UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 11-cv-2786 (DWF/LIB)

Sandy Lake Band of Mississippi Chippewa, Plaintiff, v. 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, Defendants.	**UNITED STATES' MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Despite this Court's previous dismissal for lack of subject matter jurisdiction, Plaintiff Sandy Lake Band of Mississippi Chippewa ("Sandy Lake Band") has again sued the United States and several employees of the Department of Interior, raising claims that are identical to a previous lawsuit. Specifically, Plaintiff challenges the Department of the Interior ("Interior"), Assistant Secretary of Indian Affairs' ("Assistant Secretary") denial of its request for a Secretarial Election under 25 U.S.C. § 476 (hereinafter "Section 16") of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.* This Court previously dismissed, without prejudice, Plaintiff's challenge for failure to exhaust its sole administrative remedy: The Federal acknowledgment process. *See Sandy Lake Band of Mississippi Chippewa v. United States* (*Sandy Lake I*), No. 10-3801, 2011 WL 2601840, *1-3, slip op. (D. Minn. July 1, 2011).

After the first lawsuit, Plaintiff elected not to appeal to the Eighth Circuit Court of Appeals, nor has Plaintiff cured the jurisdictional defects that plagued its original complaint. Instead, Plaintiff has simply recycled identical claims from its original complaint and its amended complaint, without alleging any new theories of relief that provide this Court with subject matter jurisdiction. As a result, Plaintiff is barred by principles of res judicata from re-litigating claims since dismissed and never appealed, and its complaint should therefore be dismissed in its entirety.

However, even if this Court were to determine that Plaintiff has established subject matter jurisdiction, that jurisdiction is limited, at most, to Plaintiff's claims One,

Five, and Six of the Complaint. Therefore, the United States moves in the alternative for summary judgment as to Plaintiff's as-applied challenges to the Secretary's promulgation of regulations requiring federal recognition. The regulatory requirement of federal recognition within 25 C.F.R. § 81.1(w) clearly harmonizes with the requirement of 25 U.S.C. § 479 (hereinafter "Section 19") that expressly limits eligibility to "*any recognized Indian tribe* now under federal jurisdiction." *Id.*; *see also Carcieri v. Salazar*, 555 U.S. 379, 393 (2009)(emphasis added). Thus, in the alternative, Claims Two, Three, and Four should be dismissed for lack of subject matter jurisdiction, while summary judgment should be granted in favor of the United States as to Claims One, Five, and Six.

Moreover, in the event this Court determines subject matter jurisdiction exists, this Court need not reach the question of the propriety of the regulations, because Plaintiff already reorganized under the IRA as a part of the Minnesota Chippewa Tribe and the Mille Lacs Band. As a result, Plaintiff fails to state a claim for relief, as the historic Sandy Lake Band already received the ultimate relief Plaintiff requests: Reorganization under the IRA.

STATUTORY AND HISTORICAL BACKGROUND

A. The Indian Reorganization Act and Secretarial elections

The IRA was passed in 1934 as a result of the general recognition that the allotment policy[1] had failed to serve any beneficial purpose for Indians. Felix Cohen,

[1] For most of the 19th century, the national policy toward Indians was to segregate reservation lands for the exclusive use and control of Indian tribes. *See Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 253-54 (1992). Late in the 19th

Handbook of Federal Indian Law at 612-14 (1982 ed.). The provisions of the IRA were intended to strengthen Indian tribes by including within its provisions substantial federal benefits, among which authorized the Secretary to purchase land to take into trust for the tribe, § 465, and provide loans for economic development, § 470. The IRA also authorized tribes to reorganize, § 476, and, in some circumstances, form corporate entities, § 477.

Congress, however, restricted eligibility for these benefits to persons who met the statutory definition of "Indians" incorporated within Section 19, which reads in pertinent part: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of **any recognized Indian tribe** now under Federal jurisdiction . . . ." 25 U.S.C. § 479 (emphasis added).[2] Moreover, the benefits of the IRA were available only on the reservations where the majority of adult Indians failed to reject it. *See* Section 18 (25 U.S.C. § 478) ("This Act shall not apply to any reservation wherein a

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century, however, this policy gave way to a policy of "allotting" reservation lands to tribal members individually, in order to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254; *see generally* Cohen, *supra*, at 612-14. Indeed, "[t]he objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Yakima*, 502 U.S. at 254.

[2] 25 U.S.C. § 479 provides for "three discrete definitions" that a tribe can satisfy: "[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." *Carcieri*, 555 U.S. at 391-92.

majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application.").

After voting not to reject the IRA, the next step for eligible Indians was to request a Secretarial Election to adopt a constitution, also known as organization or reorganization. *See* Section 16 (25 U.S.C § 476). The IRA contemplated that more than one tribe could reorganize on one reservation. *See* 1 Op. Sol. 478 (Nov. 7, 1934). The Minnesota Chippewa Tribe is one such example. However, once reorganized, the reorganized entity represented the government for the entire reservation. Indeed, 30 years ago, the Department revised its regulations through notice and comment rulemaking to "insure that the petitioning process not become a means to harass established tribal governments . . . at least 60 percent rather than one-third of the adult members must sign any petition requesting reorganization of a tribe if the petition is to be considered valid." 46 Fed. Reg. 1668-01, 1669 (Jan. 7, 1981) (to be codified at 25 C.F.R. § 81.1 *et seq*.).

