Hobart*, *supra* n.6 (vacating and remanding Regional Director's decision to take land into trust challenged by town); *Thurston Cnty*, *supra* n.6 (vacating six land into trust decisions challenged by county where Regional Director's conclusions were not supported by the record); *Kansas v. S. Plains Reg'l Dir.* (2001), *supra* n.6 (vacating trust acquisition decision challenged by county where Regional Director's analysis was improper).

process to consider plaintiffs' permit application would be an adequate remedy, and accordingly denied the preliminary injunction. *Id.*

Similarly, in *DeLite Outdoor Adver., Inc. v. City of St. Paul*, 167 F. Supp. 2d 1072 (D. Minn. 2001), the Court denied the plaintiff's request for a preliminary injunction to stay an administrative enforcement proceeding that was considering whether to revoke a billboard permit. The court concluded that the plaintiffs "failed to demonstrate how they will suffer any harm resulting from the pending administrative proceeding." *Id.* at 1076. The Court noted that the ALJ considering the matter would make recommendations to the City Council, and that "[i]t is speculative to consider what 'adverse action' the City Council might eventually determine in the face of many options." *Id.* at 1076. And even "[a]ssuming" the City Council acted adversely, plaintiffs "have an adequate legal remedy" because they "could appeal the decision to the Minnesota Court of Appeals and seek review of their statutory arguments . . . ." *Id.* "In short, Plaintiffs have not shown a threat of irreparable harm." *Id.*

So too here. The City has no way to know how the Superintendent is going to rule on the Band's fee-to-trust application, much less how the Regional Director is going to decide any appeal if the application is granted, much less how the IBIA will decide any appeal from that. And then, of course, assuming all steps of the administrative process go against the City's position, the City still has "an adequate legal remedy" because, as in *DeLite*, it can "appeal the decision" to this Court, or to another federal district court, based on a full and final administrative record, and obtain full relief.

The Secretary's administrative procedures under the fee-to-trust regulations provide not only an adequate forum, but also the appropriate forum, for the City to air its objections. Indeed, the Supreme Court described these procedures as being "sensitive to the complex interjurisdictional concerns" that arise from fee-to-trust applications:

> Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. . . . The regulations implementing §465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise.

City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 220-21 (2005) (emphasis added).

Here, the Secretary in December 2011 expressly invited the City to submit its views on the Band's fee-to-trust application, D.Ex. 11,[10] an invitation required by the Part 151 regulations.[11] The City argues at length that it needs a preliminary injunction in order to protect its regulatory interests in the use and development of land in downtown Duluth, City P.I. Br. at 24-29, and to protect against "financial loss to Duluth's tax

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[10] D.Exs. 1-19 were submitted with the Band's motion to dismiss (Doc. 16).

[11] "Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. §151.10.

base . . . ." *Id.* at 29. Yet these are concerns that are in the heartland of the administrative process, and are the very issues that the Secretary must consider.[12] And these are the issues of concern to local governments in virtually every proposed trust acquisition. If the City is right that these concerns warrant a preliminary injunction to stop the administrative process, then the Secretary's ability to implement the congressional policies embodied in §465 would be frustrated entirely.[13]

Taking advantage of the forum provided by the Secretary, the City has been a very active player in the administrative process, filing extensive comments in opposition to the Band's application, and participating directly in the environmental assessment and historic preservation aspects of the review process. Halloran Aff. ¶¶14-16, 18, 22, 23. The close scrutiny being brought to bear on the Band's application is reflected in the fact

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[12] "The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation and the acquisition is not mandated: . . . (e) If the land is to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise . . . ." 25 C.F.R. §151.10 (emphasis added).

[13] Nor is there anything special about a proposed trust acquisition within the boundaries of a city. Whenever the Secretary takes land into trust for a tribe, some unit of local government is affected. Whether it is a city or a county, there is some potential impact on a local government's exercise of regulatory and taxing authority over the property at issue, which is precisely why the Secretary's regulations require notice to local governments and consideration of these issues. In any event, there are other examples of fee-to-trust acquisitions of land within a city. *E.g.*, *City of Yreka v. Salazar*, 2011 WL 2433660 (E.D. Cal. June 14, 2011); *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109 (D. Or. 2002); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978).

that the administrative proceeding has been pending for well over two years at the first level review alone.

The City contends that, even though it is participating in the administrative process, the Band "misses the point" of the City's claim because it "should not have been put in the position of having to assert its objections in the first place." City MTD Br. at 18.[14] But this argument assumes the conclusion that section 10 provides the City with a contract right to avoid the administrative process by granting it a veto over the Band's submission of an application to the Secretary. As we show below, *infra* at 15-34, section 10 requires City consent only if the Band seeks a Reservation proclamation, not the transfer of land into trust.

In any event, the City does not allege any "irreparable harm" from merely having to participate in the administrative process, nor does it suffer any. In *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980), the Supreme Court rejected an argument that the need to appear in an administrative proceeding was itself irreparable harm:

> "[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration, Inc. v. Public Service Comm'n*, [304 U.S. 209, 222 (1938).] As we recently reiterated: "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Clothing Co.*, [415 U.S. 1, 24 (1974).]

[14] Because of overlap in the City's section 10 arguments, the Band responds here on a consolidated basis to those arguments in both the City's motion for a preliminary injunction, Doc. 23 (City P.I. Br.) and in the City's opposition to the Band's motion to dismiss, Doc. 32 (City MTD Br.).

