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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONALD ALLEN; PETER ALLEN; RICHARD ALLEN; ROBERT ALLEN; BARBARA CRABTREE; LYNN CRABTREE; VENUS HOAGLEN; SHARON IBARRA; DANIEL JACKSON; GWEN JACKSON-LOSS; JESSICA JACKSON; MARTHA KNIGHT; RYAN PINOLA; GARY POLLOCK; MICHAEL TOOLEY, AND YOLANDA TADEO,

Plaintiffs,

vs.

UNITED STATES OF AMERICA; KENNETH SALAZAR, as Secretary of the United States Department of the Interior,

Defendants.

Case No. C 11-05069 WHA

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: April 26, 2012
TIME: 8:00 a.m.
CTRM: 8, 14th Floor

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TO THE DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 26, 2012, at 8:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable William Alsup, Judge of the United States District Court for the Northern District of California, Courtroom 8, 14th Floor, located at 450 Golden Gate Avenue, San Francisco, California, plaintiffs will move the Court for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

RELIEF SOUGHT BY THE PLAINTIFFS

Plaintiffs seek the following relief from the Court:

1. A declaration that the Assistant Secretary for Indian Affairs ("Assistant Secretary") for the Bureau of Indian Affairs ("BIA") violated the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), by failing to make a final decision on the plaintiffs' ("Indians") request for reconsideration of the August 5, 2010, and October 2, 2010 decision ("Decision") of the Acting Regional Director for the Pacific Regional Office of the BIA ("Acting Regional Director"), denying the Indians' request for an election, pursuant to 25 U.S.C. § 476 of the Indian Reorganization Act ("IRA"), after the Assistant Secretary agreed to do so.

2. A declaration that the Secretary of the United States Department of the Interior ("Secretary") violated 25 U.S.C. § 476 of the IRA and the APA by failing to call and conduct an IRA election for the Indians within 180 days from the date that the Indians submitted a request to the Regional Director for the Pacific Regional Office of the BIA ("Regional Director") for an IRA election.

3. A declaration that the Indians are an "Indian tribe" as defined by 25 U.S.C. § 479 and 25 C.F.R. § 81.1(w)(2).

4. A declaration that the Acting Regional Director's Decision holding that the Indians were not eligible for an IRA election because they were not on the list of federally recognized Indian tribes ("List") published in the Federal Register, pursuant to 25 C.F.R. § 83.6(b), violated 25 U.S.C. § 479, 25 C.F.R. § 81.1(w)(2), 25 U.S.C. § 476, and the APA.

5. A declaration that the Secretary had a mandatory duty to call and conduct an IRA election for the Indians pursuant to 25 U.S.C. § 476.

6. A declaration that the Acting Regional Director's Decision and the Assistant Secretary's failure to make a final decision on the Indians' request for reconsideration constitutes a breach of the United States' fiduciary duty owed to the Indians under the IRA and, specifically, 25 U.S.C. § 476.

7. An order directing the Assistant Secretary to make a decision on the Indians' request for reconsideration.

8. An order directing the Secretary to call and conduct an IRA election for the Indians.

9. An order granting the Indians such other relief as the Court deems appropriate.

ISSUES TO BE DECIDED

1. Are the Indians an "Indian tribe" as defined by 25 U.S.C. § 479 and 25 C.F.R. § 81.1(w)(2)?

2. Does the Acting Regional Director's Decision denying the Indians' request for an IRA election on the grounds that they were not on the List of federally recognized Indian tribes conflict with the definition of "Indian tribe" set forth in 25 U.S.C. § 479 ("Section 479") and 25 C.F.R. § 81.1(w)(2) ("Regulation") and, therefore, is void?

3. Does the Secretary have a mandatory duty to call and conduct an IRA election for the Indians pursuant to 25 U.S.C. § 476?

4. Did the Assistant Secretary's failure to make a final decision on the Indians' request for reconsideration, after agreeing to do so, constitute "agency action unreasonably delayed" in violation of the APA?

5. Was the Secretary's failure to call and conduct an IRA election for the Indians within 180 days of receiving a request to do so a violation of 25 U.S.C. § 476 and 5 U.S.C. § 706?

