**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Civil No. 11-cv-2786 DWF/LIB

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| SANDY LAKE BAND OF MISSISSIPPI CHIPPEWA,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA; KEN SALAZAR, as Secretary of the Interior; LARRY ECHO HAWK, as the Assistant Secretary for Indian Affairs; JODI GILLETTE, as Acting Deputy Assistant Secretary for Policy and Economic Development, Indian Affairs; and DIANE ROSEN, Regional Director, Midwest Regional Office, Bureau of Indian Affairs,<br><br>Defendants. | MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT |

## INTRODUCTION

This action was brought by the Sandy Lake Band of Mississippi Chippewa ("Tribe") to challenge the decision ("Decision") of the Assistant Secretary for Indian Affairs ("Assistant Secretary") holding that the Tribe was not eligible for an election, conducted by the Secretary of the Interior ("Secretary"), to organize a tribal government under a written constitution pursuant to 25 U.S.C. § 476 ("Section 476") of the Indian Reorganization Act, 25 U.S.C. § 461, et seq. ("IRA"). The Decision was based on a

regulation, 25 C.F.R. § 81.1(w)(1) ("Regulation") promulgated by the Secretary ostensibly to implement the provisions of the IRA, specifically, Section 476.

The Regulation requires that a tribe be federally recognized in order to be eligible for an IRA election. Since the Tribe was not then, and is not now, on the list of federally recognized Indian tribes published by the Secretary in the Federal Register, the Assistant Secretary denied the Tribe's request for an IRA election.

Although the Tribe did not meet the definition of an "Indian tribe" as defined under the Regulation, the Tribe does meet the definition of an "Indian tribe" as defined in the IRA, specifically, 25 U.S.C. § 479 ("Section 479").

Therefore, because the Regulation is in conflict with Section 479 and the federal court precedent interpreting Section 479, the Secretary did not have the authority to promulgate the Regulation and the Regulation is void.

In this brief, the Tribe will demonstrate: (1) the Regulation and the defendants' implementation of the Regulation are inconsistent with the plain wording of Section 479; (2) the Regulation is inconsistent with the federal court precedent interpreting Section 479; (3) the Secretary lacked the authority to promulgate the Regulation because it is in conflict with Section 479; (4) in rendering the Decision, the Midwest Regional Director of the BIA ("Regional Director") and the Assistant Secretary failed or refused to consider important evidence and arguments presented by the Tribe in support of its request; and (5) as a result, the defendants' actions violated the IRA and the Administrative Procedure Act, 5 U.S.C. § 701, et seq. ("APA").

## ISSUES TO BE DECIDED

1. Is the Regulation inconsistent with the plain wording of Section 479 and, therefore, in violation of the IRA and the APA?

2. Did the Secretary lack the authority to promulgate the Regulation because it conflicts with Section 479?

3. Does the Regulation violate the IRA, because it is inconsistent with applicable federal court precedent interpreting Section 479?

4. In issuing his Decision, did the Assistant Secretary's failure or refusal to consider significant supporting evidence and legal arguments presented by the Tribe in support of its request for an IRA election constitute a violation of the APA?

5. If the Regulation is void because it is inconsistent with the IRA, does the Secretary have a mandatory duty to call an IRA election for the Tribe if it meets the criteria set forth in Section 479, defining an "Indian tribe," rather than the criteria set forth in the Regulation?

## STATEMENT OF FACTS

The facts of this case are set forth in the Declaration of Monroe Skinaway in Support of Plaintiff's Motion for Partial Summary Judgment ("Skinaway Declaration") and the Declaration of Lester J. Marston in Support of Plaintiff's Motion for Partial Summary Judgment ("Marston Declaration") filed herewith. For the convenience of the Court, the Tribe will not repeat the facts set forth in the Skinaway and Marston Declarations here but, rather, the Tribe hereby incorporates the facts set forth in both

Declarations as if set forth here in full.

## I.

## SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE.

The Tribe moves for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rule 56 "). Rule 56 provides, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, could affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

All of the facts of this case are a matter of public record set forth in either the records of the BIA or the administrative record developed before the BIA administrative offices or the Interior Board of Indian Appeals, Office of Hearings and Appeals, United States Department of the Interior ("IBIA"), therefore, there is no genuine dispute as to any material fact in this case and the Tribe is entitled to judgment as a matter of law.

