UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

OGLALA SIOUX TRIBE, Plaintiff **v.** **UNITED STATES OF AMERICA** ***et al.***	)	**Civil Action No. 22-cv-05066-KES** **OGLALA SIOUX TRIBE'S MOTION FOR EXPEDITED PRELIMINARY INJUNCTION MEMORANDUM OF POINTS AND AUTHORITIES** **Fed. R. Civ. P. 65(a)**

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APA	Administrative Procedures Act
BIA	Bureau of Indian Affairs
CI	Criminal Investigation
DDE	Division of Drug Enforcement
DOJ	Department of Justice
DOI	U.S. Department of the Interior
FY	Fiscal Year
IA	Internal Affairs
ILERA	Indian Law Enforcement Reform Act
ISDEAA	Indian Self-Determination and Education Assistance Act
OJS	Office of Justice Services
TLOA	Tribal Law and Order Act
TPA	Tribal Priority Allocation

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), Plaintiff Oglala Sioux Tribe ("Tribe") moves the Court for a Preliminary Injunction that:

1. Restrains Defendants from continuing to assign a base Indian Self Determination and Education Assistance Act, 25 U.S.C. 5301, et seq. (ISDEAA) law enforcement funding amount to the Tribe based upon the Tribe's 1999 TPA law enforcement budget pending the outcome of this litigation;
2. Restrains Defendants from continuing to use an outdated and arbitrary law enforcement service population base, including the 2013 Indian Population and Labor Force Report, for purposes of providing law enforcement resources and funding to the Tribe under the ISDEAA pending the outcome of this litigation;
3. Compels Defendants Office of Justice Services ("OJS") and Bureau of Indian Affairs ("BIA") to immediately provide the Tribe with sufficient law enforcement resources to address the ongoing public safety crisis on the Pine Ridge Reservation pending the outcome of this litigation, and;
4. Grants Plaintiff such other interim relief at law or in equity that the court finds is appropriate and necessary to alleviate the public safety crisis on the Pine Ridge Reservation pending the outcome of this litigation.

The Tribe's Motion is based upon the below Memorandum of Points and Authorities, the Plaintiff's First Amended Complaint, hereinafter ("FAC"), the Supplemental Declaration of Lisa Adams (Adams Suppl. Decl., Aug. 11, 2022), the Second Supplemental Declaration of Algin Young (Young Second Suppl. Decl., Oct. 13, 2022), the Supplemental Declaration of Bernardo

Rodriquez Jr. (Rodriguez Suppl. Decl., Oct. 13, 2022), evidence and testimony to be presented at a hearing on this Motion, and the Proposed Order filed herewith.

The Tribe's legal counsel verbally notified the Defendant's legal counsel, the United States Attorney for South Dakota, in a telephone conversation on, August 4, 2022, that the Tribe intended to file for emergency interim relief. Over the next several weeks, the parties consulted on potential avenues of relief available without judicial intervention. On September 13, 2022, the parties met in person in Washington, D.C. to further discuss settlement. After negotiations failed to provide the Tribe with relief it deems required for the short or long-term health and safety of its officers and community members, the Tribe's legal counsel, on October 24, 2022 notified Defendant's legal counsel regarding the filing of this Motion and discussed an expedited briefing schedule on this Motion. On October 25, 2022 the parties agreed to an expedited briefing schedule, a motion for which is filed contemporaneously with this motion.

MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

The Oglala Sioux Tribe is suffering catastrophic impacts from the lack of effective law enforcement services on the Pine Ridge Reservation ("Reservation") guaranteed under the Tribe's treaties and acknowledged through federal statutes intended to implement such treaty obligations. Although the 1825, 1851 and 1868 Treaties require competent and effective law enforcement services to be provided to the Tribe by the Federal government, such responsibility was subsequently assumed by the Tribe pursuant to the ISDEAA. Despite the fact that the ISDEAA mandates that the amount of funds that the BIA provides to the Tribe, "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract," 25 U.S.C. § 5325(a)(1), the BIA has failed to provide the Tribe with sufficient law enforcement resources to meet this standard.

The situation is urgent. Using an arbitrarily low base funding formula established by the BIA in 1999, the BIA has only provided the Tribe with ISDEAA funding sufficient to retain thirty-three (33) officers and eight (8) criminal investigators to cover the entire Reservation and its actual service population of over 40,000 people. (Young Decl., ¶18, Doc. No. 3). Those officers are working under extremely dangerous conditions, at a salary which is not competitive with surrounding job opportunities. (Young Suppl. Decl., ¶ 21, Doc. No. 24-7). Currently, Tribal police officers are required to work excessive overtime, increasing the average work month to 240 hours or more, with many officers working far more hours than that. (Pl.'s First Amended Compl. ("FAC"), ¶ 33, Doc. No. 24; Young Decl., ¶ 54, Doc. No. 3). They are driving so many miles per shift that they currently fill their police cars with gasoline up to two to three times per shift, or between six and nine times per car per day (Young Suppl. Decl., ¶ 16, Doc. No. 24-7), costing the

Tribe approximately $44,894 per month in fuel costs alone. (Young Suppl. Decl., ¶15, Doc. 24-7). Furthermore, due to understaffing, officers are forced to patrol alone without adequate back-up, leading to officers being endangered. (Adams Suppl. Decl., ¶ 12-14).

The lack of adequate resources to maintain an effective police force leaves many calls for police assistance unanswered. (Young Decl. ¶ 20). Officers must abandon, or not fully investigate, serious crimes. *Id.* In the interim, the federal government has enacted new laws, like the expansion of the Indian coverage under the Violence Against Women Act (Reauthorization Act of 2022, Pub.L. No. 117-103, Div. W), which, like federal gun laws, only prevent increased physical harm to the victim if there is a police officer available to respond in a timely manner to the threat.

The results of underfunding and understaffing are not just affecting the Tribal police. It has devastating impacts on the population served, particularly on those most vulnerable. (Adams Suppl. Decl. at ¶¶ 4, 5, 8).