STATEMENT OF FACTS

The relevant facts of this case are set forth in the Administrative Record ("AR")[1] filed by the defendants in this case and the Declaration of Jessica Jackson ("Jackson Declaration") and Lester J. Marston ("Marston Declaration") filed in Support of the Plaintiffs' Motion for Summary Judgment. For the Court's convenience, the Indians will not repeat those facts herein but, rather, will incorporated the facts set forth in the AR and the Jackson and Marston Declarations as if set forth here in full.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

INTRODUCTION

This is an action brought by eleven American Indians: (1) for a determination that the Indians are eligible for an IRA election; (2) to compel the Secretary to make a final decision on the Indians' request for reconsideration, and (3) to compel the Secretary to approve the Indians' request for an IRA election.

Each of the Indians possesses a one-half (½) or more degree of Pomo Indian blood. Jackson Declaration, p. 1, ¶ 2. Each of the Indians resides on the Pinoleville Indian Reservation. Jackson Declaration, p. 1, ¶ 3. The Pinoleville Indian Reservation ("Reservation") was originally purchased by the United States for homeless California Pomo Indians that resided in the Pinoleville area. *Id.*, p. 2, ¶ 4. The Reservation was illegally terminated by the United States. *Id.*, p. 2, ¶ 5. At the time of the termination of the Reservation, the United States developed and approved a plan ("Distribution Plan") for the distribution of the assets of the Reservation to various Pomo Indians. *Id.*, p. 2, ¶ 6. Under the Distribution Plan, the Reservation was divided up into individual parcels, the majority of which were conveyed by the United States to individual Indians called "Distributees." *Id.*, p. 2, ¶ 7. The Indians are

[1] On March 20, 2012, the defendants served on the plaintiffs a "Corrected Administrative Record Index" ("Index"). The Index did not contain a CD or copy of the Administrative Record. Plaintiffs, therefore, were unable to cite to the Administrative Record. All citations contained in Plaintiffs' Statement of Facts, therefore, are to the Declarations of Jessica Jackson and Lester J. Marston filed in support of Plaintiffs' Motion for Summary Judgment.

Distributees or the heirs of Distributees. Jackson Declaration, p. 2, ¶ 8.

On May 28, 2009, the Indians, along with twenty-six (26) other individual Indians, submitted a petition to the Regional Director of the BIA requesting an IRA election, pursuant to 25 U.S.C. § 476, to organize a tribal government for the Indians as a half-blood Indian community. Jackson Declaration, p. 2, ¶ 9-11.

The Pacific Regional Director failed to take any action on the Indians' request within 180 days of receiving the request as required by 25 U.S.C. § 476. Jackson Declaration, p. 3, ¶ 16.

Instead, on August 5, 2010, the Acting Regional Director of the BIA denied the Indians' request on the grounds that the Indians were not an entity listed on the "List" of federally recognized Indian tribes published by the Secretary in the Federal Register. Jackson Declaration, p. 4, ¶ 19.

The Indians then requested that the Assistant Secretary reconsider the Acting Regional Director's Decision. Jackson Declaration, p. 4, ¶ 20. On October 22, 2010, the Acting Regional Director denied the Indians' request for reconsideration. Jackson Declaration, p. 5, ¶ 26. The Assistant Secretary subsequently agreed to reconsider the Regional Director's Decision but then never made a final decision on the Indians' request for reconsideration. Marston Declaration, pp. 6-7, ¶¶ 23-26.

In this brief, based upon the above facts, the Indians will demonstrate that: (1) the Secretary has a mandatory duty under 25 U.S.C. § 476 to call an IRA election when requested to do so by an eligible "Indian tribe;" (2) the Indians are an "Indian tribe" as defined by Section 479 and 25 C.F.R. § 81.1(w)(2) and, therefore, are eligible for an IRA election; (3) the Secretary's failure to call and conduct an IRA election for the Indians within 180 days of receiving a request to do so violated 25 U.S.C. § 476; (4) the Regional Director's Decision holding that the Indians had to be on the List of federally recognized Indian tribes published in the Federal Register conflicts with the definition of "Indian tribe" established by Congress in Section 479 and the Secretary's own Regulation, 25 C.F.R. § 81.1(w)(2) and, therefore, is void; (5) the Secretary's failure to conduct an IRA election for the Indians was a breach of the United

States' trust duty owed to the Indians under the IRA; (6) the Secretary's failure to call and conduct an IRA election within 180 days of receiving a request from the Indians to do so, and the Secretary's failure to make a final decision on the Indians' request for reconsideration, constitutes agency action unreasonably delayed in violation of the APA, and (7) the Indians were not required to exhaust any administrative remedies, assuming they had one, as a pre-condition to filing this lawsuit.