## II.

## THE DECISION MUST BE REVIEWED PURSUANT TO THE STANDARDS SET FORTH IN THE APA.

The Tribe's claims challenging the actions of the Defendants 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.)

As this brief will demonstrate, in promulgating the Regulation and in issuing the Decision, the Defendants "relied on factors which Congress has not intended it to consider" and "entirely failed to consider an important aspect of the problems." As a result, both the Regulation and the Decision violate the APA and must be set aside by this

Court.

## III.

## THE REGULATION UPON WHICH THE DECISION WAS BASED IS NOT VALID, SO THE DECISION MUST BE OVERTURNED.

The Assistant Secretary's Decision that the Tribe's request for an IRA election must be denied was based on the conclusion that the Tribe did not meet the requirements set forth in the Regulation. Specifically, the Assistant Secretary based his Decision on the fact that the Tribe was not an entity "listed in the Federal Register . . . recognized and receiving services from the Bureau of Indian Affairs" ("Federally Recognized"). The validity of the Decision, therefore, depends on the validity of the Regulation. As the following arguments will demonstrate, 25 C.F.R. § 81.1(w)(1) is not valid because it conflicts with the plain wording of Section 479 of the IRA and the federal court precedent interpreting Section 479. Furthermore, because the Regulation conflicts with Section 479 and the federal court precedent interpreting Section 479, the Secretary did not have the authority to promulgate the Regulation. Finally, the Decision must be set aside because in making the Decision, the Secretary failed to consider evidence and legal arguments presented by the Tribe in support of its request in violation of the APA.

### A. The Regulation Conflicts With The Plain Wording Of The IRA.

In *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), the Supreme Court established the standard for judicial review of administrative interpretations of statutes, including the promulgation of regulations to

implement statutes:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. *If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.* If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.*, at 842-843. (Emphasis added.)

Determining, in this case, whether the Regulation is valid, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. The definition of an "Indian tribe" contained in Section 479 is unambiguous. *Carcieri v. Salazar*, 555 U.S. 379 (2009) ("*Carcieri*") (holding "Congress left no gap in 25 U.S.C. § 479 for the agency to fill. Rather, it explicitly and comprehensively defined the term. . . .").

In order to be valid under the *Chevron* analysis, the Regulation must be consistent with Section 479. Section 479 states: "The term "tribe" whenever used in said sections [§ 476] shall be construed to refer to any Indian tribe, . . . or the Indians residing on one reservation." The term "Indian," that modifies the word "tribe" in Section 479, is defined in Section 479 as: "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, . . ."

Section 479 is clear and unambiguous: to be an Indian tribe as defined by Section 479, an entity must meet three criteria. First, the entity must be composed of persons of Indian descent. Second, the Indians must be either members of a tribe that was under federal jurisdiction on June 1, 1934, or their descendants. Finally, the Indians that were members of a tribe under federal jurisdiction on June 1, 1934, must have been residing on an Indian Reservation on that date.

The Regulation, by contrast, imposes a requirement for qualifications as an Indian tribe that is not found in Section 479: that the entity must also be on the current list of federally recognized Indian tribes currently published in the Federal Register by the Secretary. Thus, the Regulation imposes a new condition on the ability of an Indian tribe to be eligible for an IRA election under Section 476 that was never contemplated or intended by Congress.

Federal case law leaves no doubt that the Secretary does not have the authority to promulgate regulations that are in conflict with the provisions of the IRA. If a regulation unreasonably interprets a statute or is inconsistent with the statute under which it is promulgated, the regulation is invalid.

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'

*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976), citing *Dixon v. United States,* 381 U.S. 68, 74 (1965).

The power of an administrative officer or board to administer a federal

> statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

*Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

In other words, "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873 (1977). See also, *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (providing that agency action "is always subject to check by the terms of the legislation that authorized it").

Given this standard that the Regulation cannot conflict with the provisions of Section 479, where in the IRA is there a provision that limits the right to an IRA election under Section 476 to tribes that are currently federally recognized? The answer is simple. There is no such provision.

In sharp contrast, Congress made it clear that it wanted the provisions of the IRA to apply only to those tribes that were under "federal jurisdiction" in 1934, and not tribes on a list published by the Secretary in the Federal Register on March 13, 2000.