And the City's remedy for the harms it does allege—loss of regulatory and tax authority—is to do what it is already doing: make the case to the Secretary that those harms are so prejudicial that the trust application should be denied.[15]

Particularly in light of the Supreme Court's recognition that the Part 151 process is the appropriate vehicle for airing and balancing the "complex intergovernmental concerns" that commonly arise in fee-to-trust applications, this Court should be exceptionally hesitant to interfere with that process prematurely and grant the City's request to enjoin that process. This is especially true in the absence of any showing by the City that the well-established, multi-level administrative process and its concomitant promise of subsequent judicial review fail to provide the City with "an adequate remedy at law." Without such a showing, there is no irreparable harm in allowing the process to run its course, and the City's request for a preliminary injunction should be denied.

B. The City Has Not Demonstrated A Likelihood Of Success On The Merits.

The Eighth Circuit has a bifurcated standard for the "likelihood of success" prong of the *Dataphase* test for preliminary injunctive relief. When an injunction is sought against an act of a government, such as a state statute, the movant must meet the "more rigorous standard" of showing it is "likely to prevail on the merits." *Rounds*, 530 F.3d at

[15] The City also claims that the Secretary "has no jurisdiction to construe and rule on Section 10 . . . ." City MTD Br. at 18. Yet it was the City, in its January 2012 objection letter to the Secretary, which extensively recounted the history and context of the City-Band contracts, and urged the Secretary to deny the fee-to-trust application based on the parties' reciprocal obligations under those contracts. D.Ex. 12 at 2-3. Having put the underlying contracts at issue before the Secretary, the City should not now be heard to argue that the Secretary has no jurisdiction to consider them.

732. This more demanding test reflects the idea that "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Id.* (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)). In other cases, a movant must meet a "fair chance of prevailing" standard. *Id.* at 731.

The "more rigorous" standard should apply here. The City seeks, as a functional matter, to enjoin a federal administrative proceeding that was initiated based on a sovereign action taken by the tribal government of the Band to formally authorize the submission of a fee-to-trust application to a federal agency. *See* D.Ex. 9 (RBC Resolution 1364/11) (certifying a vote of the Reservation Business Committee to submit the trust application). The decision to submit the application to the Secretary was a core governmental act taken by the duly elected governing body of a sovereign tribe, and it as much reflects the "governmental policies" of the Band developed through the "reasoned democratic processes" of tribal law as any statute passed by a state legislature. Indeed, the City is asking this Court to issue an order against the Tribal government, compelling the government to "request" the Secretary of Interior to stay an ongoing administrative proceeding, in contravention of the Band's sovereign action to request the initiation of the proceeding. Further, although its proposed injunction would nominally run against the Band, as a practical matter the City is seeking to enjoin the Secretary of Interior, a separate sovereign, from continuing to conduct administrative proceedings that are plainly authorized by law. The "higher degree of deference" under *Rounds* that cautions against enjoining an act of a government—here, two governments—is fully implicated.

But whatever standard applies, the City fails, for the reasons discussed below, to demonstrate a "probability that the moving party [will] succeed on the merits." *Rounds*, 530 F.3d at 729 n.3 (quoting *Dataphase*, 640 F.2d at 113); *Minn. Citizens Concerned for Life, Inc.*, 692 F.3d at 870.

1. The Band's trust application does not violate section 10.

The City contends the Band "breached Article 10 of the Commission Agreement by making application to place the [Carter Hotel] Parcel into trust without first obtaining the consent of the City." Compl. ¶69. That contention is defeated by the plain language of the Commission Agreement.

Section 10(b) of that Agreement, in pertinent part, states:

> The City of Duluth shall approve the creation of additional Indian Country, as defined herein, whenever the Mayor and the City Council of the City of Duluth determine that such additional land is essential to the activities of the Commission, and the making of such additional land Indian Country, as defined herein, will not be detrimental to the City of Duluth. The City, in its sole discretion, shall have the right to disapprove the creation of additional Indian Country, as defined herein. The Fond du Lac Band shall not create any additional Indian Country, as defined herein, unless the City of Duluth approves the creation of additional Indian Country as provided in this Paragraph b.

D.Ex. 3 at 15-16 (emphasis added).

Section 3 of that agreement, in turn, provides that "Indian Country" means:

> all land located within the corporate limits of the City of Duluth which is transferred by the Fond du Lac Band to the United States of America to hold in trust for the Fond du Lac Band pursuant to 25 U.S.C. §465, and which is made part of the Fond du Lac Indian Reservation pursuant to 25 U.S.C. §467. . . .

D.Ex. 3 at 2 (emphasis added). This definition of "Indian Country" has two elements: the land must first be taken in trust under §465 and then also made part of the Reservation under §467. Here, the City alleges only that the Band has applied to have the Secretary take the Carter Hotel parcel into trust under §465, Compl. ¶53, which it admits is only "the first step" in any effort "to create additional 'Indian Country', as defined by [section 3]." *Id*. ¶58.

a. *A fee-to-trust application and a request for a Reservation proclamation are two separate administrative procedures.*

A Reservation proclamation is an entirely distinct process from a trust acquisition. Two different statutes control, and there are two different sets of administrative procedures. Although tribal land must first be taken into trust under §465 before it can be proclaimed part of a reservation under §467, land can be held in trust for a tribe without ever becoming part of the tribe's reservation. (And conversely, land may lie within a tribe's reservation, but be held in fee, by a tribe or even by a non-Indian landowner).