I.

THE SECRETARY HAS A MANDATORY DUTY TO CALL AN IRA ELECTION FOR AN ELIGIBLE TRIBE.

Title 25 of the United States Code § 476 provides:

> Any *Indian tribe* shall have the right to . . . adopt an appropriate constitution . . . at a special election authorized and called by the Secretary. . . .
>
> * * * *
>
> The Secretary *shall* call and hold an election . . . (A) within one hundred and eighty days after the receipt of a tribal request.

25 U.S.C. § 476(a)-(c). (Emphasis added.)

Federal courts have interpreted this language as placing a mandatory duty on the Secretary to call an election under § 476 upon receipt of a request to do so from an eligible Indian tribe. *Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165, 176 (E.D. Cal. 1986).

The Indians presented the Regional Director of the BIA with a letter, petition, and proposed constitution requesting that the BIA call and conduct an election on the Indians' proposed constitution pursuant to 25 U.S.C. § 476. Jackson Declaration, p. 2, ¶ 11.

Having received the Indians' request for an IRA election, the Secretary had a mandatory duty to call and conduct an IRA election for the Indians within 180 days of receipt of the Indians' request, to allow them to organize a half-blood Indian community under a written constitution, if the Indians are an eligible "Indian tribe," within the meaning of 25 U.S.C. § 476.

II.

THE INDIANS ARE AN ELIGIBLE IRA TRIBE AS DEFINED BY 25 U.S.C. § 479.

The IRA defines the term "Indian tribe" for purposes of 25 U.S.C. § 479 as ". . . the

Indians residing on one reservation."

Section 479 defines the word "Indians" as ". . . all other persons of one-half or more Indian blood."

Section 479 is clear and unambiguous. In order to be eligible for an IRA election under 25 U.S.C. § 476, the Indians have to meet two criteria. First, they must be persons who possess one-half or more Indian blood. Second, they must reside on an Indian reservation.

Based on the facts of this case, there is no doubt that the Indians meet both criteria. All of the Indians possess one-half or more Pomo Indian blood. Jackson Declaration, p. 1, ¶ 2. In addition, all of the Indians reside on the Pinoleville Indian Reservation. Jackson Declaration, p. 1, ¶ 3.

As such, the Indians meet all of the criteria established by Congress defining an "Indian tribe" under Section 479 and are eligible for an IRA election.

III.

THE INDIANS ARE AN ELIGIBLE IRA TRIBE AS DEFINED BY 25 C.F.R. § 81.1(w)(2).

Title 25 of the United States Code § 476 places a mandatory duty on the Secretary to call and conduct an IRA election for an eligible Indian tribe "under such rules and regulations as he may prescribe." 25 U.S.C. § 476(a)(1).

Pursuant to this statutory authority, the Secretary has promulgated the Regulation, 25 C.F.R. § 81.1(w)(2). This Regulation provides in pertinent part:

> Tribe means: (1) . . .; and (2) any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. . . .

Like Section 479, the Regulation defines an Indian tribe as persons: (1) who possess at least one-half degree of Indian blood, and (2) who reside on a reservation. Unlike Section 479, the Regulation establishes an additional criteria defining the term "Tribe" that is not found in Section 479.

In addition to possessing one-half degree Indian blood and residing on a reservation, the Regulation also requires that the half-blood Indians reside on a reservation that has been

established for them. 25 C.F.R. § 81.1(w)(2).

Here, the Pinoleville Indian Reservation or Rancheria was purchased by the United States to provide land for landless or homeless California Pomo Indians.

> In 1911, under appropriation acts passed by Congress in 1908, the United States purchased approximately 99.53 acres of land for the benefit of the Pomo Indians in the Pinoleville area of California.

Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F. Supp. 1042, 1043 (N.D. Cal. 1988).

All of the Indians are California Pomo Indians who possess one-half or more Pomo Indian blood and who reside on the Pinoleville Indian Reservation, a reservation set aside for California Pomo Indians. Jackson Declaration, pp. 1-2, ¶¶ 2-8.

As was the case with the criteria set forth in Section 479, all of the Indians meet all of the criteria established by the Secretary under the Regulation defining the term "Tribe." The Indians are, therefore, an "Indian tribe" within the meaning of 25 U.S.C. § 476.

IV.

THE SECRETARY'S FAILURE TO CALL AND CONDUCT AN IRA ELECTION FOR THE INDIANS WITHIN 180 DAYS AFTER RECEIVING A REQUEST TO DO SO CONSTITUTES A VIOLATION OF THE IRA AND APA.