In promulgating the Regulation, the Secretary did not interpret or implement the IRA but, instead, established a new criteria for determining which entities were eligible for an IRA election. As a result, the Regulation has two effects. First, it excludes from the definition of "Indian tribes" tribes, such as the Sandy Lake Band of Mississippi Chippewa, that Congress clearly intended to be covered by the statute. Second, it expands the class of eligible IRA tribes to include tribes that were not under "federal jurisdiction" in 1934 but, instead, were recognized by the Secretary after that date. A result, based upon the plain

wording of Section 479, that Congress never intended. Thus, by adopting the Regulation, the Secretary made new law and that law is in clear conflict with the provisions of Section 479 and the purposes of the IRA.[1]

By promulgating the Regulation that directly conflict with the plain wording and the evident intent of Congress in enacting Section 479, the Secretary is attempting to overturn legislation through regulation. It is well settled law that the Secretary may not do so. *Morrill v. Jones*, 106 U.S. 466, 467 (1883); *Bong v. Alfred S. Campbell Art Co.*, 214 U.S. 236 (1909); *Roberts v. United States*, 44 Ct. Cl. 411, 418 (Ct. Cl. 1909).

The Regulation and the Decision based on the Regulation are in direct conflict with the plain language of Section 479. Thus, because they are "not in accordance with the law," the Regulation and the Decision must be declared unlawful and set aside under the APA. 5 U.S.C. § 706(2)(A).

**B. The Regulation Conflicts With Federal Court Precedent That Have Interpreted Section 479 And The IRA.**

Federal courts have repeatedly concluded that the IRA and, in particular Sections 476 and 479, should be interpreted in accordance with the plain wording of the statute, resolving all ambiguities in favor of the Indians. *Carcieri*, at 387 ("applying 'settled

[1] One of the stated purposes of the IRA was to allow the Indians residing on a reservation to organize a tribal government to govern themselves on their reservation. 25 U.S.C. §§ 476 and 479. Thus, the purpose of the IRA and, in particular, Section 476, is to strengthen tribal self-government, *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1086 (8th Cir. 1977), by allowing those tribal entities that meet the definition of an "Indian tribe" contained solely in Section 479 to vote on adopting a constitution to form a government.

principles of statutory construction,' 'we must first determine whether the statutory text [Section 479 of the IRA] is plain and unambiguous,' and '[i]f it is, we must apply the statute according to its terms."); *Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165, 170 ("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 doubt as to a statute's [Section 476 of the IRA] proper construction is to be resolved in their favor.").

The seminal federal court decision interpreting Section 479 is *Carcieri*. In *Carcieri*, the State of Rhode Island sued the Secretary of the Interior seeking an order setting aside the Secretary's decision to acquire a parcel of property in the name of the United States in trust for the Narragansett Tribe ("Narragansett"). At issue in the case was whether the Secretary had the authority under the IRA, specifically, 25 U.S.C. § 465 ("Section 465"), to acquire title to the property in trust for the Narragansett. *Id.*, at 385-386. Section 465 authorized the Secretary to acquire land in trust for "Indians" and "Indian tribes." To determine whether the Secretary had the authority to acquire the property in trust for the Narragansett, the Court had to construe Section 479 of the IRA to determine whether the Narragansett was an Indian tribe for purposes of Section 465. *Id.*, at 387.

Unlike the Tribe, the Narragansett were listed on the Federal Register as a federally recognized Indian tribe, but their recognition did not occur until 1983. *Id.*, at 384. Thus, the State argued that the IRA did not authorize the Secretary to take land into trust for any

tribe, including the Narragansett, that first received federal recognition after June 18, 1934, the effective date of the IRA. The Supreme Court agreed with the State and held that the phrase "now under federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the IRA's enactment in 1934. *Id.*, at 395-396.

In construing Section 479, the Supreme Court rejected the Secretary's argument that the Section was ambiguous and created a gap in construction that authorized the Secretary to fill through the adoption of an appropriate regulation defining the term "Tribe" and "Indian."

> . . . the Secretary argues that § 479 left a gap for the agency to fill by using the phrase "shall include" in its introductory clause. . . . The Secretary, in turn, claims to have permissibly filled that gap by defining "Tribe" and "Individual Indian" without reference to the date of the statute's enactment. . . . **But, as explained above, Congress left no gap in 25 U.S.C. § 479 for the agency to fill. Rather, it explicitly and comprehensively defined the term by including only three distinct definitions**: "[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation" and [3] all other persons of one-half or more Indian blood. In other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definition of "Indian" set forth in § 479. Had it understood the word "include" in § 479 to encompass tribes other than those satisfying one of the three § 479 definitions, Congress would have not needed to enact these additional statutory references to specific tribes.

