**APPLICATION TO PLACE LAND IN TRUST**
**for the PRAIRIE ISLAND**
**INDIAN COMMUNITY**

***Former Mogren Property***

Pursuant to Section 5 of the Indian Reorganization Act of 1934 (codified as 25 U.S.C. § 465), 25 C.F.R. Part 151, and Prairie Island Community Council Resolution Number 16-04-27-69,[1] the Prairie Island Indian Community in Minnesota (the "Community"), acting by and through its Community Council, submits the following application to place land located in Section 31, Township 29, Range 20 West in Washington County, Minnesota (the Property) in trust for the Community (the Application).

As required by applicable federal regulations found at 25 C.F.R. §151.10(a)-(c), (e)-(h) and §151.11, the Community offers the following information in support of the Application. These regulations do not require the BIA to reach any particular conclusion with respect to any of the criteria, do not specify the weight to be given to any of the criteria, and do not require any particular balancing of interests. *See Ziebach County, South Dakota v. Acting Great Plains Regional Director*, 38 IBIA 227 (2002). But the administrative record must demonstrate the BIA's consideration of the criteria in reaching its decision. *See McAlpine v. Muskogee Area Director*, 19 IBIA 2 (1990).

## I. THE SUBJECT PROPERTY. (25 C.F.R. 151.11(b)).

The Property is comprised of three contiguous tracts, collectively comprising 112.79 acres of land, with the following legal descriptions:

> **Tract 1 –** North ½ of the Southwest ¼ of Section 31, Township 29, Range 20, Washington County, Minnesota, except that part conveyed for highway purposes described as Parcel 3 of the Washington County Righ of Way Plat No. 36 AND Parcel 47 of Minnesota Department of Transportation Right of Way Plat No. 82-36.
>
> Together with Driveway Easement Agreement dated August 27, 2007, filed September 10, 2007 as Document Number 3661102.
>
> (PID 31.029.20.43.0001).

[1] *See* Appendix 1.

**Tract 2** –

That part of the SW 1/4 of the SE 1/4 of Section 31, Township 29, Range 20, Washington County, Minnesota, described as follows: Beginning at the northwest corner thereof thence North 89 degrees 15 minutes 53 seconds East, bearings oriented to the Minnesota State Plane Coordinate System, along the north line of said Southwest 1/4 of Southeast 1/4 a distance of 715 feet; thence South 00 degrees 38 minutes 20 seconds East parallel with the West line of said Southwest 1/4 of Southeast 1/4 a distance of 5.00 feet; thence southerly along a tangential curve concave to the west, having a radius of 500.00 feet and a central angle 13 degrees 38 minutes 50 seconds a distance of 119.09 feet; thence South 13 degrees 00 minutes 30 seconds West, tangent to last described curve, a distance of 71.06 feet; thence southerly along a tangential curve concave to the east, having a radius of 500.00 feet and a central angle of 13 degrees 38 minutes 50 seconds a distance of 119.09 feet; thence South 00 degrees 38 minutes 20 seconds East, tangent to last described curve, a distance of 872.34 feet to the north line of Parcel 47B as shown on Minnesota Department of Transportation Right-of-Way Plat No. 82-45, recorded as Document No. 435935 in the Office of County Recorder, Washington County; thence South 87 degrees 07 minutes 37 seconds West along said right-of-way line 670.47 feet to right-of-way boundary corner No. 8608 as shown on said Minnesota Department of Transportation Right-of-Way Plat No. 82-45, said point being on the west line of said Southwest 1/4 of Southeast 1/4; thence northerly along said west line to the point of beginning.

(PID 31.029.20.30.0001).

**Tract 3** – That part of the North Half of the Southeast Quarter of Section 31, Township 29, Range 20, Washington County, Minnesota, which lies West of a line 685.00 feet Easterly of, when measured at right angles with, and parallel with the West line of said North Half of said Southeast Quarter.

(PIDS 31.029.20.42.0013; 31.029.20.42.0014; 31.029.20.42.0015; 31.029.20.42.0016).

(The "Subject Property").

The Subject Property is bounded generally by CSAH 15, also known as Manning Avenue, on the West, the north/south half quarter line of the northwest quarter of Section 31 on the North, Midwest Avenue North on the East, and North Hudson Boulevard on the South. The location of the Subject Property is depicted by the attached maps entitled "*Generalized Location of the Subject Property*",[2] and the location of each "tract" identified in the legal description is depicted in the ALTA Survey map, which is also attached.[3] The Subject Property is located approximately 19.6 miles northwest of the Community's Reservation lands,[4] and 4.1 miles from the Minnesota state boundary.[5]

By Limited Warranty Deed dated June 25, 2015, Four Sisters Investments, LLC, a Minnesota limited liability Company acquired the Subject Property from Bruce and Monica Mogren on behalf of West Lakeland Sod Farm, LLC.[6] The Subject Property was used for agricultural purposes prior to the sale to Four Sisters, and that use has been continued following the sale to Four Sisters.[7] Upon approval of this Application, Four Sisters Investments, LLC will convey the Subject Property to the United States of America in trust for the Prairie Island Indian Community in the state of Minnesota.