Judicial review of a claim of agency inaction is governed by 5 U.S.C. § 706(1), which provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed."

This standard can be measured by either of two questions:

> (1) whether the agency has violated its statutory mandate by failing to act . . . or
> (2) whether the agency's delay in acting has been unreasonable.

Environmental Defense Fund v. Castle, 657 F.2d 275, 283-284 (D.C. Cir. 1981).

Mandatory injunctive relief under § 706(1) or 28 U.S.C. § 1361 is appropriate: "if the courts' study of the statute and relevant legislative materials causes it to conclude that the defendant official has failed to discharge a duty that Congress intended him to perform. . . ." *Carpet Linoleum & Resilient Title, Etc. v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981).

In determining whether the Secretary violated the APA, the fundamental question that must be answered is: Does the IRA and the Regulation promulgated thereunder require the Secretary to call and conduct an election after receiving a request from an eligible Indian Tribe? If the Court answers this question in the affirmative, then it must find that the Secretary violated the APA and issue appropriate injunctive relief.

> As long as the statute, once interpreted, creates a peremptory obligation for the officers to act, a mandamus action will lie.

13th Regional Corp. v. U.S. Department of Interior, 654 F. 2d 758, 760 (D.C. Cir. 1980).

As discussed in Sections I, II, and III, *supra*, there can be no doubt that 25 U.S.C. § 476 and 25 C.F.R. § 81.5 place an affirmative duty on the Secretary to authorize and call an IRA election for the Indians.

The Indians requested the Secretary to call and conduct an IRA election for them on May 28, 2009. Jackson Declaration, p. 2, ¶ 11. The Secretary, acting through the Regional Director, took no action to approve or deny the Indians' request within the 180-day time period established by Congress for calling IRA elections under 25 U.S.C. § 476. There is no justification for such an unreasonable delay.

Under both general equitable powers and powers under the APA, this Court can ensure that the statutory rights of the Indians are not denied by the Secretary's inaction. *Caswell v. Califano*, 583 F.2d 9, 15 (1st Cir. 1978); *British Airways v. Port Authority of N.Y.*, 564 F.2d 1002, 1010 (2d Cir. 1977).

As demonstrated in Sections II and III above, the Indians have shown that they are a "Tribe" within the meaning of 25 U.S.C. § 479 and eligible for an IRA election. The failure of the Secretary to call and conduct an IRA election for the Indians within 180 days after receiving the Indians' request to do so is a direct violation of both 25 U.S.C. § 476 and 25 C.F.R. § 81.5 and, therefore, a violation of the APA. 5 U.S.C. § 706(2).

V.

THE REGIONAL DIRECTOR'S DECISION REQUIRING THE INDIANS TO BE ON THE LIST OF RECOGNIZED TRIBES IS A VIOLATION OF THE IRA AND APA.

A. The Regional Director's Decision Is Reviewable Under The APA.

The Indians' claims challenging the actions of the Secretary must be reviewed pursuant to the standards set forth in the APA. Under the APA, the court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1995). The relevant analysis for review under the "arbitrary and capricious" standard was summarized by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983):

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc*. v. *United States, 371 U.S. 156, 168 (1962)*. In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, [419 U.S. 281 (1974)] *at 285*; *Citizens to Preserve Overton Park v. Volpe,* [401 U.S. 402, 414 (1971)] *at 416*. **Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider,** entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)*.

Id. (Emphasis added.)

B. The Regional Director's Decision Requiring The Indians To Be On The List Of Federally Recognized Indian Tribes Violates Both The IRA And APA.

The Acting Regional Director of the BIA denied the Indians' request for an IRA election on the grounds that the Indians were not on the List of federally recognized Indian tribes published in the Federal Register by the Secretary. Jackson Declaration, p. 4, ¶ 19.

The Acting Regional Director's Decision conflicts with both the plain wording of the

IRA, Section 479, and the Secretary's own Regulation, 25 C.F.R. § 81.1(w)(2), defining who is an eligible Indian tribe for purposes of 25 U.S.C. § 476.

An examination of both Section 479 and the Regulation makes it clear that the Indians do not have to be on the List in order to be an Indian tribe eligible for an IRA election.