The trust acquisition process is guided by the Secretary's Part 151 regulations, while Reservation status is governed by the Secretary's "Proclamation Guidelines." D.Ex. 16. The Reservation proclamation process must be initiated by a tribal resolution that expressly requests such a Proclamation, *id.* ¶1, and the tribe must provide the Secretary with information "describing the advantages, need, rationale, or other justification for securing reservation status of the trust land," along with information about the "present use and future use of the property," *id*. ¶10. The BIA must provide

"30-day notice of the proposed action . . . to the state, county, and municipal governments within whose jurisdiction such land is located." *Id.* ¶5.

None of this has happened here. In contrast to the process followed in 1986 when the Band expressly sought both trust status and Reservation status for what is now the casino property, the Band's October 2011 resolution sought only trust status for the Carter Hotel property, and made no request for a Reservation proclamation. D.Ex. 9. Nor has the Band done so subsequently. Affidavit of Karen R. Diver ¶¶16-17. Nor does the City allege that it has received any notice from the BIA about Reservation status for the parcel, as would be required under the Secretary's Guidelines.[16]

The City makes much of the statement in the Band's trust application that one of the Band's purposes is to "reestablish[] the Band's reservation land base." City P.I. Br. at 16-17; Compl. ¶¶54-55. As is made clear by the balance of the application, the Band sought to have the BIA consider the Band's need for trust land in light of the historic losses of land the Band suffered as a result of past federal policies, and in light of the promises that the United States made by Treaty to provide the Band with a permanent homeland.

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[16] The City notes that in section 10(a) of the 1986 Agreement, which is labeled "Initial Approval," it gave consent to both the trust acquisition and the Reservation proclamation for the casino site, and argues that this shows that City consent is needed for both steps of the Carter Hotel site. City P.I. Br. at 20. But the "initial approval" process was unique; indeed, the land had already been taken into trust (on June 14, 1985) and proclaimed part of the Band's Reservation (on January 7, 1986) before the 1986 Agreement was even signed by the parties (on April 10, 1986). By contrast, the Carter Hotel property is controlled by the different language of section 10(b)—"Subsequent Approval"—which refers to the creation of "additional Indian Country," a term specifically defined in section 3(a) and not used in section 10(a).

But whatever the Band's ultimate purposes are, it has not requested a Reservation designation under §467 for the Carter Hotel parcel. The Band's trust application states that it is an "Application to Place Land in Trust" pursuant to "25 U.S.C. §465," with no request that the land be proclaimed a Reservation, nor any reference to §467, nor any of the explanation or justification for Reservation status that would be required under the Guidelines. D.Ex. 10 at 1, 3-4. The same is true of the BIA's July 18, 2012 letter (and similar letters) cited by the City, Doc. 25, Exs. 2, 4, 5, which state that the BIA is processing the Band's application "to take into trust a parcel of land currently held by the Band in fee." *Id*., Ex. 4. *See also id*., Exs. 2, 5. These letters contain no indication the Secretary is considering a Reservation proclamation, much less providing the specific notice required by the Guidelines.[17]

Indeed, the Band may never ask the Secretary to declare the Carter Hotel parcel part of its Reservation. Diver Aff. ¶17. In other words, the Carter Hotel parcel may never become "Indian Country, as defined herein," either because the Secretary denies the pending fee-to-trust application or because the Band never seeks to add the trust parcel to its Reservation.

[17] In short, the Band and BIA simply used the term "reservation" colloquially, not formally—to mean land (including trust land) set aside for the Band. *See, e.g., Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1292-94 (D.C. Cir. 2000) (discussing "varying definitions of 'reservation'" beyond "the formal reservation contemplated by 25 U.S.C. §467"). That usage does not convert a §465 request into a §467 request, and section 10 requires City consent only for a formal reservation set aside under §467.

b. *City consent is not required for a fee-to-trust application alone.*

Section 10 of the 1986 Agreement does not require the Band to obtain City consent in order to submit a fee-to-trust application under §465. The drafters could hardly have emphasized this point more. In addition to including a specific definition of the term "Indian Country" in section 3, the Agreement uses the cumbersome phrase, "Indian Country, as defined herein," 35 times throughout the Agreement, including in section 10.

The City labors to find ambiguity in this unambiguous contract language. Ultimately, it resorts to speculating about the "purpose" and "intent" of the parties, City P.I. Br. at 14-15. The City reasons that consent is required for the submission of a fee-to-trust application (without regard to Reservation status) because that is "the only meaningful time for Duluth to have protected itself from the loss of tax base and regulatory control . . . ." *Id*. at 21. Therefore, according to the City, the contract must be construed to say that, even if the actual language of the contract says otherwise.

The City's logic turns contract law on its head. "Extrinsic evidence of the parties' subjective intent cannot be used to create contractual ambiguity where none exists on the face of the [contract]." *In re SCR Holding Corp.*, 545 F.3d 661, 666 (8th Cir. 2008) (citing *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 498 (Minn. 1995)). And here, the City does not even offer "extrinsic evidence" of intent, but simply its post-hoc speculation about what the City and the Band must have been thinking 28 years ago when the contract was negotiated. Even the City acknowledges that a court "must look to the contract language when determining the parties' intent" and should

"assign[] unambiguous contract language its plain meaning." City P.I. Br. at 14-15. Indeed, "[i]f the contract is memorialized in a written instrument, the written contract serves as the best evidence of the parties' intent, and the court determines that intent 'from the plain language of the instrument itself.'" *Olympus Ins. Co. v. AON Benfield, Inc.*, 711 F.3d 894, 898 (8th Cir. 2013) (emphasis added) (analyzing contract governed by Minnesota law). "If the [contract] language is unambiguous, Minnesota courts give that language its plain and ordinary meaning." *SCR Holding Corp.*, 545 F.3d at 666.