*Carcieri*, at 392. (Emphasis added.)

*Carcieri* makes it clear that if the Secretary does not have the authority to adopt a regulation expanding the definition of "Indian" and "Indian tribe" in Section 479 to include federally recognized Indian tribes recognized by the Secretary after June of 1934,

then the Secretary does not have the converse authority to adopt a regulation narrowing the definition of "Indian" and "Indian tribe" in Section 479 to exclude tribes that are not federally recognized, but who were, like the Tribe, under federal jurisdiction in 1934.

Thus, *Carcieri* held that Section 479 is not subject to a broad interpretation but, rather, must be narrowly construed. *Id.*, at 387. *Carcieri* also rejected an interpretation of Section 479 that would have imposed additional conditions, through the adoption of a regulation defining the term "Indian tribe" contained in Section 479, that were not stated in the Statute. *Id.*, at 391-392.

By imposing restrictions and conditions defining an Indian tribe for purposes of the IRA, that are not set forth in Section 479, and by effectively excluding a whole class of tribes from the definition of "Indian tribes" that would otherwise meet the definition set forth in Section 479, the Regulation is inconsistent with the Supreme Court's construction of Section 479 set forth in *Carcieri*. This the Secretary is not permitted to do. *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991) (holding: "*Chevron* [*USA Inc., v Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)] does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body."); *Bankers Trust New York Corporation v. United States*, 225 F.3d 1368 (D.C. Cir. 2000) (holding: "It is a fundamental principle of Constitutional law that the duty to interpret the statutes as set forth by Congress is a duty that rests with the judiciary . . . . In executing this duty, we may not give . . . any executive branch agency the power to overrule an established statutory construction of the court--a

power that, with regard to our prior precedents, even a later panel of this court lacks.").

The Regulation is inconsistent with the holding in *Carcieri* and, therefore, violates the APA.

**C. The Secretary Lacked The Authority To Promulgate The Regulation**.

In subsection A, *ante*, the Tribe demonstrated that the Regulation is inconsistent with the provisions of Section 479. As such, the Regulation violates the provisions of the IRA, specifically, Section 479, and is void. *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The Regulation conflicts with the provisions of Section 479 and the IRA, the Secretary, therefore, had no authority to promulgate the Regulation and for this reason alone the Regulation must be set aside by this Court. *Id.*; see also, *Carcieri* at 391.

**D. The Assistant Secretary's Decision Violates The APA, Because He Refused To Consider Important Information And Arguments Submitted By The Tribe**.

Finally, the Decision constitutes a violation of the APA because the Assistant Secretary failed to consider essential evidence and arguments presented by the Tribe in support of its request for an IRA election. Specifically, the Tribe argued that it was an "Indian tribe" within the meaning of Section 479, because, although it was not federally recognized, it was under federal jurisdiction in 1934, and its members were of Indian descent and descendants of Indians who resided on an Indian reservation in 1934. Marston Declaration, p. 3, ¶ 6. In support of its position, the Tribe submitted its Treaties

with the United States, the Executive Orders creating the reservations set aside for the Tribe, the various laws enacted by Congress pertaining to the Tribe, and the various BIA correspondence pertaining to the Tribe as evidence that the Tribe was under "federal jurisdiction" in 1934 and, therefore, an "Indian tribe" as defined by Section 479. Marston Declaration, p. 3, ¶ 6.

Instead of considering this evidence and these arguments, the Interior Board of Indian Appeals ("IBIA"), acting on behalf of the Assistant Secretary, summarily dismissed the Tribe's appeal relying on a prior decision of the Assistant Secretary that the Tribe was not eligible for an IRA election. Monroe Declaration, p. 6, ¶ 18. Then, the Assistant Secretary himself failed to consider this evidence and arguments on reconsideration. Marston Declaration, p. 4, ¶ 9.

The Assistant Secretary's failure to consider the evidence and argument presented by the Tribe in support of its position violated the APA and must be set aside. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

In *Butte County v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010) ("*Butte County*"), the Court of Appeals for the District of Columbia set aside a decision by the Secretary to take land into trust for gaming purposes for the Mechoopda Tribe, because he had failed to consider important evidence and arguments submitted in opposition to the request to have the land taken into trust.