## II. THE STATUTORY AUTHORITY FOR THE ACQUISITION OF THE SUBJECT PROPERTY (25 C.F.R. 151.10(a)).

Under Section 5 of the Indian Reorganization Act,[8] the Secretary of the Interior has discretionary authority to, among other things, acquire lands in trust, within or without existing reservations, for the purpose of providing land for Indians. Where, as here, land is located outside of and noncontiguous to a tribe's reservation, and the acquisition is not mandated by statute or otherwise, the Secretary must consider: 1) the criteria identified in 25 C.F.R. 151.10 (a) through (c) and (e) through (h); 2) the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation; and 3) if the land is being acquired for business purposes, the tribe shall provide a plan which specifies the

[2] *See* Appendix 2-1 – 2-8.
[3] *See* Appendix 2-9.
[4] *See* Appendix 3.
[5] *See* Appendix 4.
[6] *See* Appendix 5.
[7] Agricultural Lease between Four Sisters Investments, LLC and Steve Biscoe, dated December 30, 2015. *See* Appendix 16.
[8] Wheeler-Howard Act of June 18, 1934, 25 U.S.C. 465, 48 Stat. 985; Pub. L. 100–581.

anticipated economic benefits associated with the proposed use.

## III. THE NEED AND PURPOSE FOR ADDITIONAL LAND (25 C.F.R. 151.10(b) & (c)).

The Community offers the following information in support of its application, as required by 25 C.F.R. §151.10(a)-(c), (e)-(h) and §151.11.

### A. Need (25 C.F.R. 151.10(b)).

Indians need not be landless for the Secretary to exercise her discretion to acquire land for them under 25 U.S.C. 465 and 25 C.F.R. 151.10, and the Secretary's authority to acquire land is not limited to the acquisition of land for a particular purpose. *See United States v. 29 Acres of Land*, 809 F.2d 544, 545 (8th Cir. 1987); *Chase v. McMasters*, 573 F.2d 1011, 1015-16 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *City of Sault Ste. Marie v. Andrus*, 532 F. Supp. 157, 162 (D.D.C. 1980); *City of Tacoma v. Andrus*, 457 F. Supp. 342, 345-46 (D.D.C. 1978).

The Community needs the Subject Property in order to provide a permanent, safe and secure land base for its members. This need is driven by the lack of sufficient land contiguous to the Community's reservation that is free of Mississippi River flooding and nuclear waste. This need has been apparent for decades and the immediacy of the need has been apparent since at least 1993, when high-level nuclear waste was first stored at Prairie Island over the objection of the Community. In fact, in 2003 the Minnesota Legislature acknowledged the need for Community land remote from nuclear waste storage when it passed legislation addressing the resolution of disputes surrounding the proposed dry cask storage of nuclear waste at Prairie Island. Specifically, the Community and Northern States Power (NSP) agreed, and the state legislation recognizes, that the Community may use impact payments from NSP to acquire up to 1,500 acres of land within a 50-mile radius from the Community for relocation purposes.[9]

The Community's Application is consistent with the purpose and intent of the Statute and is consistent with its parameters. Acquisition of the Subject Property will assist the Community in fulfilling its Constitutional obligation--and the federal government in fulfilling its trust responsibility--to establish, protect and

[9] Minnesota Statutes, Section 261B.1645, Subdivision 4 (the Statute). *See*, Appendix 11.

preserve a land base that is safe and secure for the Community and its members.

### 1. The Prairie Island Indian Community.

The Prairie Island Indian Community in the State of Minnesota (the Community) is a federally recognized Indian Tribe that has had a government to government relationship with the United States for over 200 years. The Community is a successor in interest to the Mdewakanton Band of Dakota who signatories to various agreements and treaties with the United States in 1805, 1825, 1837 and 1851, and the subject of various Acts of Congress in 1863, 1884, 1886, 1888, and 1889**.** Following enactment of the Indian Reorganization Act of 1934, the Mdewakanton at Prairie Island formally organized as the Prairie Island Indian Community in the State of Minnesota, a federally-recognized Indian Tribe, and approved a Constitution and Bylaws on May 23, 1936, which was in turn approved by the Secretary of the Interior on June 20, 1937.[10]

The Prairie Island Indian Reservation is located on the ancestral homeland of the Mdewakanton Dakota (Sioux) -- *Tinta Wita* -- at the confluence of the Vermillion and Mississippi Rivers, approximately 35 miles southeast of the Twin Cities of Minneapolis - Saint Paul and near the cities of Red Wing and Hastings, Minnesota. The Reservation currently includes approximately 3,100 acres of land held in trust by the United States for the benefit of the Community.

There are currently over 900 enrolled members of the Community, approximately 300 of whom reside on or near the Reservation. The Community provides a full range of governmental services to its members, it owns and operates a number of businesses, including, notably, Treasure Island Resort and Casino. and is the largest employer in Goodhue County with approximately 1,700 employees. Treasure Island includes a 500-room hotel and convention center, and offers gaming, dining, live entertainment, a 95-space RV park, and a 137-slip marina to accommodate visitors arriving by the Mississippi River.

### 2. The Community's Historical Occupation of the Region including the Subject Property.

Mdewakanton residency in the upper Mississippi river watershed can be traced back in the written historical records for over 350 years.[11] The ancestors of

[10] *See* Appendix 6.