This dangerous situation has been caused by Defendants' violations of the United States' obligations to provide the Tribe with competent and effective law enforcement under the 1825, 1851 and 1868 Treaties. Treaty with the Sioune and Oglala Tribes, July 5, 1825, 7 Stat. 252 ("1825 Treaty"); the Treaty of Fort Laramie with the Sioux Etc., Sept. 17, 1851, 11 Stat. 749 ("1851 Treaty"); the Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, Apr. 29, 1868, 15 Stat. 635 ("1868 Treaty") (collectively, the "Treaties"). It has been compounded by Defendants' failure to provide the "amount of funds . . . [that the] Secretary would have otherwise provided for the operation of" the Tribe's law enforcement program, as required by the ISDEAA. 25 U.S.C. § 5325(a)(1). This endangers both the police officers and the public, causing great harm to the Tribe and to the Pine Ridge community.

II. FACTS

A. The Public Safety Crisis on the Pine Ridge Reservation

Through the ISDEAA, the BIA provides funding to the Tribe for thirty-three (33) law enforcement officers, who must protect and serve at least 40,000 individuals within its 3.1 million acres and respond to its in excess of 133,000 annual E-911 calls. FAC ¶¶ 72, 73, 75-A.[1] Moreover, the Tribe is currently struggling with an influx of potent and deadly synthetic drugs and high-powered assault style weapons and other firearms. *See* FAC ¶ 78. Recent on-Reservation crime statistics show:

- In the months of July and August 2022, Tribal police responded to five deaths, all of which are likely to be charged as homicides. (Young Suppl. Decl., ¶10, Doc. No. 24-7). This includes the beating death of a fifteen-year-old girl found dumped in a ravine. (*Id*.) Additionally, during July and August of this year alone, the Tribal Police responded to four shootings, four stabbings, three cases of sexual assault, and five cases of assault. (*Id*., ¶ 11-14).
- Between October 1, 2021 and June 30, 2022, Tribal police responded to over fourteen questionable deaths, thirteen of which have been investigated as or charged as homicides. (Young Decl., ¶ 53, Doc. No. 3).
- Between October 1, 2021 and June 30, 2022, Tribal police investigated more than 1,295

[1] On December 27, 2021, the Tribe requested new ISDEAA contract negotiations for fiscal year 2022. (FAC ¶109). On March 30, 2022, the BIA issued two partial denial letters of the Tribes proposed FY 2022 contracts. *Id.* On October 25, 2022, the Tribe approved submitting its proposed fiscal year 2023 ISDEAA contracts to the BIA for, among other things, 112 uniformed police, seventeen dispatchers, ten criminal investigators, one missing and murdered indigenous persons officer, four drug officers, and six school resource officers. The Tribe intends to submit those proposed contracts no later than October 28, 2022. A copy of the Tribal authorizing resolution is attached hereto as Exhibit A.

violent crimes and 1,042 drug related crimes. (Young Decl., ¶ 53, Doc. No. 3).

- Tribal police received a total of 285 missing persons reports from January 1, 2022, through June 30, 2022. Of these, there were two questionable deaths in February 2022 alone. (Young Decl.,¶ 55, Doc. No. 3).
- From January through June 2022, there have been a total of 308 gun-related calls into Dispatch and 49 reported rapes. (Young Decl., ¶ 56, Doc. No. 3)
- The homeless population on the Reservation is particularly terrorized. (Adams Suppl. Decl., ¶ 5). Violent assaults on the homeless population have increased since January 2022, with one man being beaten and then run over by a car, shattering his leg. (Adams Suppl. Decl., ¶ 5).
- On-reservation deaths, homicides, drug sales, police-involved accidents, and overdoses have increased significantly since 1999. (Young Decl. ¶ 25, Doc. No. 3).
- This Tribal service population generates more than 133,000 E-911 calls per year. (Young Decl., ¶ 16, Doc. No. 3; Rodriguez Decl., ¶ 20, Doc. No. 4). According to tribal and FBI crime data in FY 2021 there were 794 calls involving an assault, 1,463 domestic violence calls, 522 gun-related calls, and 541 drug/narcotic calls, most of which required immediate attention to protect life, health, and safety. (Young Decl., ¶ 17, Doc. No. 3).
- The Tribe itself is also being negatively impacted by the lack of effective law enforcement. The safety of tribally operated schools, health facilities, programs, and businesses are compromised. (Young Decl., ¶ 28, Doc. No. 3).
- The Tribe's referred care costs have increased because of the serious injuries sustained by crime victims, and drug abuse (Young Decl., ¶ 30, Doc. No. 3), and the Tribal economy

is negatively impacted because businesses are not attracted to high crime areas. (Young Decl., ¶ 31, Doc. No. 3).

- Tribal police are losing valuable call response time because of medical clearances. Federal guidelines require many detainees to receive a medical clearance before being held in one of the Tribe's federally funded detention facilities. (Rodriguez Decl., ¶ 25, Doc. No. 4). To obtain that medical clearance officers must drive the detainee to the hospital or clinic, which is often up to 40 miles away. (Rodriguez Decl., ¶¶ 20, 25, Doc. No. 4). These officers lose up to two hours of on-duty response time while waiting to receive that medical clearance paperwork before driving the detainee to one of its jails. (Rodriguez Decl., ¶ 25, Doc. No. 4).
- Police response times often exceed thirty minutes, even in cases of domestic violence, gun activities, and other imminent threats of harm, leading to additional injuries. (Young Decl., ¶ 22, Doc. No. 3.).
- Due to a lack of adequate staffing, Police officers operate alone, with backup often being over thirty miles away, even in cases involving guns or weapons, placing officers in unnecessary danger (Adams Decl., ¶ 12, Doc. No. 6; Young Decl., ¶ 23, Doc. No. 3.).
- Witness statements and other evidence is not being collected in a timely manner, thereby endangering federal and tribal prosecutions and convictions (Young Decl., ¶ 24, Doc. No. 3).
- Law enforcement officers and criminal investigators are required to work an unreasonable amount of overtime, even multiple shifts, with inadequate sleep or downtime. (Young Decl., ¶ 25, Doc. No. 3).
- Five of the thirty-three officers currently funded (approximately 15 percent of the entire

force) resigned from the job during the past two months, due to stressful working conditions and non-competitive salaries. (Young Second Suppl. Decl., ¶ 7).