Here, the "plain and ordinary" meaning of the contract requires City consent only for the "creation of additional Indian Country," and to put an exclamation point on that phrase, it adds, "as defined herein." That definition makes clear that trust land alone is not "Indian Country." The "plain and ordinary" meaning of a definition that contains two elements—here, trust status under §465 and Reservation status under §467—is that both elements of the definition must be satisfied.[18]

Because the language of the contract is unambiguous, the Court has no cause to reach the City's arguments about the "intent" of the parties, *i.e.*, the City's claim that the

[18] *See Wisor v. Dir. Office of Worker's Comp. Programs*, 748 F.2d 176, 179 (3d. Cir. 1984) ("definition of miner contains two elements" and "[b]oth of these requirements must be met."); *Hanna v. Dir., OWCP*, 860 F.2d 89, 91 (3d. Cir. 1988) (same); *Sullen v. Mo. Pac. R.R. Co.*, 750 F.2d 428, 431 (5th Cir. 1985) (two elements of a definition must be met for a principal to be a "statutory employer" and "[a]bsent either of these two conditions," the definition will not be satisfied); *Levels v. Merlino*, 969 F. Supp. 2d 704, 731 (N.D. Tex. 2013) (definition of "federally related mortgage loan . . . includes two prongs and requires satisfaction of both"). To read section 3 as the City does—that "Indian Country" includes land taken into trust without reference to Reservation status—makes the definition's reference to section 467 into surplusage, a disfavored way to read contract language. *See Werner Enters., Inc. v. MNX Carriers, Inc.*, 163 F.3d 490, 492 (8th Cir. 1998) (court should avoid interpreting contract so as to render any part surplusage).

parties must have intended to provide the City with a right of consent prior to the submission of a fee-to-trust application because any other interpretation "would leave Duluth with a meaningless consent power." City P.I. Br. at 21; City MTD Br. at 8.

But if the Court reaches the question, the City errs in asserting that the contract leaves it with a "meaningless" consent power. It can be presumed that the parties in 1986 knew that the law then, like today, provided that a fee-to-trust application would be subject to a rigorous administrative review process in which the Secretary was required to consider the "impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls," and "jurisdictional problems and potential conflicts of land use which may arise. . . ." 25 C.F.R. §151.10(e), (f) (1985). *See also* Land Acquisitions, 45 Fed. Reg. 62,034, 62,035 (Sept. 18, 1980) (explaining that these provisions were included "to ensure that conflicting interests are evaluated before land is acquired in trust status").

Further, the BIA at the time, like today, gave State and local governments notice of trust applications and an opportunity to comment. *See* Land Acquisitions (Nongaming), 60 Fed. Reg. 32,874 (June 23, 1995) (describing amendment to §151.10 to codify past practices on notice and comment). And then, as now, the BIA regulations provided for administrative appeals of initial agency decisions on trust acquisitions. 25 C.F.R. §2.3 (1985). Given these established administrative protections for the City under the then-existing fee-to-trust-regulations, a contractual "consent" requirement for the submission of a trust application was superfluous. The court should not presume that the

parties in 1986 considered the Secretary's fee-to-trust process, with its solicitous review of local government concerns, to be "meaningless."

It appears that the City today labors under the impression that the Part 151 administrative process is a sham. The City claims that it "would be a hollow and meaningless protection if the parties intended to allow the Band to create as much trust land in the city as it wanted, but only required the Band to obtain Duluth's consent if the trust land was subsequently added to the Band's Reservation. That result is absurd." City MTD Br. at 11 (emphasis added); City P.I. Br. at 21-22.

But the Band does not create trust land by unilateral *diktat* and it cannot create "as much trust land in the city as it want[s]." The Secretary has to approve the Band's request for a trust acquisition, subject to judicial review. The fact that the Band's application for the Carter Hotel parcel has been pending for over two years at what is just the very beginning of the administrative review process, subject to close scrutiny by the BIA, is just one indication of how misleading the City's characterization is.

By contrast, and as the City points out, City P.I. Br. at 21, there were (and still are) fewer administrative protections for a party that objects to a Reservation proclamation.[19] To fill this gap, the parties by contract provided a right for the City to consent to Reservation status for a trust parcel.

In the context of the 1986 Agreement as a whole, this section 10 consent mechanism made perfect sense. The City today focuses solely on the "harm to Duluth's

[19] While the Guidelines recite that state and local governments are not formally invited to comment, they also provide that if comments are submitted, they will be forwarded to the Assistant Secretary for consideration. D.Ex. 16, ¶6.

governmental interests" (loss of regulatory and taxing authority) that "occurs when the land is placed into trust status, not when it is added to the reservation." City MTD Br. at 9; City P.I. Br. at 21-22. But that was not the focus of the "Indian Country" definition in the 1986 Agreement. That definition did not serve to protect the City from the consequences of the Band acquiring land in trust, but rather served an entirely different purpose: to demarcate the boundary of the authority that both the City and the Band were granting to the Fond du Luth Commission. *See* D.Ex. 3 at 2 (granting Commission the power "[t]o license and/or operate business activities on Indian Country" and to "establish such other rules and regulations as may be necessary to administer, regulate and control activities conducted on Indian Country located within the corporate limits of the City of Duluth"); *id.* at 3 (granting Commission the power "[t]o administer, regulate and control all activities on all Indian Country, as defined herein"). The Commission was granted no regulatory authority over land that was not "Indian Country, as defined herein."