Both Section 479 and the Regulation define an "Indian tribe" as persons possessing one-half Indian blood who reside on a reservation established for them, separate and apart from the definition of "recognized Indian tribe" contained in Section 479 and an "Indian entity" "listed in the Federal Register" contained in 25 C.F.R. § 81.1(w)(1).

Section 479 is clear and unambiguous. It defines an eligible Indian tribe as either: (1) any Indian tribe, or (2) the Indians residing on one reservation. 25 U.S.C. § 479. Section 479 defines the term "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" and "all other persons of one-half or more Indian blood." Thus, to be an Indian tribe as defined by Section 479, the Indians have to be either: (1) a "recognized Indian tribe now under Federal jurisdiction," or (2) Indians of half-blood or more residing on a reservation, but not both." 25 U.S.C. § 479. See, also, *Carcieri v. Salazar*, 555 U.S. 379 (2009).

In this case, the Indians qualify as an eligible IRA tribe not because they are members of a "recognized Indian tribe now under Federal jurisdiction" but because they are Indians of the "half-blood" residing on a reservation. Thus, despite the fact that the Indians are not on the List of federally recognized Indian tribes, they are an "Indian tribe" as defined by Section 479 and eligible for an IRA election.

If there was any doubt that the Indians' interpretation of Section 479 was correct, that doubt was clarified by the Secretary with the adoption of the Regulation.

Like Section 479, the Regulation makes it clear that the Indians are an eligible IRA tribe if they meet either one, but not both, of the definitions of a "Tribe" contained in the Regulation:

> Tribe means: (1) Any Indian Entity . . . included, or is eligible to be included, among those tribe, bands, pueblos, groups, communities, or Alaska Native entities listed in the Federal Register . . . , and (2) any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. . . .

If a group could only be eligible for an IRA election by being on the List of Federally Recognized Indian Tribes, there would have been no need for the Secretary to include subsection 2 in the definition of "Tribe" set forth above. The only possible explanation for including subsection 2 in the definition of "Tribe" is that it is a separate, independent definition of the word "Tribe." If a group can meet the criteria set forth in 25 C.F.R. § 81.1(w)(2), then they are a "Tribe" eligible for an IRA election, even though they are not on the List of Federally Recognized Tribes published by the Secretary in the Federal Register. Any other explanation would render 25 C.F.R. § 81.1(w)(2) meaningless and a nullity.

The Acting Regional Director's Decision denying the Indians' request for an IRA election is contrary to the plain wording and definition of "Tribe" set forth in the Secretary's own Regulation implementing the IRA. The Acting Regional Director's Decision clearly contravenes express regulatory requirements and ultimately undermines the very purpose for which the IRA was enacted: to strengthen tribal self-government by allowing half-blood Indians residing on an Indian reservation to organize a tribal government under a written constitution. Such a result cannot be squared with the IRA and the APA.

VI.

THE UNITED STATES BREACHED ITS FIDUCIARY OBLIGATIONS OWED TO THE INDIANS UNDER THE IRA BY FAILING TO CALL AN IRA ELECTION FOR THE INDIANS.

A. The Federal Defendants' Conduct In This Case Must Be Judged By The Most Exacting Fiduciary Standards.

It is indisputable that the United States maintains a trust relationship with Indians and Indian tribes. "This principal has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). See, *United States v. Mason,* 412 U.S. 391, 398 (1973); *Minnesota v. United States,* 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe,* 304 U.S. 111, 117-118 (1938); *United States v. Candelaria,* 271 U.S. 432, 442 (1926); *McKay v. Kalyton,* 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock,* 185 U.S. 373, 396 (1902); *United States v. Kagama,*118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia,* 30 U.S.1 (1831). The nature of that trust relationship was eloquently stated by the

Supreme Court in *Seminole Nation v. United States*, 316 U.S. 286 (1942):

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. *Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards*.

Id., at 296-297. (Emphasis added.)

The existence of a fiduciary responsibility toward Indians exists, furthermore, independent of an express provision of a treaty, agreement, executive order or statute.

> Defendant [federal government] contends that no fiduciary obligation can arise unless there is an express provision of a treaty, agreement, executive order or statute creating such a trust relationship, and the trust relationship is limited by the precise terms of the document. *If by this the Government means that the document has to say in specific terms that a trust or fiduciary relationship exists or is created, we cannot agree*. The existence vel non of the relationship can be inferred from the nature of the transaction or activity.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 991 (Ct. Cl. 1980). (Emphasis added.)