B. The Tribe's Base Law Enforcement Funding Under the ISDEAA

Prior to 1998, the BIA provided the Tribe with its BIA law enforcement funding through a process called the Tribal Priority Allocation System ("TPA"). TPA is a budget allocation system that provides a tribe with a lump sum of money derived from combining the federal appropriations from a variety of BIA programs. Once these funds are combined, the TPA system allows a tribe to allocate its share of those funds to a predetermined list of BIA functions (e.g., tribal government operations, human services, child welfare, and (until 1999), law enforcement). (*E.g.*, FAC Ex. D-1, Doc. No. 24-4 at p. 4).

In 1999, the Tribe, with the full knowledge and encouragement of the BIA, began participating in a short-term three-year law enforcement study ("Study") and related programs funded by the U.S. Department of Justice ("DOJ"). (Young Decl. ¶ 11, Doc. 3). During that period, the Tribe had 123 law enforcement officers. Of those, forty-five were funded by the BIA; the remaining seventy-eight were funded by DOJ. (Young Supp. Decl. ¶ 21, Doc. 24-7). The Tribe was led to believe throughout that time period that the BIA would assume responsibility for those DOJ-funded officers after the Study and related DOJ funding ended.[2] (Rodriguez Suppl. Decl., ¶8). For these reasons, in 1999, the Tribe minimized the amount it utilized for law enforcement from its share of the TPA funds, and instead used those funds for other BIA

[2] In fact, BIA stated in its 2007 Budget Justification to Congress that it was in the process of negotiating a Memorandum of Understanding with DOJ to address how to provide continued funding for those DOJ officers for whom funding was about to expire (the study had been extended for close to 3 years because of delayed awards and carryover funds) (FAC Ex. F, Doc. 24-6 at p. 5).

programs. *Id.*

At the same time that the Tribe began receiving the short-term DOJ law enforcement grants, BIA unilaterally decided to move all of its law enforcement funding for tribes out of the TPA funding system and separated that funding as a separate BIA/OJS operated law enforcement program. (Dubray Decl. ¶¶ 6-9, Doc. No. 7). Despite BIA's knowledge that the Tribe's 1999 law enforcement budget was artificially low due to the temporary DOJ grants it had been receiving, BIA has used that 1999 law enforcement budget as the Tribe's base funding for purposes of the Tribe's ISDEAA contract, under which the Tribe is obligated to carry out the Secretary of the Interior's obligation to provide law enforcement on the Reservation.

This base law enforcement budget has left the Tribe with funding for only 33 law enforcement officers. (FAC Ex. 7, Young Supp. Dec. ¶ 21). This is 90 officers less than the U.S. was providing with federal funds awarded to the Tribe in the early 2000's and far fewer officers than it had in 1879 when the federal Indian agent at the Pine Ridge Reservation had organized, deputized, and began equipping and paying a federal Oglala Sioux Tribal Police Force of over 50 men to patrol 4,000 square miles inhabited by 8,000 Indians. Mark Ellis, RESERVATION AKICITAS: THE PINE RIDGE INDIAN POLICE, 1879-1885, pg. 207 (South Dakota State Historical Society (1999), Vol 29, No 3. In fact, this artificially low base budget has left the Tribe with 90 *fewer officers than it had during its participation in the DOJ law enforcement study and related grants over twenty years ago*. (FAC Ex. 7, Young Supp. Dec. ¶ 21).

C. Tribal Service Population

More than 40,000 people reside on or conduct business on the Reservation (Young Decl. ¶ 9, Doc. No. 3), all of whom are dependent on federally funded BIA law enforcement officers

to protect them and their on-reservation property. (Young Decl. ¶¶ 9-10, Doc. No. 3; Rodriguez Decl. ¶¶ 9-16 Doc. No. 4). Among these are Oglala Sioux Tribal Members, non-member Indians, and non-Indians who reside on or enter the reservation on a regular basis. *Id*. These individuals comprise the actual law-enforcement service population of the Reservation, according to applicable federal law. *Id*. *See also*, Memo from Sara Jumping Eagle, CEO Pine Ridge Service Unit, to the Oglala Sioux Tribe Health Administrator (April 26, 2022) (Attached hereto as Exhibit B); South Dakota DOT, Oglala Lakota Average Daily Traffic Map (Attached hereto as Exhibit C). BIA has failed to include all of these individuals in calculating the Tribe's law enforcement service population and has instead chosen to arbitrarily utilize an almost 13-year-old BIA study of the Tribe's service labor force population. This study, conducted in 2010 was itself based on the highly inaccurate 2010 Census. This report did not include a significant population of non-member Indians and non-Indians who now reside on or travel to the Reservation, but who were not included in the Tribe's service population in 2010. (*E.g.*, FAC Ex. D-1, Doc. No. 24-4 at p. 7 (*citing* Office of the Assistant Secretary—Indian Affairs, 2013 American Indian Population and Labor Force Report)).

A large percentage of crimes on the Reservation involve both an Oglala Sioux member and a non-member Indian, or non-Indian. The decision of the Defendants to continue to use the 2013 BIA Labor Force Report as the basis of establishing the service population of the Tribe is inconsistent with the existing law enforcement obligations of the Defendants, because the Tribe has criminal jurisdiction over non-member-Indians under the Indian Civil Rights Act, 25 U.S.C. § 1301; can exercise civil jurisdiction over non-Indians who engage in consensual relationships with the Tribe (*Montana v. United States*, 450 U.S. 544 (1981)); can exercise the stop and search jurisdiction detailed in *United States v. Cooley*, 141 S.Ct. 1638 (2021) and other tribal

jurisdictional cases; and can exercise expanded criminal jurisdiction over non-Indians in many cases of domestic violence pursuant to the Violence Against Women Act, Pub. L. No. 113-4, Mar. 7, 2013, 127 Stat. 54 (2013). It is also inconsistent with the fact that many Tribal officers, who possess Special Law Enforcement Commissions, are specifically charged with exercising many forms of both tribal and federal criminal jurisdiction over both Indians and non-Indians in Indian country, including on Pine Ridge.