As originally structured in the 1986 Commission Agreement, the Joint Commission was a robust and powerful quasi-public entity that would retain half of the net profits from its activities and exercise broad regulatory authority.[20] What was meaningful about the City's section 10 consent right was that it gave the City and Band joint control over the designation of the land within the City that would be subject to the powers of the Joint Commission—"Indian Country, as defined herein." The City's

[20] Over time, and due to disputes between the parties and changes in law, the Joint Commission withered and, for all practical purposes, became moribund.

interest in circumscribing the territorial reach of the Commission is fully protected—and far from "meaningless"—when section 3 and section 10 are given their "plain and ordinary" meaning. By having a right to consent to the Band seeking Reservation status for a parcel of trust land, the City became a full participant in the designation of "additional Indian Country" that (unlike trust land alone) would be subject to the regulatory authority of the Joint Commission.[21]

To be sure, section 10 could have been written to require the City's consent for the Band simply to seek trust status for land within the City, without regard to its Reservation status (and section 3 could have been written to define "Indian Country" as trust land without regard to Reservation status). But the Agreement was not so written, and the City is bound by the contract language as drafted, however much it may now wish that language to be different, or broader. *See Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 470 N.W.2d 118, 125 (Minn. 1991) (sophisticated parties who contract with assistance of counsel are "accountable for the product of their negotiations").

The City's request for a preliminary injunction should be denied because the City has no chance of prevailing on its section 10 claim.

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[21] The City contends that it "demonstrated its concern over the loss of regulatory authority" by the language in Paragraph 10(c), which makes City regulatory codes applicable to "all Indian Country, as defined herein." City P.I. Br. at 19. But far from solving the City's interpretation problem, section 10(c) just re-states it: like section 10(b), it too applies only to "Indian Country, as defined herein." Unless the City contends that trust land meets the section 3 definition of "Indian Country" for all purposes in the Agreement—a reading that is irreconcilable with the language—then section 10(c), like section 10(b), applies only to land that has been both acquired in trust and proclaimed as part of the Band's Reservation.

2. The section 10 "consent" provision was not, and is not, in effect.

Even assuming, *arguendo*, that section 10 could be read to require the City's consent before the Band can submit a fee-to-trust application to the Secretary, that provision was not in effect when the Band submitted the Carter Hotel application, and it is not in effect today.

a. Section 10 was dormant when the Band submitted its application.

At the time the Band submitted its application in November 2011, section 10 had been made "dormant and of no force or effect" pursuant to the 1994 amendments to the 1986 Agreement. Section 2 of the 1994 Amendments—the "dormancy clause"—states:

> Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement, insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space, shall be dormant and of no force or effect for so long as the Sublease is in effect.

D.Ex. 7 at 3 (emphasis added). *See also* D.Ex. 5 at 3 (same dormancy language). This plain language made section 10 of the 1986 Agreement "dormant and of no force or effect" on November 18, 2011 when the Band submitted its application to have the Carter Hotel parcel taken into trust.

First, section 10 "pertain[s] to gaming activities and Ancillary Businesses at the Sublease space." *See* D.Ex. 7 at 3. "Pertains to" is a broad and inclusive phrase that means "to have reference or relation; relate" to something. Webster's New Universal Unabridged Dictionary 1447 (1996). *See* Black's Law Dictionary 1260 (9th ed. 2009) ("pertain" defined as "[t]o relate to; to concern"). Thus, as long as the invocation of

section 10 relates to gaming at the casino (*i.e.*, at the "Sublease space"), the "pertains to" condition is met.

That is the situation here. The proposed trust acquisition of the Carter Hotel parcel, which is adjacent to the Band's existing Reservation land occupied by the casino, clearly "pertains to" the Band's gaming activities. As the Band's application for trust status states, that parcel is "currently occupied by a vacant, derelict, three-story brick building that formerly housed commercial business space on the street level and a 24-room, resident hotel on the second and third floors." D.Ex. 10 at 1. The application explains:

> Acquisition of the Subject Property in trust for the Band will also serve to enhance the Band's economic activities, which fully occupy the adjoining Reservation land . . . .
> . . . .
> . . . The land uses the surrounding the Reservation have a detrimental effect on the Band's on-Reservation activities by reducing the level of enjoyment and sense of security for its guests and employees. Acquisition of the Subject Property would allow the Band to provide the necessary attention and commitment that has been lacking in the past in order to rehabilitate one of the parcels adjoining the Reservation. This will help enhance the Band's on-Reservation activities by remediating deleterious adjoining land uses and enhancing safety.

D.Ex. 10 at 4-5 (emphasis added).