The Court of Appeals's reasoning in *Butte County* provides the standard for the

evaluation of the Assistant Secretary's Decision in the present case:

> under *§ 555(e)*, the agency must provide an interested party -- here Butte County -- with a "brief statement of the grounds for denial" of the party's request. As this court held in *Tourus Records, Inc. v. DEA, 259 F.3d 731, 737, 347 U.S. App. D.C. 262 (D.C. Cir. 2001)*, the agency must explain why it decided to act as it did. The agency's statement must be one of "reasoning"; it must not be just a "conclusion"; it must "articulate a satisfactory explanation" for its action. 259 F.3d at 737.

*Id.*, 613 F.3d at 194.

In *Butte County*, the Court continued, "an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of *§ 706*." *Id.*

Based on these fundamental standards, the Court of Appeals found:

> The Interior Department managed to violate the minimal procedural requirements [5 U.S.C.] § 555(e) imposed. When Butte County furnished the Interior Secretary's office with a copy of the Beckham Report and gave numerous reasons why the Tribe's land did not constitute "restored land," that issue was still pending before the Secretary. The Secretary's final determination did not come until two years later, on March 14, 2008. Yet the entirety of Interior's response to Butte County was this: "We are not inclined to revisit this decision [the opinion of the Gaming Commission] now because the Office of the Solicitor reviewed this matter in 2003, and concurred in the NIGC's determination of March 14, 2003.". .
>
> This response violates *§ 555(e)* for the same reason the response in *Tourus Records* violated that provision. The response "provides no basis upon which we could conclude that it was the product of reasoned decision making." *259 F.3d at 737*.

*Id.*

In this case, the Assistant Secretary provided "no basis upon which [the Court]

could conclude that" the rejection of the Tribe's arguments "was the product of reasoned decision making." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001). His refusal to consider evidence bearing on the issue before him constitutes arbitrary agency action. Thus, the Assistant Secretary's Decision was arbitrary and a violation of the APA.

**IV.**

**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 Tribe presented the Superintendent of the Minnesota Agency and the Regional Director of the BIA with a letter, resolution, and proposed constitution requesting that the BIA call and conduct an election on the Tribe's proposed constitution pursuant to 25 U.S.C. § 476. Skinaway Declaration, p. 5, ¶ 13.

Having received the Tribe's request for an IRA election, the Secretary had and still

has a mandatory duty to call and conduct an IRA election for the Tribe, if the Tribe is an eligible "Indian tribe" within the meaning of 25 U.S.C. § 479.

**V.**

**THE TRIBE IS ELIGIBLE FOR AN IRA ELECTION IF IT IS A TRIBE AS DEFINED BY SECTION 479**.

The IRA defines the term "Indian tribe" for purposes of 25 U.S.C. § 476 as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. 25 U.S.C. § 479.

The IRA also defines the term "Indian" as:

> . . . *all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, . . .

25 U.S.C. § 479 (Emphasis added).

If the Regulation is void as the Tribe contends, and it is, then the Tribe only needs to meet the criteria set forth in Section 479 to be eligible for an IRA election under Section 476. If the Tribe can demonstrate to this Court by way of summary judgment or at trial that it meets the criteria set forth in Section 479, then the Court will have no choice but to order the Secretary to call and conduct an IRA election for the Tribe.

CONCLUSION

The Secretary cannot be permitted to rewrite the IRA through a Regulation that is in conflict with the plain meaning of the IRA, the plain wording of Section 479, and

Supreme Court precedent interpreting Section 479.

Moreover, the Secretary's Decision rejecting the Tribe's request for an IRA election should not be upheld without a reasoned explanation. Nor should the Court allow the Secretary to ignore the evidence and argument presented to him by the Tribe in support of their meritorious request for an IRA election under Section 476.

The Secretary has a mandatory duty to call an IRA election for the Tribe, pursuant to Section 476, if it is an eligible tribe as defined solely by Section 479.

For these reasons, the Tribe respectfully requests that the Court grant its motion for partial summary judgment declaring the Regulation void and setting aside the Secretary's Decision as violating the APA.

Respectfully submitted,

Dated: December 30, 2011

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