The Defendant's use of the 2013 BIA Labor Force Report to establish the Tribe's service population is also inconsistent with how Defendants have proposed allocating funds to other treaty tribes. For example, recently the BIA calculated law enforcement and criminal investigation needs for several Oklahoma treaty Tribes. (Attached hereto as Exhibit D). In determining the law enforcement needs for Oklahoma tribes, BIA proposes using "service population and land base . . . ." *Id*. Unlike how BIA calculates service population for the Oglala Sioux Tribe, the BIA included the Oklahoma tribes' total tribally certified enrollment in calculating their Service Population. (Exhibit D at p. 2). Considering that the Oglala Sioux Tribe's land base is 3.1 million acres, and that its enrollment is currently almost 50,000 people, applying this same formula to determine its law enforcement needs would result in far greater allocation of law enforcement resources to the Tribe.

As a result of BIA's reliance on artificially lowered historic funding tied to a point in time more than twenty years ago, today the Tribe has funding for only thirty-three federally funded officers and inflation has made maintaining even that number of officers difficult. (Young Suppl. Decl., ¶ 21, Doc. No. 24-7). The BIA has been made aware of this problem but has yet to fix it.

III. ARGUMENT

A. Standard for Granting a Preliminary Injunction

To obtain a Preliminary Injunction, the moving party must show by a preponderance of the evidence that the balance of these four factors weighs in its favor: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on [the nonmovant]; (3) the probability that [the] movant will succeed on the merits; and (4) the public interest." *Mgmt. Registry, Inc. v. A. W Cos., Inc.*, 920 F.3d 1181, 1183 (8th Cir. 2019) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). The *Dataphase* factors apply regardless of whether a movant seeks a mandatory injunction or simply a prohibitory injunction. *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 591-592 (8th Cir. 1984).

"Success on the merits has been referred to as the most important of the four factors." *Roudachevski v. All-American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). However, it is a flexible analysis, in which "no single factor in itself is dispositive." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998). Rather, the court weighs on a sliding scale the case's particular circumstance to determine "whether the balance of equities so favors the movant that justice requires the court to intervene." *Dataphase*, 640 F.2d at 113. Here, all four factors weigh in favor of injunctive relief.

B. Applicable Canons of Construction, Standard of Review and Burden of Proof

Unique interpretative rules apply to Indian treaty cases such as the present case. These rules "are rooted in the unique trust relationship between the United States and the Indians. *Rosebud Sioux Tribe v. U.S.*, 9 F.4th 1018, 1023 (8th Cir. 2021) (*citing County of Oneida v. Oneida Indian*

Nation of N.Y., 470 U.S. 226, 247 (1985)). Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*. *See also, U.S. v. Cheyenne River Sioux Tribe*, 205 F. Supp.3d 1052, 1063 (D.S.D. 2016) (*quoting Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979)) (finding that treaty terms must "be construed, not in according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians"); *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452, 2470 (2020) ("[O]ur rule [is that] treaty rights are to be construed in favor, not against, tribal rights").

This canon of construction also applies to "statutes passed for the benefit of Indian tribes," such as the ISDEAA, which "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca Cnty., Minnesota*, 426 U.S. 373, 392, (1976) (citations and internal quotations omitted). This "Indian canon of construction" also supersedes deference ordinarily granted to agency interpretations under C*hevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)*. In *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001), the Court held:

> This departure from the *Chevron* norm arise[s] from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior," applicable to the trust relationship between the United States and the Native American people.

Accord, Governor of Kansas v. Kempthorne, 516 F.3d 833 (10th Cir. 2008); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461–62 (10th Cir. 1997).

Instead of *Chevron* deference, this judicial district has held that "Congress intended a *de novo* review for civil actions brought under the ISDEAA." *Cheyenne River Sioux Tribe v. Kempthorne*, 496 F.Supp.2d 1059, 1067 (2007) (*citing Cherokee Nation of Oklahoma v. U.S.*,

190 F.Supp.2d 1248, 1258 (E.D.Okla.2001), *rev. on other grds*. by *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005); *Shoshone–Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306, 1318 (D.Or.1997)).

Further, "[u]nlike the usual civil case in which the plaintiff bears the burden of proof by a preponderance of the evidence, the ISDEAA places the burden of proof in any hearing or on appeal on the Secretary 'to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof.)'" *Cheyenne River Sioux Tribe*, 496 F.Supp.2d at 1067 (*quoting Shoshone–Bannock*, 988 F.Supp. at 1318 (quoting 25 U.S.C. § 450f(e)).

C. The United States has a Trust Obligation to the Tribe to Provide Competent and Effective Law Enforcement on the Reservation.

In determining whether the United States owes a trust obligation to an Indian tribe, Courts look to whether "Treat[ies] and other relevant statutes *when read in conjunction* create a duty for the Government." *Rosebud Sioux Tribe v. U.S.*, 9 F.4th 1018, 1023 (8th Cir. 2021)(emphasis added). A tribe can rely on a comprehensive framework of 'statutes and regulations . . . [to] establish fiduciary obligations of the Government.'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (quoting *United States v. Mitchell* ("Mitchell II"), 463 U.S. 206, 226 (1983)).

The United States Supreme Court has long recognized the federal government's "duty of protection" to Indian tribes *United States v. Kagama*, 118 U.S. 375, 384 (1886). This duty "has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *Id*.

Here, Defendants' obligation to the Tribe to provide law enforcement services on the Reservation originated in the United States' 1825, 1851 and 1868 treaties with the Tribe. This

obligation was subsequently recognized in numerous federal statutes, including the Snyder Act, ILERA and TLOA, and assumed by the Tribe in the scope of work in its ISDEAA law enforcement contract.

1. The Law Enforcement Obligations Undertaken by the United States to the Tribe in the 1825 Treaty and the Fort Laramie Treaties of 1851 and 1868.

The United States Constitution grants the federal government the power to negotiate and enter into treaties with Indian tribes. Const. art. II § 2; Const. art. I § 8; Const. art. IV, § 3. Pursuant to this constitutional authority, the United States entered into a series of treaties with the Oglala Sioux Tribe and other Lakota bands.