The nexus between the Carter Hotel property and gaming at the casino is also set forth in the formal resolution adopted by the Band's Reservation Business Committee authorizing the filing of the fee-to-trust application:

> [T]he Subject Property is adjacent and contiguous to the Fond du Lac Reservation located in Duluth, Minnesota and was acquired in order to expand and restore the Band's land base, and to remediate and rehabilitate a blighted property adjoining the Band's Reservation so as to enhance the existing economic activities on that Reservation;

D.Ex. 9 at 1 (emphasis added). The trust application "pertains to," *i.e.*, relates to, gaming at the Sublease space because its objective is to improve the environment immediately adjacent to the Sublease space. The "pertains to" condition of the dormancy clause thus was satisfied.[22]

The "Sublease" condition of the dormancy clause was also met at the time of the alleged breach. When the Band submitted its trust application on November 18, 2011, the Sublease was in effect as part of this Court's 1994 consent order.[23]

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[22] The City's contrary reading of the dormancy clause limits the "pertains to" language only to activity that is literally at the Sublease space. City P.I. Br. at 23; City MTD Br. at 14. That reading is, in the context of section 10, nonsensical. Since the "Sublease space"—the casino site—already is "Indian Country," the application of section 10 to the "creation of any additional Indian Country" (emphasis added) must mean land other than "the Sublease space." Thus, at least with regard to section 10, the "pertains to" language must be read as applying to land other than "the Sublease space," or else section 10 could never satisfy the conditions of the dormancy clause. Since section 10 was expressly included in the dormancy clause, any such interpretation is untenable.

The City also relies on the Supreme Court's discussion of the *noscitur a sociis* canon in *Maracich v. Spears,* 133 S. Ct. 2191 (2013), where the Court used the neighboring text of a statute to cabin the phrase "in connection with" litigation proceedings, to include activities by an attorney as an officer of the court, but to exclude commercial solicitations of new clients. *Id.* at 2202. The Court noted that the phrase is "indeterminate" and needs a "limiting principle consistent with the structure of the statute." *Id.* at 2200. So too, the City argues, the "pertains to" condition in the dormancy clause should not be given unbounded application. City MTD Br. at 15-16. But just because a broad standard should not be construed to apply without limit, so too it should not be construed as so limited that it never applies. While the "pertains to gaming activities . . . at the Sublease space" standard might not reach a flower shop on the other side of the City, it surely reaches an immediately adjacent property whose deteriorated condition is depressing the commercial success of the "gaming activities . . . at the Sublease space."

[23] Subsequently, in light of the July 2011 NOV, this Court modified the 1994 Consent Order to vitiate all of the 1994 Agreements, including the Sublease, on a

Thus, the conditions of the dormancy clause were satisfied at the time the Band submitted its fee-to-trust application to the Secretary, so section 10 was then dormant and "of no force and effect." Accordingly, the Band had no obligation to obtain the City's consent to submit its fee-to-trust application, and the City cannot show it is likely to succeed on this claim.

b. *Section 10 is not currently in effect because the 1986 Agreements are illegal and unenforceable.*

While section 10 was dormant at the time the Band submitted its fee-to-trust application, the City argues that the dormancy clause of the 1994 Agreements does not currently apply. The City contends that the 1986 Lease was cancelled by the Secretary in May 2012, well after the Band's application was submitted, which (in the City's view) necessarily cancelled the Sublease. City P.I. Br. at 22. If the Sublease was cancelled *sub silencio*, the City reasons, then the dormancy clause no longer applies, which means that section 10 of the 1986 Agreement has sprung back to life.

But the City's argument is not sound. Even assuming the dormancy clause does not currently apply, the 1986 agreements are not thereby revived. The NIGC determined in 1993 that the 1986 Agreements are illegal, D.Ex. 4, a conclusion it reaffimed in its July 2011 NOV, D.Ex. 8 at 2. And the same conclusion had also been reached in 1990 by the

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prospective basis. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, (*Duluth II*), 830 F. Supp. 2d. 712, 724 (D. Minn. 2011) (relieving the Band and City "of any further prospective compliance with their obligations under the 1994 Agreements and Order"). But as of the date of the Band's submission of the trust application—the relevant date for purposes of determining whether the Band was required to obtain the City's consent in order to submit the trust application—the Sublease was still in effect and accordingly, the "Sublease" condition of the dormancy clause was satisfied.

Interior Department's Associate Solicitor for Indian Affairs. Second Affidavit of Henry M. Buffalo, Jr., at D.Ex. 20.

Where an agreement with an Indian tribe requires federal approval, but such approval is not obtained, is denied or is withdrawn, the agreement is invalid and unenforceable in its entirety. *See, e.g., Contour Spa at Hard Rock, Inc. v. Seminole Tribe of Fla*., 692 F.3d 1200, 1211-12 (11th Cir. 2012) (contract with a tribe that required but did not have federal approval was invalid and no portion of it could be enforced); *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 131-32 (2d Cir. 2008) (contracts with a tribe subject to federal approval but which had not been approved were invalid in their entirety); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 787-88 (9th Cir. 1986) (same, "no part of [an unapproved agreement] may be enforced or relied upon"). *See United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc*., 883 F.2d 886, 890 (10th Cir. 1989) ("[e]very case addressing the validity of an unapproved bingo management contract under section 81 has voided the contract"); *United States ex rel. Shakopee Mdewakanton Sioux Cmty. v. Pan Am. Mgmt. Co*., 616 F. Supp. 1200, 1203, 1218-19 (D. Minn. 1989) (claims for breach of contract dismissed because contract with a tribe lacked federal approval required by 25 U.S.C §81), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986).