[11] *See*, History of the Occupation of the Prairie Island Area by the Mdewakanton

the members of the Community were present to greet the first French explorers and traders who penetrated the Upper Mississippi watershed.[12] The Mdewakanton occupied the west bank of the Mississippi from Northern Iowa to St. Anthony Falls[13] and by the time Zebulon Pike reached the Upper Mississippi in 1805-06, the Mdewakanton already had villages on both the Mississippi and the Minnesota Rivers.[14]

The Mdewakanton's use of their ancestral lands was constrained by successive land cession treaties in 1825[15] and 1837.[16] Ultimately, by the 1851 Treaty of Traverse des Sioux,[17] the lands of the Mdewakanton at Prairie Island were lost.[18] Although the Treaty promised the Dakota reservations along the north and south banks of the Minnesota River, the Senate amended the treaties to eliminate the two described reservations and substituted undefined reservations to be selected by the President outside of the ceded territory. *Medawakanton v. U.S.* 57 Ct. Cl. 357, 361 (1922). Successive generations of Mdewakanton continued to occupy the region, despite the Federal Government's repeated efforts to remove them following the Treaty of 1851 -- during the so-called "Reservation Period" for the Minnesota Sioux from 1853-1862 -- and, again, after the Dakota War of 1862.

Federal retribution for the Dakota War posed significant additional challenges to the Mdewakanton's use and occupation of their ancestral homelands. In addition to the execution of 38 Dakota at Mankato on December 26, 1862, remaining Dakota prisoners of War, and at least 1,700 Dakota who had not been charged or convicted of anything, were imprisoned at Fort Snelling and were later

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Dakota, the Formative Years 1640-1940 (Jacobson, Buffalo, Schoessler & Magnuson Oct. 1998).

[12] Antoine Denis Raudot, Memoir Concerning the Different Indian Nations of North America, Letter 51, published in Indian of the Western Great Lakes, 1615-1760, W. Vernon Kinietz, ed. (Ann Arbor: University of Michigan Press, 1996 Ed.), at 377.

[13] Collections of the Michigan Pioneer and Historical Society, vol. 11, at 487.

[14] Rev. Samuel W. Pond, The Dakotas in Minnesota as They Were in 1834, Minn. His. Soc. Col. (1908), vol. XII, at 320.

[15] Treaty of August 19, 1825, 7 Stat. 272.

[16] Treaty of September 29, 1837, 7 Stat. 538. *See* Appendix 7.

[17] Treaty of August 5, 1851, 10 Stat. 954. *See* Appendix 7.

[18] The Subject Property is included in Royce Area 243 on the attached map, which depicts Indian land cessions in the current state of Minnesota and is reproduced from the 18th Annual Report of the bureau of American Ethnology, 1896-97 (J.W. Powell, Reporter). *See* Appendix 8. Royce Area 243 reflects land ceded by the Mdewakanton Sioux by the Treaty of September 29, 1837. *See* Appendix 7.

transferred in federal custody to Crow Creek in southeastern South Dakota where they were held in a prisoner camp. While the Dakota were confined, Congress passed the so-called "Abrogation and Forfeiture Act,"[19] which invalidated all treaties with the Mdewakanton, Sisseton, Wahpaton and Wahpakoota and forfeited their right to the payment of any annuities due them under those treaties. A month later, Congress passed the so-called "Removal Act" directing the "removal of the Sisseton, Wahpaton, Mdewakanton and Wahpakoota Bands of Sioux or Dakota Indians and for the disposition of their lands in Minnesota and Dakota."[20] Many Sioux avoided detention, removal and imprisonment by fleeing west, while some followed leaders north into Canada, where they received land reserves and protection from the Crown. A small group of Dakota, against all odds, maintained a presence in Minnesota during the dark years following the 1862 War.[21]

Despite the deprivations at Crow Creek, the distance from home, and a renewed effort in 1867 to remove the Dakota remaining in Minnesota to reservations outside of the state,[22] Dakota people remained in and continued to return home to Minnesota, with villages scattered in at least 14 locations, including at Red Wing and Wabasha. By 1883, the Mdewakanton at Prairie Island were a growing community. In 1884, Congress appropriated funds for the purchase of stock and the distribution of agricultural implements and lands for the Mdewakanton Band of Sioux in the State of Minnesota.[23] Subsequent Acts of Congress appropriated additional funds for the acquisition of lands at Prairie Island.[24] Populations increased at Prairie Island in the 1890s, and in 1899 Congress authorized the last appropriation for the Mdewakanton in Minnesota until the 1930s.

Following enactment of the Indian Reorganization Act of 1934, the Mdewakanton at Prairie Island approved a Constitution and Bylaws on May 23,

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[19] Act of February 16, 1863, 12 Stat. 652.
[20] Act of March 3, 1863, 12 Stat. 819.
[21] S.P. Adams to D.N. Cooley, August 10, 1866, NARS, RG 75, LR (Minn. His. Soc. Microfilm M175, Roll 765).
[22] Meyer, History of the Santee Sioux: United States Indian Policy on Trial (St. Paul: Minn. His. Soc. Press: rev. ed., 1993) p. 268.
[23] Act of July 4, 1884, 48th Cong., 1st Sess., ch. 180, 23 Stat. 76, 87; Act of March 3, 1885, 48th Cong., 2nd Sess., ch. 341, 23 Stat 362, 375.
[24] Act of May 15, 1886, 49th Cong., 1st Sess., ch 333, 24 Stat. 29, 39; Act of June 29, 1888, 50th Cong., 1st Sess., ch. 503, 125 Stat. 217, 228-229; Act of March 2, 1889, 50th Cong., 2nd Sess., ch. 412, 25 Stat. 980, 992-993; Act of August 19, 1890, 51 Cong., 1st Sess., 26 Stat. 336, 349-350.