Seeking to cease conflict between the Tribe and non-Indians in the area and secure peace with these tribes, and ensure safe trade, on July 5, 1825, the United States entered into the 1825 Treaty with Sioune and Oglala Tribes. Treaty with the Sioune and Oglala Tribes, 1825, July 5, 1825, 7 Stat. 252 (1825) ("1825 Treaty"). That Treaty was one of the earliest federal commitments to provide law enforcement to the Tribe. The major goal of the federal government was to secure free trade in the area and stop groups from attacking non-Indians in response to the criminal violations that the Tribes were sustaining at the time. *See Id.*, arts. 4 & 5. The United States, in exchange for the promise of protection from these unlawful acts, solicited and received an agreement that "for injuries done by individuals, no private revenge or retaliation shall take place, but instead thereof, complaints shall be made, by the injured party, to the [federal] superintendent or agent of Indian affairs . . . . upon complaint being made . . . the person or persons so offending shall be tried, and if found guilty shall be punished . . . ." *Id.*, art. 5.

Later in the 1851 Treaty of Fort Laramie, the Sioux agreed to allow the United States the right to establish roads and military and other outposts in certain locations in their aboriginal

territory. Treaty of Fort Laramie with Sioux, Etc., September 17, 1851, 11 Stat. 749 (1851) ("1851 Treaty") at Art. 2. They did this in exchange for, among other things, the United States binding itself to protect the Tribe and its members from "the commission of all depredations by the people of the United States." *Id.* at Art. 3 This was the second promise of exclusive federal law enforcement protections of the interests of the Tribe and its members.

By the 1860s, largely because the federal troops, who were supposed to police the Tribe's territory, had been called away to fight in the Civil War, a series of major confrontations were taking place between the Tribes and non-Indians, which federal studies later concluded were still largely due to the "aggression of lawless white men" and insufficient federal enforcement. Kerry Oman, *The Beginning of the End; The Indian Peace Commission of 1867-1868*, 22 Great Plains Quarterly 35, 36 (2002). One of the federal government's main concerns at the time centered around the aggressive Sioux attacks on those who were traveling along the Bozeman Trail. The federal and Sioux military actions that followed those Sioux attacks is more commonly known as the Powder River War. By 1867, Congress concluded that it was more cost effective to enter into further treaties with certain tribes, including the Oglala Sioux Tribe, than it was to continue military operations. *Id.*

One of those new treaties was the 1868 Treaty of Fort Laramie. This treaty was entered into to bring an end to the Powder River War, bring an end to tribal retaliation against non-Indians and members of other tribes who threatened Oglala people or property, set the boundaries of what is commonly known as the "Great Sioux Reservation," and to promote peace between the Sioux bands and the U.S. *See generally*, Treaty with the Brule, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee Arapaho, April 29, 1868, 15

Stat. 635 (1868) ("1868 Treaty"). In exchange for these tribal actions and peaceful relations, the U.S. promised once again to be the provider of law enforcement on the Reservation. Given the federal government's failures to live up to its policing commitments in the past, without this firm commitment, the Tribes would never have agreed to cease their violent responses to these criminal actions by non-Indians, members of other tribes or even members of their own bands. *See* Oman, *supra,* at 47 . Switching the enforcement of law from tribal retaliation to federal law enforcement was why the 1868 Treaty was sought and why the Tribe agreed to cease its own forceful responses to criminal activity. In fact, Article I of the 1868 Treaty includes two provisions that are commonly referred to as the "bad men" clauses. The "bad men" clauses include the following commitments:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once **to cause the offender to be arrested and punished according to the laws of the United States**, and also re-imburse the injured person for the loss sustained.[3]
>
> And
>
> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians named solemnly agree that they will, upon proof made to their agent and notice by him, **deliver the wrong-doer to the United States, to be tried and punished according to its laws** . . . .

1868 Treaty, art. I (emphasis added).

Article V of the 1868 Treaty included the following additional United States obligations:

> The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them, and keep an office open

[3] This role of the Commissioner of Indian Affairs is now delegated by statute to the OJS and the United States Attorney. 25 U.S.C. §2802.

> at all times for the purpose of **prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation** under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

Id. (emphasis added).

Under the 1868 Treaty's "bad men" clauses in Article I and the commitments set forth in Article V, in return for law enforcement on the Reservation, which power the Tribe gave away and which, unlike education or health care, could be taken over *only* by the federal government,[4] the Tribe agreed to cease hostilities and cede valuable sovereign authority. 1868 Treaty, Art. 11 ("In consideration of the advantages and benefits conferred by this treaty . . . the tribes who are parties to this agreement hereby stipulate ....").

2. Congress Reaffirmed and Implemented the United States' Law Enforcement Treaty Obligations in 1877 and Subsequent Appropriations.

Through the treaties and other actions, the federal government has undertaken an exclusive and specific trust responsibility to ensure effective and competent law enforcement and public safety to the Tribe. *See*, Cohen's Handbook of Federal Indian Law § 20.07[1][a] Nell Jessep Newton ed., (2017). Through legislation, the federal government recognized and reinforced this duty.

On February 28, 1877, the Forty-Fourth Congress enacted a statute to "ratify the agreement with certain bands of the Sioux Nation of Indians." *See*, Act of February 28, 1877, Ch. 72, 19 Stat. 254 ("Act of 1877"). The purpose of the Act of 1877 was, in part, to reaffirm the provisions made

[4] See discussion of *Rosebud Sioux Tribe v. U.S.*, 9 F.4th 1018 (8th Cir. 2021) below at section III(A)(4).

in the 1868 Treaty, including the Article I "bad men" clauses and the Article V provision providing a federal agent responsible for investigating complaints by and against tribal members. Through that statute, the federal government reaffirmed its exclusive obligations to provide effective law enforcement services to the Tribe.

Along with confirming those promises, Congress also unilaterally made additional commitments to the Sioux by inserting the following language:

> The provisions of said treaty of 1868 … shall continue in full force, and, with provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and **Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life**.

Act of 1877, art. 8 (*emphasis added*).

To accomplish this goal, in 1878, Congress began appropriating specific federal funds for federal Indian law enforcement in the western tribal areas of the United States, including at the Pine Ridge Reservation. Act of May 27, 1878, Ch. 142, 20 Stat. 63, and continued to do so. *See*, Act of May 11, 1880, Ch. 85, 21 Stat. 114. This appropriation of funds displays the federal government's recognition of and intent to uphold its duties under the 1825, 1851 and 1868 Treaties. By the end of 1879, the Federal Indian Agent at Pine Ridge had organized, deputized, and began equipping and paying a federal Oglala Sioux Tribal Police Force of over 50 men. Mark Ellis, RESERVATION *AKICITAS*: THE PINE RIDGE INDIAN POLICE, 1879-1885, pg. 207 (South Dakota State Historical Society (1999), Vol 29, No 3).