Here, the City and the Band expressly recognized that the 1986 Agreements were subject to federal approval. D.Ex. 3 at §38(b). In 1990, following the enactment of IGRA, the Interior Department's Associate Solicitor concluded that those agreements no longer complied with the law. D.Ex. 20. The NIGC, in 1993, reached the same

conclusion. D.Ex. 4. Because the federal officials possessing approval authority over the 1986 Agreements concluded that those Agreements do not comply with federal law, they are invalid and unenforceable in their entirety. [24]

There is no basis for the City's claim that section 10 should be severed from the balance of the invalidated 1986 Commission Agreement. While a severability analysis may apply in the normal case of a contract between private parties to determine whether any provision of an invalid contract should continue to be enforced, that analysis has no application in the special case of a contract with an Indian tribe that is subject to the requisites of federal approval, where such federal approval is denied or withdrawn.[25]

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[24] The review by the Associate Solicitor in 1990 and then by the NIGC in 1993 reflected the transition of regulatory oversight that resulted from IGRA. While IGRA was enacted in 1988, "the regulatory scheme created by the Act did not take effect until the NIGC came into existence, some five years later. The preexisting regulatory scheme, administered by the BIA, remained in effect until 1993." *U.S. ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 421 n.2 (8th Cir. 2002). In 1993, "the authority formerly vested in the Secretary of the Interior under 25 U.S.C. §81, *e.g.*, approving contracts between Indians and non-Indians, is transferred to the NIGC with respect to contracts regulated by IGRA." *U.S. ex rel. Saint Regis Mohawk Tribe v. President R.C.--St. Regis Mgmt. Co.*, 451 F.3d 44, 48 (2d Cir. 2006).

[25] Even if this were the normal case governed by common law, where the key terms of a contract are illegal and pervade the contract as a whole, there is no basis to pick apart the contract and determine if some provisions (like section 10) remain untainted by the contract's core illegality. *Restatement (Second) of Contracts* §184 (1981)(even "if less than all of an agreement is unenforceable" because it violates the law, a court may only enforce the remainder if "the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange"); *Simmer v. Simmer*, 261 N.W. 481, 482 (Minn. 1935) ("general rule is that where the illegality so far pervades the entire bargain that no set of its reciprocal promises can be said to be unaffected thereby, and unrelated thereto in respect to the inducement of consideration, the whole must fall.").

To the contrary, as the courts have consistently held, the statutes requiring federal approval of agreements with Indian tribes, especially those affecting Indian lands, were "enacted solely for the protection and benefit of Indians." *Shakopee*, 616 F.Supp. at 1208 (emphasis added). "The potential economic interest of nonIndians in a contractual relationship with a tribe is not within the intended purview of the statute," *id*., as "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id*. (citing *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976)); *accord Contour Spa*, 692 F.3d at 1211 ("[I]f it seems as if the approval requirement embodied in 25 U.S.C. 81 is entirely one-sided, giving all the benefit to the Indian tribe and placing all of the risk on the non-tribal party, that is because the statute was designed that way.")

Because of the broadly protective purpose of these statutes, the courts have consistently held that the lack of federal approval renders the contract invalid in its entirety, rejecting assertions that the remedy provisions contained in such agreements might still be effective, *Contour Spa*, 692 F.3d at 1211; *A.K. Mgmt. Co.*, 789 F.2d at 787-88, or that common law contract principles might be applied, *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 853 (8th Cir. 2001). [26]

These rules control here. The 1986 Commission Agreements is a contract with an Indian tribe for a joint venture to manage and profit from gaming activities in "Indian

[26] The Court there stated, "no matter the 'correct approach in ordinary contract disputes, in the context of Indian gaming the directives of Congress, when made apparent, must control,'" *id.* (citation omitted), and applied that rule to conclude that although the original agreements with the tribe had the requisite federal approval, later amendments which had not been approved could not be enforced.

Country," and it is subject to the requirements of federal law. This contract is invalid not at its periphery, but at its core—its overarching purpose was to provide for joint ownership and control of a gaming operation in "Indian Country," and for the Band to receive only 25.5 percent of the revenues from those activities. D.Ex. 3, §14(c). These core terms are plainly illegal under federal law, and were so declared in 1990 (by the Associate Solicitor) and in 1993 (by the NIGC). In the absence of federal approval, the contract is invalid and unenforceable in its entirety.

Accordingly, the City cannot prevail on its claim that the Band violated section 10, because that provision either was dormant and "of no force or effect" when the Band submitted its fee-to-trust application in 2011, or because the 1986 Agreement as a whole, including section 10, is invalid under federal law. Either way, the City cannot meet its burden to show a likelihood of success on the merits for purposes of a preliminary injunction.

C. The Balance Of Harms Favors Denying An Injunction.

The third factor for a preliminary injunction requires the Court to balance the alleged irreparable harm to the City with the harm that a preliminary injunction would cause to the Band. *Dataphase Sys.*, 640 F.2d at 113; *Edin*, 2013 WL 4494128 at *5.