Furthermore, the trust duty, standing alone, independent from any duty imposed by federal statute upon the Executive Branch of the United States Government, can serve as an adequate legal basis for the declaratory and injunctive relief sought by the Indians:

> When the Congress legislates for Indians only, something more than a statutory entitlement is involved. *Congress is acting upon the premise that a special relation is involved, and is acting to meet the obligation inherent in that relationship*.

White v. Califano, 437 F. Supp. 543, 557 (D.S.D. 1977) (emphasis added). See, also, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Morton v. Ruiz*, 415 U.S. 199 (1974); *McNabb v. Bowen*, 829 F.2d 787 (9th Cir. 1987); *Coyote Valley Band of Pomo Indians*, *supra*; *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977) aff'd, 581 F.2d 679 (8th Cir. 1978); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C.1972).

Thus, in the exercise of its trust responsibility towards the Indians in this case, the Secretary's conduct must be judged by this Court "by the most exacting fiduciary standards." *Smith v. United States*, 515 F. Supp. 56, 58 (N.D. Cal. 1978).

B. This Court Is Required To Construe The Federal Statutes And Regulations Involved In This Case In Favor Of The Indians, Resolving All Ambiguities In The Indians' Favor.

By enacting the IRA, and specifically 25 U.S.C. § 476, the United States imposed certain duties and obligations on the Secretary with respect to any eligible Indian tribe. As stated above, it is clear and undisputed that, when Congress enacts legislation imposing duties upon itself with respect to Tribes or individual Indians, it has a trust responsibility to carry out those duties. *Seminole Nation v. United States,* 316 U.S. 286, 296-297 (1942). In the exercise of its trust responsibility towards the Indians, the Secretary's conduct must be exercised with "great care," *United States v. Mason*, 412 U.S. 391, 398 (1973), in accordance with "moral obligations of the highest responsibility and trust," and must be measured "by the most exacting fiduciary standards." *Smith v. United States*, 515 F. Supp. 56, 58 (N.D. Cal. 1978).

This trust obligation of the United States also constrains Congressional power in a procedural manner. Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that statutes and other federal actions should, when possible, be read as protecting Indian rights and in a manner favorable to Indians. *Lane v. Pueblo of Santa Rosa*, *supra*; *Morton v. Ruiz*, *supra*; *McNabb v. Bowen*, *supra*; *Coyote Valley Band of Pomo Indians*, *supra*; *White v. Califano*, *supra*; *Pyramid Lake Paiute Tribe of Indians v. Morton*, *supra*.

For these reasons, the Supreme Court, on numerous occasions, has adhered to "the general rule that statutes passed for the benefit of the dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918).

In addition, the Supreme Court has held that statutes dealing with Indians shall be construed liberally in favor of establishing Indian rights. When Indian rights are shown to exist, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights. This principle of a "clear and plain statement" before Indian treaty rights can be abrogated, also applies in the non-treaty context. *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). See also, *Bryan v. Itasca County*,

426 U.S. 373 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

These canons of statutory construction apply equally to the interpretation of administrative regulations promulgated by the Secretary of the Interior for the benefit of Indians. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982).

Based upon these canons of construction, any doubts about the interpretation of the applicable statutes and regulations involved in this case, 25 U.S.C. §§ 476, 479, and 25 C.F.R. Part 81, must be construed in favor of the Indians with all doubts and ambiguities being resolved by this Court in their favor with the intent of upholding their rights.

> Thus, the courts have consistently applied the principle that statutes passed for the benefit of Indian tribes and communities are to be liberally construed in favor of the Indians, and any doubts as to a statute's proper construction is to be resolved in their favor. *Bryan v. Itasca County*, 426 U.S.C. 373 . . . (1976); *Ashcroft v. United States Dept. of Interior*, 679 F.2d 196, 198 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 . . . (1983); *Rockbridge* [*v. Lincoln*], 449 F.2d [567] at 571 [9th Cir. 1971].

Coyote Valley Band v. United States, *supra*, 639 F. Supp. at 168.

C. The Federal Defendants Breached Their Trust Duty By Failing To Construe 25 U.S.C. § 479 And 25 C.F.R. § 81.1(w) In The Indians' Favor.

Despite the plain, unambiguous wording of § 479, the Secretary asserts that § 479 and 25 C.F.R. § 81.1(w)(2) require the Indians to be on the List of Federally Recognized Indian Tribes in order to be eligible for an IRA election.