Federal law enforcement efforts expanded after the treaties were ratified and the Act of 1877 was passed. By the fall of 1878, "all the problems encountered at other [federal] agencies seemed to be compounded… at the six federal agencies located within Lakota territories." William

T. Hagan, *Indian Police and Judges* 83 (1980). "There were more Indians, more room for them to roam, more opposition to the civilian programs, and along the Nebraska line and at the landings on the Missouri River, more whites to interfere." *Id.* This is reinforced in an 1879 report to the Commissioner of Indian Affairs, written by Federal Agent McGillycuddy, the Indian Agent at Pine Ridge. In that report, he justified the more than 50 federal Indian Police that he was employing at the Pine Ridge Agency in 1879 by noting that just over the Nebraska state line was a large Mexican settlement which he believed to be a "rendezvous for criminals and outlaws of all kinds" and he wanted "to keep the reservation free of such undesirable elements." *Id.* at 90-91.

At about that same time, McGillycuddy noted that he was also concerned about Indian-versus-Indian conflicts, noting specifically his concerns about potential local trouble from Red Cloud, a principal chief at Rosebud, who along with his warriors had successfully closed the Bozeman Trail in the 1860's, and who was resisting federal law enforcement and other efforts on the Pine Ridge Reservation. *Id.* at 91. For those reasons Professor Hagan concluded that the "McGillycuddy fifty-man force [at Pine Ridge] was absolutely indispensable in administering the 4,000 square miles inhabited by 8,000 Indians." *Id.* at 91.

The federal government further expanded this federal authority in 1885 with the passage of the Major Crimes Act ("MCA"), 18 U.S.C. § 1153. The MCA expanded federal jurisdiction over Indians who commit crimes against other Indians within Indian Country. *Id.* In upholding the MCA, the United States Supreme Court recognized the federal government's "duty of protection" that arose from the treaties. *United States v. Kagama*, 118 U.S. 375, 384 (1886). The Court noted that the duty of protection "has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *Id.*

After awarding re-occurring appropriations for federal law enforcement at the Pine Ridge Reservation for over 42 years, in the 1921 Snyder Act Congress provided the on-going authorization of appropriations "which the Secretary shall direct, supervise and expend . . . for the benefit, care, and assistance of the Indians." 25 U.S.C. § 13 (1921). One of the specific purposes set forth in this Act is to provide funds for the employment of "Indian police." *Id.* From the Snyder Act's enactment forward, Congress has directed the Secretary to use funding appropriated by Congress to pay for "Indian police." *Id.*

3. Congressional Reaffirmation and Implementation of Law Enforcement Treaty Obligations in the Modern Era through Enactment of the ILERA, the TLOA and the ISDEAA.

Following the Congressional "Indian police" authorization of the Snyder Act, the Indian Law Enforcement Reform Act of 1990, P.L. 101-379, August 18, 1990, 104 Stat. 473, provided that the United States Secretary of Interior, acting through the BIA, "shall be responsible" for providing federal and, at the request of the Tribe, tribal law enforcement services in Indian country. This, along with the Treaties, distinguishes law enforcement from other federally created programs, and made competent law enforcement an obligation of the Secretary and the BIA.

The ILERA also created a specific Office of Justice Services (OJS) within DOI, making it responsible for carrying out the law enforcement functions of the Secretary in Indian Country.

The ILERA articulates in even more specific terms what competence means in the context of the federal government's law enforcement duties and responsibilities owed to the Tribe. Section 2802(c) states that the OJS is responsible for the following:

1) the enforcement of Federal law and, with the consent of the Indian tribe, tribal law;
2) in cooperation with appropriate Federal and tribal law enforcement agencies, the investigation of offenses against criminal laws of the United States; [and]

3) the protection of life and property.

25 U.S.C. § 2802(c).

In 2010, Congress again reinforced the federal government's prior existing law enforcement duty owed to the Tribe when it enacted the Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Title II, July 29, 2010, 124 Stat. 2258 ("TLOA"), *codified as amended* in various sections of 18 U.S.C., 21 U.S.C., 25 U.S.C., 28 U.S.C., and 42 U.S.C.

TLOA requires BIA to report annually to Congress on the unmet needs of law enforcement in Indian Country. TLOA sec. 211, 25 U.S.C. §2802(c)(16). This in turn requires the BIA to determine for itself what the minimum "need" is to provide "competent" law enforcement. In fact, the BIA's 2011-2019 TLOA-mandated reports to Congress actually each contain statements defining that "need" for a "'basic' program that would serve tribes with service populations ranging from 1,601 to 6,500" as 2.8 officers per 1,000 people. (FAC., ¶ 60; Ex's D-1 – D-6, Doc. No. 24, 24-4). That 2.8-standard was based upon the DOJ's Uniform Crime Data collected from comparable rural areas of 10,000 or less which, unlike the Tribe, do not have excessive crime or excessive distance between tribal communities and tribal police calls.

Section 106 of the ISDEAA, 25 U.S.C. § 5325(a)(1), provides that the "amount of funds provided under the terms of self-determination contracts" "shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract…." The amount of funds that the Secretary of the Interior "would have otherwise provided" for competent law enforcement is no less than the amount than the Secretary is required to expend under the Tribe's treaties, the ILERA and TLOA.

In TLOA's "Findings and Purposes" Congress, after multiple committee hearings, concluded that "The United States has distinct legal, treaty and trust obligations to provide for the public

safety of Indian country." TLOA sec. 202, 25 U.S.C. §2801 (note). To the Oglala Sioux Tribe, these are not just words. They reflect the federal government's obligations since the 1825, 1851 and 1868 Treaties to take responsibility for the Tribe's sovereign national defense against crime, that quintessential governmental function the Tribe ceded to the United States in the1825, 1851 and 1868 Treaties in return for an end the Powder River War, an end to the Tribe's own response to criminal acts, and to ultimately open the Great Sioux Reservation to peaceful non-Indian settlement and travel.