1936, which was approved by the Secretary of the Interior on June 20, 1937.[25] The reacquisition of the Community's homelands began between 1936 and 1939 with the purchase of 414 acres of land by the federal government for the benefit of the newly organized Community. This acreage constitutes the central core of the Community. While much of that land is not suitable for development because it falls within the 100-year flood plain, the Community, nevertheless, was able to develop a small residential area that provided homes for a number of Community members.

### 3. The Need for a Safe and Secure Homeland and the Development of the Prairie Island Nuclear Generating Facility and the Storage of Nuclear Waste at Prairie Island.

The Community's need for land is as much the result of non-tribal appetite for power generation as the vagaries of the Mississippi River or the results of the Dakota War. In the late 1960s, a nuclear generating facility was sited and constructed adjacent to the Community's lands. The plant was originally announced as a coal and gas-fired power plant that would provide jobs and generalized economic benefit to the economically depressed area. Ultimately, however, the Plant design was for nuclear power generation.

On December 16, 1973, Unit 1 of the Prairie Island Nuclear Generating Plant (PINGP) started operation and PINGP Unit 2 reactor started operating on December 21, 1974, both pursuant to 20-year operating licenses. On June 27, 2011, the Nuclear Regulatory Commission (NRC) renewed the PINGP Unit 1 and 2 operating licenses for an additional 20 years, authorizing their continued operation until 2033 and 2034, respectively.

The PINGP's nuclear reactor core contains zirconium-clad rods filled with enriched uranium pellets. Over time, the fuel produces a less efficient nuclear reaction and must be replaced. Because spent-fuel rods "generate enormous heat and contain highly radioactive uranium, actinides and plutonium," the spent rods are placed on racks in a pool adjacent to the reactor to cool down.[26] The spent fuel and fuel assembly materials, while no longer useful for nuclear power generation, continue to pose a enormously dangerous long-term health risks -- including, increased cancer risks, birth defects, and death -- as well as potentially devastating

[25] *See* Appendix 6.
[26] *See Minnesota v. NRC*, 602 F.2d 412, 413 (D.C. Cir. 1979).

and permanent environmental impacts.[27] Spent nuclear fuel remains radioactive, and thus continues to pose these extreme hazards, "for time spans seemingly beyond human comprehension."[28]

The nearest tribal member residences are approximately 600 yards from the PINGP and, as discussed below, the nuclear waste that is stored near that facility.[29] In addition to being directly adjacent to the Community's lands, businesses, governmental buildings and Community member homes, the PINGP is located *on* the Community's ancestral homeland immediately adjacent to the PIIC Reservation. While actually located in Welch Township, the area encompassing the PINGP was annexed by the City of Red Wing.[30]

**4. Nuclear Waste With No Place to Go.**

Simply put, nuclear power generates dangerous nuclear waste, and throughout the 1970s and 1980s the PINGP generated nuclear waste without the federal government having any formal plan for the disposal of that waste. Initially, the government believed that spent nuclear fuel would be processed, avoiding the waste storage issue entirely. When that plan was scrapped, the interim solution was to store the nuclear waste on site with "dense packing" of cooling pools, until the

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[27] *Nuclear Energy Inst. v. EPA*, 373 F. 3d 1251, 1258 (D.C. Cir. 2004) (internal citations omitted).

[28] *New York v. NRC*, 681 F.3d 471, 474 (D. C. Cir. 2012) citing *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1258 (D. C. Cir 2004) (per curiam). Spent nuclear fuel must be contained from the environment for tens of thousands of years. *See* Appendix 10.

[29] A Map depicting the location of the PINGP and the nuclear waste storage in relationship to Community member homes, Community governmental buildings and businesses is attached as Appendix 9-1 & 9-2.

[30] The City of Red Wing is named after a succession of Mdewakanton Dakota chieftains who were named Hoopaahoosha, which translates in English as "Red Wing." The Mdewakanton Dakota village in the vicinity of what is now downtown Red Wing was already established when Zebulon Pike arrived in the area. Three Mdewakanton villages on the Mississippi were encountered by Pike's expeditions – near the mouth of the Upper Iowa River, near the mouth of the Cannon River, and just upstream from the mouth of the Saint Croix. *See* Coues, Elliot, ed., Expeditions of Zebulon Montgomery Pike (New York: Francis P. Harper, 1895), vol. 1, at 342-44. *See also Sisseton v. U.S.*, 10 Ind. Cl, Comm. 137, 142-43 (1962). These were the homes of the Kyuska under Wabasha, the Hemnican under Red Wing and the Kaposia under Little Crow. *See* Gary Clayton Anderson, Kinsman of a Different Kind – Dakota-White Relations in the Upper Mississippi 1650-1862 (Minn. His. Soc. Press, 1997 ed.) at 80.

federal government developed permanent storage solution. With "dense packing" in full swing, the federal government decided to establish a permanent common repository, which the NRC predicted would be operational by 1985.[31] In 1984, while awaiting the opening of the common repository, the NRC expanded its system of decentralized, on-site storage of spent nuclear fuel and, under Court order to do so in the *Minnesota* litigation,[32] the NRC issued its analysis of the safety of storing nuclear waste on-site at power plants and, based on that policy analysis, issued a temporary storage rule.[33]

In 1987, Congress designated Yucca Mountain in Nevada as a potential site for a permanent repository and directed that, for cost reasons, no other sites would be considered until a decision was made about that site.[34] In 1990, in light of delays in opening a permanent repository, the NRC revised its policy statement and temporary storage rule to provide that permanent storage would be available "in the first quarter of the twenty-first century."[35]