For the reasons set out above, the City cannot show <u>any</u> imminent harm justifying preliminary injunctive relief. The harms alleged by the City—potential loss of property taxes, and impact on the City's "interest in guiding and regulating redevelopment in Old Downtown," City P.I. Br. at 30—would occur only if and only when the property is taken into trust. But the Secretary will not take the property in trust pending the conclusion of

the ongoing administrative proceeding, including all appeals. And during that period, the Band will continue to pay property taxes, as it has since it acquired the property. Diver Aff. ¶15. So there is no harm to the City during the continued pendency of the administrative proceedings.[27]

By contrast, a preliminary injunction would significantly harm the Band. That relief would substantially disrupt the status quo by seeking to stay an ongoing administrative proceeding in which the Band (and no doubt, the City) have invested substantial time and effort (and attorney fees and expert costs). Diver Aff. ¶14. And the City seeks to accomplish this stay, and thus to interfere with the agency's statutory responsibility to consider a fee-to-trust application, even though the agency is not a party to this case. The City wants to side-step the obvious indispensability of the agency by proposing that the Court order the Band to request the Secretary to stay the proceedings.[28]

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[27] In any event, in 2014, total property taxes on the Carter Hotel parcel were $6,817.10, of which $1,316.48 was assessed by the City. Diver Aff. ¶15, Ex. 2. The Court in weighing the equities should consider this *de minimis* tax impact against the countervailing benefits to the City from the Band's trust acquisition of the parcel. The Band intends to remediate the property in order to "enhance safety in the area and promote tourism," Diver Aff. ¶21, which will not only provide commercial benefits to the adjacent Casino (with resulting economic gains for both Indian and non-Indian employees), but also "benefit other businesses in Historic Downtown Duluth, including the City's recent acquisition of and plans for the NorShor Theater-Temple Complex . . . ." *Id.*. The trust acquisition "is entirely consistent with the City's stated interest in making Old Downtown the hub of a growing and vibrant arts and entertainment community." *Id.*

[28] The City's proposed order would require the Band to "request that the Department stay further consideration of the trust application, unless such stay is removed by further order of this Court." City Proposed P.I. Order ¶3.

But this dodge poses risks of its own, because it would not require the Secretary to grant the stay and any order running against the Secretary is beyond the scope of this case. In the event the Secretary declines to stay the administrative proceeding, the Band and its attorneys would nonetheless be barred from any action that might "cause[] the Secretary of the Department of the Interior to formally accept the . . . property into trust status . . . ." City Proposed P.I. Order ¶2. If, for example, the Department had questions about the stay request, only the City could respond, not the Band. Or if the Agency Superintendent makes an initial decision to approve the application and the City appeals to the Regional Director, the Band's attorneys could not file an appeal brief unless the City consented or the Court permitted the filing by further order.

The City's proposal to inject the Court into managing the pending administrative proceeding would cause immediate harm to the Band (and to the agency, which itself has invested countless hours in the more than two years of administrative proceedings that have already taken place). These substantial harms that will result from disrupting the status quo clearly outweigh the negligible harm to the City by letting the administrative process run its course. This is particularly so because the administrative proceeding itself could provide the City with all the relief it seeks.

D. The Public Interest Is Served By Denying An Injunction.

The fourth factor, the impact on the public interest, *Dataphase Sys*, 640 F.2d at 113, is also served by denying the City's request for injunctive relief. Both Congress and the federal courts have consistently emphasized the important federal policies of tribal self-government and tribal self-sufficiency embodied in §465, which was enacted in 1934

as part of the Indian Reorganization Act. The purpose of that Act was to further the independence of tribes, strengthen their ability to govern themselves, and to "'stabilize the tribal land base.'" *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1101 (8th Cir. 2010) (quoting *Nichols v. Rysavy*, 809 F.2d 1317, 1323 (8th Cir. 1987)). "Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005).[29]

The regulations implementing §465 themselves recognize the broader public interests that trust land applications can raise, and they are expressly designed to address those concerns. In the more than two and a half years during which the Band's trust application has been pending, considerable work has been done to evaluate these competing issues. Not only have the BIA and the Band (and indeed, the City) expended substantial time and resources, but the State of Minnesota, the federal Advisory Council on Historic Preservation, St. Louis County, the Minnesota State Historic Preservation

[29] The City argues that the Band does not need the Carter Hotel property taken in trust at all, because it can remediate the property as the fee owner. City P.I. Br. at 31. But as the Eighth Circuit has held, "[s]uch analysis is not required by the regulations, and we have recognized that it would be 'an unreasonable interpretation of [the regulation] to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance.'" *Cnty. of Charles Mix*, 674 F.3d at 903 (quoting *South Dakota*, 423 F.3d at 801). In any event, trust status is important for other reasons as well. For example, trust status is a condition of eligibility for the receipt of certain federal funding that is not available for tribally owned fee land. *Id.* (citing BIA Regional Director). It also is necessary for other federal benefits, such as those under the tax code which condition a tribe's ability to issue tax-exempt bonds on a requirement that 95 percent or more of the net proceeds will be used to finance property located on land held in trust. 26 U.S.C. §7871(a)(4), (c)(3)(B)(iii), (c)(3)(E).

Office, and various nearby property owners have also participated in these proceedings, providing their views and comments. Halloran Aff. ¶¶17-23.

The public interest here is in allowing the §465 process to go forward because that process provides all interested parties with an opportunity to express their concerns and objections to the proposed trust acquisition, and because all interested parties have invested considerable time and expense in doing so. There is no reason why the public participants should be deprived of their right to get a decision on the Band's trust application; nor is there any reason why the Band itself should lose the opportunity for a decision, particularly since the City would still have two levels of administrative review available to it, even if the initial decision were to grant the application.

The public interest is simply not served by having this Court enjoin the very administrative proceedings established by law to balance "the complex interjurisdictional concerns," *Sherrill*, 544 U.S. at 221, that are presented by a fee-to-trust application. This is particularly so when those proceedings have been underway for more than two years and before there is any agency decision that might (or might not) be adverse to the City's position.

IV. CONCLUSION

The City's motion for a preliminary injunction should be denied.

Respectfully submitted,

s/ Henry M. Buffalo, Jr.

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