4. Defendants Have a Duty to Provide Competent and Effective Law Enforcement on the Reservation.

In *Rosebud Sioux Tribe v. U.S.*, 9 F.4th 1018 (8th Cir. 2021), the Court examined whether the 1868 Treaty and federal statutes (the Snyder Act and the Indian Health Care Improvement Act ("IHCIA")) established a trust obligation of the federal government to provide health care services to the Rosebud Sioux Tribe, and the scope of such duty.

In the 1868 Treaty, the federal government promised to provide the Sioux Tribes with a "physician . . .[and] such appropriations [as] shall be made from time to time ... as will be sufficient to employ such persons." *Id*. at 1020 (quoting 1868 Treaty, Art. VIII). The Snyder Act authorized Congress to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States ... [f]or relief of distress and conservation of health." *Id*. (quoting 25 U.S.C. § 13). The IHCIA, in turn, recognized a "major national goal of the United States is to provide the quantity and quality of health services which will permit the health status of Indians to be raised to the highest possible level," and states: "[I]t is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians ... to ensure the highest possible health status for Indians ... and to

provide all resources necessary to effect that policy." *Id*. at 1020-21 (quoting 25 U.S.C. §§ 1601 - 1602).

The Court found that the government's promise to provide a physician and to appropriate funds to employ such physician in the 1868 Treaty, along with the Government's "persistent" delivery of healthcare to the Tribe in the decades following the Treaty, supported the existence of a trust obligation of the government to provide health care to the Tribe. *Id*. at 1024. The Court further found that the government's treaty obligations to provide health care "was reinforced by the Snyder Act, which authorized appropriations "for the benefit, care, and assistance of the Indians throughout the United States ... [f]or relief of distress and conservation of health," and by the IHCIA, which established the IHS with the stated goal to raise the health status of Indians . . .. *Id*.

Like in *Rosebud Sioux Tribe*, in the present case the federal government has a duty to provide the Tribe with law enforcement under the Treaties. In the 1825 Treaty the government promised to try and punish persons committing offenses against tribal members, 1825 Treaty, Art. 5; in the 1851 Treaty the government promised to protect the Tribe and its members from "the commission of all depredations by the people of the United States," 1851 Treaty, Art. 3; and in the 1868 Treaty the United States promised that any person committing "a wrong or depredation upon the person or property" of the Tribe or its members shall be "arrested" "tried and punished." 1868 Treaty, Art. 1 and V. Also, like in *Rosebud Sioux Tribe*, the government's persistent appropriation of funds for, and the delivery of, law enforcement services to the Tribe in the decades following the 1868 Treaty serve to reinforce the existence of its trust duty to provide law enforcement on the Reservation. *See, e.g.*, Act of 1877, art. 8.

Also like in *Rosebud Sioux Tribe*, the duty to provide law enforcement was further reinforced by federal statutes – namely, 1) the Act of 1877, which mandates that "each individual [Sioux

Indian] shall be protected in his rights of property, person, and life," Act of 1877, art. 8; 2) the Snyder Act, which authorizes ongoing appropriations for the employment of "Indian police," 25 U.S.C. § 13; 3) ILERA, which specifically charges OJS with enforcing federal and tribal law, investigating crimes and "protect[ing] life and property in Indian Country," 25 U.S.C. § 2802(c); and 4) TLOA, which provides that "the United States has distinct legal, treaty, and trust obligations to provide for the public safety of Indian country" (Tribal Law and Order Act of 2010, P.L. 111-211, July 29, 2010, 124 Stat. 2262 §202) by enforcing "Federal law and, with the consent of the Indian tribe, tribal law." 25 U.S.C. § 2802(c)(1). Indeed, these statutory obligations are more comprehensive and detailed than those at issue in *Rosebud Sioux Tribe*.

In addressing the scope of the United States' duty to provide health care to the Tribe, the Court in *Rosebud Sioux Tribe* held that, "The [1868] Treaty created a duty, reinforced by the Snyder Act and the IHCIA, for the Government to provide competent, physician-led healthcare to the Tribe and its members." *Rosebud Sioux Tribe*, 9 F. 4th at 1026. The Court reasoned:

> The "competency" portion of the duty comes from the recognition that some "adjustment and accommodation" must occur to make a tribe whole when treaties are read decades later. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 681, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). After all, it is difficult to imagine a set of circumstances in which the Tribe would have agreed to the Government's delivery of "incompetent" healthcare. The declaratory judgment below gives meaning to promises made, and it assigns to the Government a measure of accountability for persistent deficiencies . . ..

Id. at 1025.

As in *Rosebud Sioux Tribe*, applying the canons of treaty and statutory construction discussed above and the specific obligations in the Treaties, the 1877 Act, Snyder Act, ILERA and TLOA, the Oglala Sioux Tribe is likely to succeed on the merits of its claim that the Defendants' trust duty is to provide law provide competent and effective law enforcement to the Tribe and its

members.

5. The Current BIA and OJS Law Enforcement Funding System Neither Fulfills the Federal Obligations For Providing Competent and Effective Law Enforcement to the Tribe Nor Meets the Tribe's Actual Need for Law Enforcement Services.

The record demonstrates that the Tribe is likely to succeed on the merits of its claim that Defendants have failed to meet their trust obligation to provide competent and effective law enforcement to the Tribe and its members.

In fact, in assigning the 1999 TPA base funding amount to the Tribe for the purposes of calculating the base budget amount for the Tribe's ISDEAA law enforcement contracts, by failing to adjust that base funding to absorb the costs of the DOJ-funded officers lost when the Tribe's short-term DOJ grant funding expired, and by failing to provide the Tribe with the minimum number of officers that BIA admits is required for a "basic" law enforcement program, the BIA has failed its duty to provide competent and effective law enforcement, , and such ongoing actions continue to have deadly consequences today. Defendant's breaches of their trust obligations are also evidenced by the BIA's failure to use the number of complaints that are received at Pine Ridge's E-911 call center to determine the amount of law enforcement services required, its failure to obtain any updated tribal service population numbers, and its failure to consider the substantial increase in crime on the reservation since 1999. Also, by ignoring its treaty obligations and by using the Tribe's 1999 TPA allocation for law enforcement as its base budget for purposes of the Tribe's ISDEAA law enforcement contract, BIA has failed to provide the Tribe with "amount of funds [that] the . . . Secretary would have otherwise provided for the operation" of the Tribe's law enforcement program "for the period covered by the contract…" as required by the ISDEAA. 25 U.S.C. § 5325(a)(1).