In 2010, the NRC again revised its policy analysis and the temporary storage rule by which the NRC acknowledged that it could not say with any confidence when nuclear waste could be moved to a permanent repository, but that such a repository would be available "when necessary."[36] The Community and the States of New York, Connecticut, Vermont and New Jersey challenged the NRC decision,[37] and the United States Circuit Court of Appeals for the District of Columbia Circuit struck down the revised policy analysis and temporary storage rule.[38] The Circuit Court concluded that the NRC did not conduct a sufficient analysis of the environmental risks,[39] failed to evaluate the probability and consequences of failing to establish a permanent common repository and appeared to have no plan other than "hoping for a geologic repository" despite what the Court describes as "societal and political barriers to selecting a site."[40]

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[31] *NRDC v. NRC*, 582 F.2d 166, 173 (2d Cir. 1978).
[32] *Minnesota v. NRC*, 602 F.2d 412, 413 (D.C. Cir. 1979).
[33] 10 C.F.R. 51.23(a)(1984); 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984).
[34] 42 U.S.C. 10134.
[35] 55 Fed. Reg. 38, 472, 38, 472 (Sep. 18, 1990).
[36] 10 C.F.R. 51.23(a).
[37] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).
[38] *Id.*
[39] *New York*, 681 F.3d at 483.
[40] *Id.* at 478-79.

As the date for moving nuclear waste to a permanent federal repository moved further into the horizon, and the PINGP continued to generate nuclear waste, the NRC proposed expanding the on-site nuclear waste storage at Prairie Island using dry casks, and on October 19, 1993, the NRC issued a 20-year license authorizing the storage of dry cask nuclear waste at Prairie Island. That license, permitting the storage of up to 48 casks, expired on October 19, 2013, but Northern States Power sought and was granted a license renewal, authorizing an additional 40 years of storage - through 2053. The storage facility is located immediately adjacent to the Community's central residential and business district. [41]

Based on current operations, approximately 100 fuel assemblies are used and removed from PINGP's two reactors and are placed into the spent fuel pool every 2 years. That is a rate sufficient to fill roughly 10 dry casks every 8 years. The renewal of the PINGP operating licenses through 2034, and the current stock of spent nuclear fuel awaiting loading into casks at the Plant,[42] insure that nuclear waste storage will have to be expanded from the initially-approved 48 casks to at least 98 casks. The math is *certain* that 64 total casks of nuclear waste will be placed at the storage facility by the time that the license expires in 2034, with another 34 casks needed after the Plant is decommissioned.[43] In fact, that prospect has been acknowledged to the Minnesota Public Utilities Commission, which approved a certificate of need for up to 64 casks at the Prairie Island storage facility.

Despite years of "blue ribbon" commissions, congressional hearings, agency reports, and site investigations, the United States has not yet developed a permanent solution for storing nuclear waste required by the Nuclear Waste Policy Act.[44] That failure is the "central flaw of the U.S. nuclear waste management

[41] *See* Appendix 9-1 and 9-2.

[42] There are currently 29 casks of nuclear waste at the Prairie Island storage facility. Each dry cask is filled with 40 spent nuclear fuel assemblies. There are currently 1,189 fuel assemblies stored in the PINGP spent fuel pool awaiting loading into casks, enough to fill 30 additional casks, which combined with the waste already deposited at the facility would total 59 casks of nuclear waste.

[43] The NRC's revised rule, which was unsuccessfully challenged by the Community and the States of New York, Vermont, and Connecticut, envisions the long-term storage of nuclear waste *after* plants at Prairie Island and elsewhere are decommissioned. *New York v. NRC,* No. 14-1210 D.C. Cir. 6.03.16*). See* Appendix 19.

[44] *New York v. NRC,* 681 F.3d 471, 474 (D.C. Cir. 2012). *See* Appendix 10.

program to date."[45] While experts appear in consensus that the ultimate nuclear waste disposal solution will be a "geologic repository," twenty years of work on establishing just such a repository at Yucca Mountain in Nevada was abandoned by Department of Energy when it withdrew its license application for the facility just over 4 years ago.[46] At this time, there is not even a prospective site for a repository, let alone progress toward the construction or licensing of one. As a result, District of Columbia Circuit recently observed, on-site storage, optimistically labeled 'temporary storage,' has been used for decades longer than originally anticipated. The delay has required plants to expand storage pools and to pack SNF (spent nuclear fuel) more densely within them. The lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary SNF storage and the reasonableness of continuing to license and relicense nuclear reactors."[47]

Nearly fifty years after the nuclear plant was sited and built next to the Community's homes and businesses, and almost twenty-five years after Yucca Mountain was first identified as a preferred site for a permanent nuclear waste repository, the Prairie Island Plant continues to generate nuclear waste, and that waste continues to accumulate on the Community's ancestral homeland and next to its homes and businesses, with no timeframe for its removal.[48]

**5. 2003 Legislative Action Addressing Relocation.**

In 2003, the Minnesota Legislature adopted amendments to Minnesota Statutes, Section 216B.1645, which recognize the resolution of outstanding disputes between the Community and Northern States Power over the storage of nuclear waste at Prairie Island. Specifically, the amendments recognize that the Community may use settlement payments made by NSP to acquire "up to 1500 acres of contiguous or non-contiguous acres of land in Minnesota within 50 miles