Such an interpretation of Section 479 and the Regulation is not only contrary to the wording of Section 479 and the Regulation, but it is inconsistent with the United States' trust obligation to construe legislation passed for the benefit of Indian tribes in favor of the Indians.

The Secretary failed to properly construe and administer 25 U.S.C. §§ 476 and 479 and 25 C.F.R. § 81.1(w)(2) in this case. In doing so, the Secretary breached the United States' fiduciary obligations to construe these statutes and the Regulation in favor of the Indians and to carry out his duties as required under these laws. *Coyote Valley v. United States, supra*, 639 F. Supp. at 170. Consistent with the United States' trust obligation, Section 479 and the Regulation must be interpreted as not requiring the Indians to be federally recognized in order to be eligible for an IRA election.

VII.

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT REQUIRED IN THIS CASE.

A. The Indians Are Not Required To Exhaust Any Administrative Remedy Prior To Filing This Lawsuit.

The Indians have plead both a cause of action for violation of the APA, 5 U.S.C. § 706, and the IRA, 25 U.S.C. § 476, on the grounds that the Secretary failed to call and conduct an election as requested by the Indians within the 180-day time period mandated by 25 U.S.C. § 476. Complaint, pp. 3-11, ¶¶ 8-49.

The Secretary's failure to call and conduct the election within the 180-day time period is not only unlawful because it is arbitrary, capricious, and an abuse of discretion within the meaning of 5 U.S.C. § 706(2)(a), but also because it constitutes "agency action unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. § 706(1).

Having alleged that the Secretary has failed to call and conduct an IRA election, as requested by the Indians, and delayed calling the Indians' IRA election in violation of the APA, the Indians have stated claims arising under federal law for purposes of 28 U.S.C. § 1331 jurisdiction.

> Federal jurisdiction exists over actions arising under the laws of the United States. 28 U.S.C. § 1331. Petitioners' claims involve 25 U.S.C. § 476 and its accompanying regulations which authorize and regulate Secretarial elections. Specifically, petitioners argue that respondents violated 25 C.F.R. §§ 81.8(a) and (b), 81.11 and 81.6(d). Therefore, federal question jurisdiction exists over this matter.

Alvina Lucero v. Manuel Lujan, 788 F. Supp. 1180, 1182 (D.N.M. 1991).

> The court finds that the statutes conferring federal jurisdiction in this area are 28 U.S.C. §§ 1331, 1361, and 1362. Since the success or failure of plaintiffs' claims depends on an interpretation of federal law, namely 25 U.S.C. § 476, and its accompanying regulations, federal question jurisdiction under 1331 exists [citations omitted]. Insofar as plaintiffs allege that the Secretary owed them a mandatory duty under section 476 to call an election and assuming that no other adequate remedy is available, jurisdiction under the mandamus statute may also be appropriate.

Coyote Valley Band of Pomo Indians v. United States, 639 F. Supp. 165, 169 (E.D. Cal. 1986).

The APA usually requires exhaustion of administrative remedies prior to judicial review. *Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940, 942 (9th Cir. 1979). There are two exceptions to the exhaustion rule: that is where the administrative remedy is inadequate (*United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1253 (9th Cir. 1982)), or where the issue before the Court, as in this case, is solely one of statutory interpretation. *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499-500 (9th Cir. 1980), citing *Frontier Airlines v. Civil Aeronautics Board*, 621 F.2d 369, 371 (10th Cir. 1980) ("The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpretation.")

As a general rule, administrative actions are subject to judicial review. Nonreviewability is the narrow exception which must be clearly demonstrated. *City of Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978). "[P]reclusion of judicial review is not lightly inferred, and usually will not be found absent a clear command of the statute." *Moapa Band of Paiute Indians v. United States Dept. of Interior*, 747 F.2d 563, 565 (9th Cir. 1984).

Here, the issue before the Court is solely one of statutory construction. The facts are not in dispute and the Court is being asked to determine whether Section 479 and 25 C.F.R. § 81.1(w)(2) require the Indians to be on the List of Federally Recognized Indian Tribes in order to be eligible for an IRA election.

Assuming, for argument's sake, that the Indians had an adequate administrative remedy available to them to exhaust, which they do not, they are not required to exhaust that remedy because this case falls within the exception to the exhaustion rule: a case solely involving the interpretation of a statute and regulation. *Aliknajih Native Ltd. v. Andrus*, *supra*, 648 F.2d at 499-500.