All of the foregoing demonstrates the strong likelihood of the Tribe's success on the merits and the Tribe respectfully requests that its motion for preliminary injunction be granted.

D. The Tribe will Suffer Irreparable Harm in the Absence of Emergency Injunctive Relief.

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp. v. Harry Brown's, LLC,* 563 F.3d 312, 319 (8th Cir. 2009). The Tribe does not perceive any way it may calculate an award of damages from the government for the arbitrary and woefully inadequate funding for its law enforcement services, its loss of economic development, and the personal injuries or loss of life its members and law enforcement officers.

As outlined in Section I and II of this Memorandum, and in the Tribe's First Amended Complaint, ¶¶ 75-81, the harm is well documented. In July 2022 alone, the Tribal Prosecutor's office handled 261 arraignments, 161 dispositions, 117 review of sentence compliance, and 590 incoming calls. (Adams Suppl. Decl., ¶ 4) These included what is believed to be a rape perpetrated by a serial rapist that has been threatening the Tribal community for some time. (Adams Suppl. Decl., ¶ 4) Also in July 2022, there were many calls into the Tribal police of people firing assault style weapons. (Adams Suppl. Decl., ¶ 4) One of those calls involved shots fired at the Tribe's Porcupine Elderly Complex. (Adams Suppl. Decl., ¶ 4) Another involved shots fired at a car occupied by a mother and her child. (Adams Suppl. Decl., ¶4)

All told, in the months of July and August 2022, the Tribe had 5 deaths, all of which are likely to be charged as homicides. 4 shootings which did not result in death but resulted in serious

injuries, 4 stabbings, 3 cases of sexual assault, and 5 cases of assault. It also had 58 reports of missing persons, 18 breaking and entering calls, 36 cases of child abuse/neglect, 159 calls reporting domestic violence, 65 gun involved crimes (including one with an assault rifle discharged at the Pine Ridge Elders Center), 36 drug narcotic calls and 5,633 calls for service.

Compounding all this is the fact that the Tribal Corrections Department is full and understaffed by seventy officers, thus leaving it unable to control the jail population. (Adams Suppl. Decl., ¶ 6). This is leading to assaults on corrections officers by inmates and contraband such as fentanyl being smuggled into the jail. (Adams Suppl. Decl., ¶ 6). These events are adding to the already unacceptable workload of the 33 tribal officers when they are called to assist corrections officers in curbing violence in the detention facilities. For these reasons, immediate relief is needed before more incalculable harm occurs.

The relief requested in this motion will help provide significant assistance. By 1) enjoining the BIA from continuing to use an arbitrarily low base funding amount and using an arbitrarily low service population for purposes of the Tribe's ISDEAA law enforcement contracts, and 2) compelling BIA and OJS to immediately provide the Tribe with sufficient law enforcement staff and equipment to address the ongoing public safety crisis on the Pine Ridge Reservation pending the outcome of this litigation, the Tribe may begin to provide the law enforcement that was promised in the Treaties and reinforced in the statutes as discussed herein.

E. The Balance Between the Harm and Injury that Granting this Motion Will Inflict on the Defendants and the Harm that Plaintiff Will Suffer if it is Denied, and the Public Interest Support Granting the Requested Relief.

The balance of harms and the public interest favor the Tribe. When the federal government or agency is the defendant, the final two *Dataphase* factors, the balance of harms and the public

interest, can "merge" into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

If the preliminary injunction is issued, the harm faced by the Defendants (if any) is insignificant compared to the harm caused to the Tribe if the injunction is denied, especially because this Motion is brough at the beginning of the fiscal year. Without emergency injunctive relief, the Tribe will continue to suffer immediate and long-term harm resulting from the Defendants' failure to provide adequate law enforcement resources to address criminal activity on the Reservation and to protect the Tribe, its members and the tribal service population. Absent immediate relief, more lives will be lost, more injuries will be sustained, and more crimes will go insufficiently investigated, unsolved, and unprosecuted and economic development will continue to be discouraged.

Furthermore, crime does not stay on the Reservation: the guns and drugs discussed herein are moving on and off the reservation to some of the state's largest cities and to border towns. This is one of the reasons that both houses of the South Dakota Legislature passed a Concurrent Resolution urging the federal government to fulfill its treaty obligations by fully funding the Oglala and Rosebud Departments of Public Safety, South Dakota. Concurrent Resolution 6014, March 2022. (Attached hereto as Exhibit E). The public interest, as expressed through the Treaties and related federal law, therefore aligns with the Tribe's interest in providing competent and effective law enforcement on the Pine Ridge Reservation.

Without this relief the situation will only get worse. The Tribe currently faces the possible loss of more Law Enforcement Officers as a result of the overtime hours and dangerous working conditions. As noted above, the Tribe has had five law enforcement officers resign in the past two months because of excessive overtime, extreme stress, and low wages. (Young Second Suppl. Decl., ¶7). These officers are highly trained individuals who are background checked, trained, and

deputized by the federal government. The further loss of any of these skilled employees constitutes irreparable harm to the Tribe and the United States. *See, First Premier Bank v. US. Consumer Fin. Protection Bureau,* 819 F.Supp.2d 906, 921-22 (D.S.D. 2011) (likelihood of losing employees constitutes irreparable harm warranting injunctive relief).

Finally, the public interest is served by ensuring that the Defendants' administration of the United States' treaty and statutory , including its obligations under the Act of 1877, TLOA and ILERA are accomplished in accordance with what the United States President executed by Treaty, Congress intended in legislation enacted, and the Executive Branch committed to implement.

IV.CONCLUSION

For the foregoing reasons, the Tribe requests that the Court enter an order 1) restraining Defendants from continuing to assign a base ISDEAA law enforcement funding amount to the Tribe based upon the Tribe's 1999 TPA law enforcement budget; 2) restraining Defendants from continuing to use an outdated and arbitrary law enforcement service population base for purposes of providing law enforcement resources and funding to the Tribe under the ISDEAA; and 3) compelling BIA and OJS to immediately provide the Tribe with sufficient law enforcement resources to address the ongoing public safety crisis on the Pine Ridge Reservation, pending the outcome of this litigation.

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