[45] *Id.*, citing Blue Ribbon Commission on America's Nuclear Future, Report to the Secretary of Energy 10-11 (2012) T 27.
[46] *Id.* at 3.
[47] Most of the nuclear plants currently operating in the Unites States were designed with limited spent fuel pool capacity because of the belief that the SNF would quickly be transported to reprocessing facilities. Prairie Island Final EIS, ML081840311:192 (May 1973). *See also, Minnesota v. NRC*, 602 F.2d 412, 418 D.C. Cir. 1979). When reprocessing was abandoned, SNF began to accumulate in pools, leading the NRC to authorize and direct "dense packing" of pools so that they could hold much larger amounts of fuel than initially contemplated. *Id*.
[48] *See In re Aiken County et al.*, No. 10-1050 (D.C. Cir. August 3, 2012).

of the tribal community reservation at Prairie Island to be taken into trust by the federal government for the benefit of the Community."[49] The legislation specifically acknowledged the intent of the Community to acquire lands for relocation purposes,[50] relocation options necessitated by the creation of a nuclear waste repository immediately adjacent to the Community's homes.

### B. Purpose for Land Use (25 C.F.R. 151.10(c)).

The Community is in need of additional land that is further away from the nuclear generating plant and the nuclear waste repository.[51] While the Community has no fixed plans for the use of the Subject Property, such use will be consistent with the intent expressed in the Settlement Agreement with NSP and acknowledged in the 2003 Legislation. The BIA must evaluate the proposed use of the land and should discuss present use of the property, any record of the tribes proposed plan for use for the property and other facts relevant to the proposed use. *See Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 139 (1998). The BIA is not required to consider every speculative use to which a property might be put. *See Town of Charlestown, Rhode Island Governor, State of Rhode Island and Providence Plantation v. Eastern Area Director*, 35 IBIA 93, 103 (2000); *Lake Montezuma Property Owners Association, Inc. v. Phoenix Area Director*, 34 IBIA 235, 238 (2000; *Town of Ignacio, Colorado v. Albuquerque Area Director*, 34 IBIA 37, 38-39 (1999). Speculation is not a proper basis for the BIA to evaluate this element, and the BIA's refusal to speculate as to potential uses does not constitute a sufficient showing that the BIA did not properly exercise its discretion in considering the proposed use articulated by a tribe in its application or indicated by other facts known to the BIA. *See State of Iowa and Board of Supervisors of Pottawattamie County, Iowa v. Great Plains Regional Director*, 38 IBIA 42, 52 (2002); *City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102 (1999).

While it need not fabricate potential uses of the Subject Property that are not currently planned in order to meet this element, the Community can state with certainty that: 1) the current agricultural use of the Subject Property continues unaltered, except that corn production has replaced sod production, and will continue for the next several years; and 2) any change in use will be consistent with the purposes permitted by the 2003 Settlement and Legislation.

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[49] Minn. Stat., Sec. 216B.1645, subdivision 4. *See* Appendix 11.
[50] *Id.*
[51] *See* Prairie Island Tribal Council Resolution at Appendix 1.

As clearly described elsewhere in this Application, the Subject Property was acquired as part of a nuclear waste storage compromise, whereby the State permitted NSP/XCEL Energy to store additional casks of deadly radioactive nuclear waste 600 yards from the Community's main residential area and, in exchange, the Community received compensation that could be used to acquire up to 1500 acres of contiguous or non-contiguous acres of land in Minnesota within 50 miles of the Community's reservation to be taken into trust by the federal government for housing and other residential purposes.

Accordingly, and consistent with the 2003 Legislation, if the current use of the Subject Property is altered in the future, it will be for low density residential housing with considerable open space, consistent with the surrounding family farming and low density residential uses. Because no plans exist and none are being developed, there is little more that the Community can say except that future use will be as specified in the Settlement and the legislation. In the past he Community has developed other residential housing areas for its members. Those developments involved low density, single family dwellings with large building sites and subdivision-like roads rather than cross-section streets and avenues. Given that history and the restrictions on use imposed by the Settlement and Legislation, it is likely that any future development would be similar and could be served by individual wells and septic, like the Community's recent developments, or could utilize centralized sewer and water if available in the Township. And such a development would also involve the installation of all necessary infrastructure, the development of park space and the preservation of green space, among other residential amenities.

## IV. IMPACT ON STATE AND POLITICAL SUBDIVISIONS (25 C.F.R. 151.10(e)).

The Community acknowledges that the BIA must also consider the impact of the loss of tax revenue from the Subject Property, but that the BIA will not consider generalized arguments regarding the cumulative loss of taxes to a state or local government. *See, e.g.*, *City of Timber Lake, South Dakota v. Great Plains Regional Director*, 36 IBIA 188, 191 (2001). The standard for measuring the potential tax impact from a trust transfer is the revenue that would be lost upon transfer of the parcel to trust compared to the overall county tax revenues. *See County of Charles Mix v. United States Dept. of the Int.*, 799 F.Supp.2d 1027 (D.S.D. 2011) (county's loss compared to County's total annual tax budget);

*County of Mille Lacs v. Midwest Regional Director, BIA*, 37 IBIA 169, 175 (2002) (same). A *de minimus* impact on overall County tax revenues is not a proper basis to deny an application for trust transfer.