Furthermore, the Indians are relieved of their obligation to exhaust administrative remedies because the sole remedy available to them is inadequate. Assuming that the Acting Regional Director's Decision was final, which it was not, the only remedy available to the Indians would have been to appeal the Decision to the Interior Board of Indian Appeals pursuant

to 25 C.F.R. Part 2. However, taking such an appeal and exhausting the appeal process prescribed in Part 2 conflicts with 25 U.S.C. § 476 and, therefore, is inadequate.

Title 25 U.S.C. § 476 mandates that the Secretary call and conduct an IRA election within 180 days after receiving a request from an eligible tribe to do so.

> The Secretary shall call and hold an election as required by subsection (a) of this Section (A) within one hundred and eighty days after receipt of a tribal request for an election to ratify a proposed constitution. . . .

25 U.S.C. § 476(c)(a)(A).

Section 476 mandates that during the 180-day time period, the Secretary must provide technical advice and assistance to the Indians and determine if any provision in the constitution violates any applicable laws. 25 U.S.C. § 476(c)(2)(B).

Furthermore, the Secretary is required, 30 days prior to the expiration of the 180-day time period, to notify the Indians in writing if the proposed constitution violates any applicable laws.

In this case, the Secretary did none of these things. If the Secretary thought the Indians were not eligible for an election, he was required to inform them of that fact 30 days prior to the expiration of the 180-day time period so that the Indians could bring an action in the Federal District Court to review the actions or inactions of the Secretary.

> Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

25 U.S.C. § 476(d)(2).

To require the Indians to appeal the Secretary's inaction or the Decision, which is clearly contrary to Section 479 and the Regulation, would render the time periods prescribed by Congress in Section 476 a nullity. The provisions of 25 C.F.R. Part 2 do not provide the Indians with an adequate administrative remedy that would address their claims within the time periods prescribed by Congress under Section 476 for completing the election process. For this reason alone, the Indians do not have to exhaust any administrative remedy.

B. The Indians Have No Adequate Administrative Remedy Because The Interior Board of Indian Appeals Has No Jurisdiction Over The Assistant Secretary.

In ruling on whether the Secretary has "unreasonably delayed" the calling of the Indians' election, the Court can consider all of the actions of the Secretary and DOI that have caused the delay.

In this case, the Assistant Secretary agreed to reconsider the Acting Regional Director's Decision. Marston Declaration, pp. 6-7, ¶¶ 23-26. Once the Assistant Secretary agreed to reconsider the Decision, the Interior Board of Indian Appeals lost jurisdiction to hear any appeal filed by the Indians.

The IRA, and the regulations promulgated thereunder, do not provide for any administrative appeal process. The only administrative appeal process that even remotely covers this case is found in 25 C.F.R. Part 2. That part is limited, however, to having the Interior Board of Indian Appeals review decisions by the "Area Director" or a "Deputy to the Assistant Secretary." 25 C.F.R. § 2.4(e). The Interior Board of Indian Appeals has no jurisdiction to review a decision or the inaction of the Assistant Secretary for Indian Affairs, or the Secretary. *Id.*

Because the Indians are seeking review of the Secretary's and Assistant Secretary's inactions, 25 C.F.R. Part 2 does not apply to this case. The Indians, therefore, have no adequate administrative remedy to exhaust.

CONCLUSION

The Secretary failed to call and conduct an IRA election for the Indians within the 180-day time period required by 25 U.S.C. § 476(a). The Secretary failed to provide the Indians with any technical assistance in determining the eligibility of the Indians for an IRA election as required by 25 U.S.C. § 476(c)(2). The Secretary failed to notify the Indians in writing prior to the expiration of the 180-day time period of any reasons why the Indians might not be eligible for an IRA election as required by 25 U.S.C. § 476(c)(3).

The Secretary has violated the APA by failing to act on the Indians' request within the 180-day time period required by 25 U.S.C. § 476 and by failing to make a decision on the

Indians' request for reconsideration. As a result of the Secretary's illegal conduct, the Indians have been denied the right to establish a tribal government and to apply for the benefits and services made available to tribal governments by Congress.

For these reasons and the reasons stated above, the Court should determine whether the Indians are eligible for an IRA election and, if so, order the Secretary, in light of the Court's decision, to make a decision on the Indians' request.

Respectfully submitted,

DATED: March 22, 2012

RAPPORT AND MARSTON

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2012, my office electronically filed the foregoing document using the ECF System for the United States District Court, Northern District of California, which will send notification of such filing to the following:

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