County property tax paid in 2015 on the Subject Property was $5150.00.[52] The County's total property tax budget for 2015 was $91,376,100, a 3.4% increase over the $88,330,300 collected in 2014.[53] The loss of the tax revenue from the Subject Property compared to the 2014 County property tax revenues therefore represents a .005% impact and is therefore, by definition, *de minimus*.[54]

Even though the tax impact is defined by precedent as *de minimus*, and that is the primary consideration for purposes of weighing any potential claims of negative impact from loss of tax revenues, the financial-impact calculation must look further and may not be done in a vacuum. Rather, the effect of the anticipated loss of tax revenue resulting from a trust transfer must be considered in the context of the Community's overall economic effect on the local and regional economy. As noted by the IBIA in a decision affirming another Minnesota tribe's trust acquisition:

> [T]he Community's role as taxpayer or tax generator in Mille Lacs County is not limited to its role as a property owner. . . The Band also asserted that it had relieved Appellant's taxpayers of significant financial obligations through its ability to secure Federal funding for infrastructure development and its use of its own and Federal funds to provide schools, law enforcement services, a health clinic, solid waste removal services, and other governmental services. It also argued that its business activities had contributed significantly to economic growth within the area, which had led to reductions in tax rates for Appellant's citizens.

*County of Mille Lacs*, 37 IBIA 169, 175. The same context must be considered here.

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[52] *See* Appendix 17, Schedule B.II, item 9.

[53] *See* Appendix 12, Minnesota County Budgets, 2015 Summary Budget data with 2014 Revised Summary Budget Data.

[54] County of Charles Mix, 799 F.Supp.2d 1027, 1046 (county's loss of $6,260.10 was insignificant when compared to County's $2,744,755 total annual tax budget, about a .23% reduction).

The economic impact of the Community on the local and regional economy is significant and positive. The Community operates a significant gaming facility in the Region, Treasure Island Resort & Casino in Goodhue County. The Community employs approximately 1,700 people, approximately 70% of whom are full time and over 90% of whom are not Community members. Even excluding its other business activities, the Community's workforce at Treasure Island alone makes it the largest employer in Goodhue County, outpacing the next largest employer by over two times.

The Community's employees have good-paying, benefit-providing jobs, which are generated by the Community without ***any*** subsidy or investment by any City, County, or the State government. Excluding the costs of benefits (typically 30% of wages), the Community makes annual total wage distributions of $44.6 million. Annual payroll-related taxes paid on these wages are nearly $13 million.[55] Annual wages per employee (excluding benefit costs) paid at Treasure Island are $25,600 compared to an average of $20,200 for leisure & hospitality sector jobs, $16,600.00 for accommodations sector jobs and $10,400 for food and beverage sector jobs.

The Community's government gaming enterprise also provides employee benefits, including health and dental insurance, disability coverage, 401k and wellness initiatives. Based on current levels, the Community pays nearly $10 million in benefits to its employees and their dependents on an annual basis.

In addition to good-paying, benefit-providing jobs, the Community spends in excess of $46 million annually on goods and services to support its government gaming enterprise, over $31 million (nearly 67%) of which is spent in-state. And these sums exclude the hundreds of millions of dollars that the Community has invested in infrastructure and other capital expenditures, which have a profound ripple effect on the regional economy.

In addition, the BIA must take into account the Tribal and federal services provided to the Community's more than 900 members, which services are funded without contribution by the State or local governments.

On July 23, 2003, the Community Council established the Prairie Island Indian Community Police Department, which provides primary law enforcement to

[55] $12.98 million paid in federal and state withholding, Social Security and Medicare taxes.

the Community. The Department is comprised of a Chief of Police and 8 officers, with Departmental authorization for 11 officers. The Department is fully equipped with patrol cruisers, off road vehicles and boats. Department officers are all certified by the State of Minnesota, are licensed peace officers and possess jurisdiction to enforce state and tribal laws. Three of the officers also possess federal deputation.

On March 11, 2004, the Community entered into a Cooperative Agreement Regarding Law Enforcement with Goodhue County and the City of Red Wing, Minnesota and their law enforcement agencies.[56] This Agreement recognizes the Community's Police Department as the primary provider of law enforcement services to the Community. The Community also has participated as a party to the South East Region Counties Mutual Aid Agreement for law enforcement services.[57] It also entered into a prosecution agreement with the Goodhue County Attorney's Office, which receives annual payments to serve as the prosecuting agency for state citations issued by the Community's Police Officers. This arrangement exists notwithstanding the fact that the Indian Country at Prairie Island has been subject to state jurisdiction since 1953 by virtue of Public Law 280.

The Community also provides social services to its members through its Family Services Department, which includes child welfare services, individual counseling services, chemical dependency counseling, vulnerable-adult services, among other services.

The Community also operates a fully-staffed Tribal Court that exercises jurisdiction over a broad array of civil matters including, but not limited to, family services matters, child welfare proceedings, divorce and child custody matters, conservatorships and guardianships, probate, contract and tort proceedings. The Court also exercises drug court jurisdiction over tribal members.

In short, the Community provides virtually all essential governmental services to its members without any appreciable cost to the State, County or local unit of government. This has the effect of relieving those governmental units of the financial obligation to deliver services to members, thus dramatically relieving demands on their resources. Accordingly, the loss of the tax revenue from the conveyance of the Subject Property in trust must be considered in the proper

[56] *See* Appendix 14.
[57] *See* Appendix 15.

context of the economic impact that the Community, both as employer and as the primary governmental unit delivering services to its members, has on the non-tribal community and the surrounding governments. When that impact is considered in the context of the Community's overall financial impact on the region, any tax impact is not merely *de minimus*, it is infinitesimal.

## VI. POTENTIAL JURISDICTIONAL PROBLEMS AND LAND USE CONFLICTS (25 C.F.R. 151.10(f)).

The Community does not anticipate that the proposed acquisition will present any jurisdictional problems or conflicts. There are no current plans to change the current land use, and there will be no jurisdictional problems. The Subject Property is zoned agricultural and the property is leased for agricultural production through December 31, 2016.[58] Uses adjacent to the Subject Property include agricultural, residential and mixed commercial. Because the Community does not anticipate an immediate change in the use of the Subject Property, it does not anticipate any land use conflicts with local government. If the Subject Property were needed by the Community to relocate its members further away from the nuclear generating facility, it is anticipated that it would be developed for low density residential housing with considerable open space, which is consistent with the surrounding family farming and low density residential uses.

In addition, the Community exercises exclusive civil regulatory authority over tribal lands and member-owned fee lands. The Community also may exercise regulatory authority over non-Indian lands in certain circumstances. The Community also does not anticipate any law enforcement jurisdictional problems, inasmuch as the Subject Property is vacant, infrequently used, and has had no law enforcement contacts since the Community acquired it.

Accordingly, the Community does not foresee any jurisdictional problems as a result of the conveyance of the Subject Property into trust.

## VII. ADDITIONAL BIA RESPONSIBILITIES (25 C.F.R. 151.10(g)).

The PIIC does not anticipate that the BIA will experience any significant increase in responsibilities as a result of the transfer of the Subject Property into trust since the proposed transfer will not result in any material increase in the Reservation population or any currently foreseeable change in the current use of the

[58] *See* Appendix 16.

Subject Property.

## VIII. CONTAMINANT SURVEY (25 C.F.R. 151.10(h)).

A Phase I Contaminant Survey ("Phase 1") for the Subject Property will be performed in the near future my Herbert Nelson, a qualified environmental professional, with Pine Beach LLC, and the report of that assessment will be submitted to the Bureau of Indian Affairs' Midwest Regional Director for review and approval.

## VII. NEPA AND NHPA COMPLIANCE (25 C.F.R. 151.10(h)).

No development or land use change for the Subject Property is currently proposed or planned. Therefore, no environmental review or archeological survey is required for the transfer of this property into trust. *See* BIAM Release No. 9303 (February 24, 1993), & 4.4.1 ("Approvals or grants of conveyances and other transfers of interests in land where no change in land use is planned" are "Categorical Exclusions" from NEPA requirements) and 36 C.F.R. § 800.3(a)(l) ("If the undertaking does not have the potential to cause effects on historic properties, the Agency Official has no further obligations under section 106 or this part"). A NEPA Categorical Exclusion Checklist is attached.[59]

## VIII. EVIDENCE OF TITLE

Attached hereto is the following evidence of title in the Community to the Subject Property:

1. Copy of the Corrective Limited Warranty Deed to the Community from West Lakeland Sod Farm, LLC to Four Sisters Investments LLC is attached.[60]
2. An ALTA U.S. title insurance commitment naming the United States of America in trust for the Prairie Island Indian Community in Minnesota as the insured party is attached.[61]

[59] *See* Appendix 13.
[60] *See* Appendix 5.
[61] *See* Appendix 17.

## IX. DRAFT DEED

A draft warranty deed from Four Sisters Investments, LLC to the United States of America in trust for the Prairie Island Indian Community in the state of Minnesota is attached.[62]

Date: July 7, 2017, *nunc pro tunc*
June 6, 2016

Respectfully submitted,

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[62] *See* Appendix 18.

## APPENDIX

1. Prairie Island Indian Community Resolution.

2. Maps entitled *Generalized Location of the Subject Property.*

3. Map of Property Relative to Prairie Island Reservation Lands.

4. Location of Subject Property Relative to MN State Boundaries.

5. Copy of the Corrective Limited Warranty to Four Sisters Investments, LLC dated November 28, 2016 and recorded as Document 4093903 with the Washington County Recorder on December 2, 2016.

6. May 23, 1936 Constitution and Bylaws of the Prairie Island Indian Community.

7. Treaty of September 29, 1837, 7 Stats. 538.

8. Royce Area 243 Map of Subject Property.

9. Map Depicting Location of PINGP and Nuclear Waste Storage in Relation to Community Member Homes.

10. *New York v. NRC,* 681 F.3d 471, 474 (D.C. Cir. 2012).

11. Minnesota Statutes, Section 216B.145, Subdivision 4.

12. State Auditor's April 23, 2015 Summary County Budgets with Revised Summary Budget Data for 2014.

13. NEPA Categorical Exclusion Checklist.

14. March 11, 2004 Cooperative Agreement Regarding Law Enforcement Between the Community, Goodhue County and the City of Red Wing and Their Law Enforcement Agencies.

15. South East Region Counties Mutual Aid Agreement.

16. Agricultural Lease between Four Sisters Investments, LLC and Steve Biscoe, dated December 30, 2015.

17. Amended Title Insurance Commitment naming the United States of America in Trust for the Prairie Island Indian Community as the Insured Party.

18. Corrected draft warranty deed conveying the Subject Property from Four Sisters Investments, LLC to the United States in trust for the Prairie Island Indian Community in Minnesota, a federally recognized Indian tribe.

19. *New York v. NRC*, No. 14-1210 (D.C. Cir. 6.03.16).