The two sections of the IRA that relate to Secretarial elections are 25 U.S.C. §§ 476[3] and 479. However, "the IRA left many of the terms and procedures for Secretarial

[3] 25 U.S.C. § 476 provides: Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

> (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
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> (2) approved by the Secretary pursuant to subsection (d) of this section.

elections undefined." Felix S. Cohen, *Handbook of Federal Indian Law*, § 4.06[2][b] (2005 ed.). Indeed, under Section 16 (25 U.S.C. § 476(a)(1)) as originally authorized, Congress delegated to the Secretary the authority to promulgate rules and regulations governing Secretarial Elections. *See* Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (1934) (the reorganization is effective when ratified at a "special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe.") This provision remains in effect. *See* 25 U.S.C. § 476(a)(1).

Thus, on January 7, 1981, the Secretary promulgated rules and regulations, after notice and comment, the purpose of which was "to provide uniformity and order in," *inter alia*, (1) holding elections for voting on proposed constitutions when tribes wish to reorganize, and (2) adopting constitutional amendments. 46 Fed. Reg. at 1669.[4]

B. The Organization of the Minnesota Chippewa Tribe Under the IRA and the Participation of the Historic Sandy Lake Band

Plaintiff claims to represent the historic Sandy Lake Band, an Indian group located in northern Minnesota. However, Interior views the historic Sandy Lake Band as having participated in reorganization under the IRA as a part of the Mille Lacs Band – one of the six component bands of Indians who incorporated into the Minnesota Chippewa Tribe. *Sandy Lake I*, 2011 WL 2601840, at *3.

In 1936, "a majority of the tribes and bands of Chippewa Indians residing on various Indian reservations in Minnesota organized a single tribal government under a

[4] However, where " a discrepancy might appear to exist between the regulations and a specific requirement of the statute governing the reorganization of a tribe, the regulations shall be interpreted to conform with the statute." 46 Fed. Reg. at 1669.

written constitution, the Constitution of the Minnesota Chippewa Tribe." *Id*. at *1. The six component reservations included within the Minnesota Chippewa are: White Earth, Leech Lake, Fond du Lac, Bois Forte, Grand Portage Reservations, and the nonremoval Mille Lacs Band of Chippewa Indians ("Mille Lacs Band"). *Id*. Three years later, the Mille Lacs Band ratified and accepted a charter of organization, which defined its membership as consisting of "[a]ll Chippewa Indians permanently residing on the Mille Lacs Reservation and at, or near, the Villages of . . . Sandy Lake, Minnesota . . . ." *Id*.

Then, five decades later, the view that the Mille Lacs Band incorporated the historic Sandy Lake Band was memorialized in an opinion authored by counsel for the Bureau of Indian Affairs, Field Solicitor Nitzschke, in response to a jurisdictional dispute over tribal lands. In that opinion, the Field Solicitor stated, "[t]here must be, however, a present tribal governing body with authority to manage these lands." Dkt. No. 1, Ex. 24 (No. 20-cv-3801). That authority resides in the Mille Lacs Band as a direct result of the original 1939 organization of the Mille Lacs Band whose membership "would consist of 'all Chippewa Indians permanently residing on the Mille Lacs Reservation and at, or near, the villages of Isle, Danbury, East Lake and Sandy Lake.'" *Id.* (quoting the original charter of the Mille Lacs Band). This "affiliation between the historic Sandy Lake Band and the successor Mille Lacs Band has been consistent" and has existed since 1939. *Id.*

Thus, the United States acknowledges the Minnesota Chippewa Tribe and its six component reservations, including the Mille Lacs Band, as a federally recognized tribe, eligible for special programs and services of the Bureau of Indian Affairs ("BIA"). *See*

"Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," 75 Fed. Reg. 60,810 (Oct. 1, 2010); *see also* 75 Fed. Reg. 66,124 (Oct. 27, 2010) (supplemental listing adding the Shinnecock Indian Nation to the list of federally recognized tribes). Plaintiff, however, is not a federally recognized tribe. *Id.*

Nor has Plaintiff ever completed the federal acknowledgment process; a process that allows for tribes seeking federal recognition in the first instance, 25 C.F.R. § 83.7, as well as those tribes seeking federal recognition premised on prior acts of the United States such as treaties or executive orders. *See* 25 C.F.R. § 83.8.

PROCEDURAL HISTORY

This Court provided a thorough overview of the relevant facts underpinning the Assistant Secretary's denial of Plaintiff's request for a Secretarial Election under Section 16 of the IRA. *See Sandy Lake I*, 2011 WL 2601840, at *1-3. However, given Plaintiff's relitigation of claims since dismissed for lack of subject matter jurisdiction, and in light of Plaintiff's failure to cure the jurisdictional defects, the following is brief description of the procedural posture of this case, as well as description of Plaintiff's original complaint, Dkt. No. 1 (filed Sept. 1., 2010) (2010 Compl.), the attempt to file an amended complaint, Dkt. No. 38 (filed July 29, 2011), and the most recent complaint filed on September 28, 2011, (2011 Compl.). Dkt. No. 1, Civ. No. 11-cv-02786.[5]

[5] Plaintiff's Complaint was filed on September 28, 2011, and assigned to the Honorable Judge Joan N. Ericksen, Civ. No. 11-cv-02786. On October 19, 2011, the case was subsequently reassigned to the Honorable Judge Donovan W. Frank. Civ. No. 10-cv-3801.

A. The Assistant Secretary's Denial of Plaintiff's Request for a Secretarial Election.

The genesis of Sandy Lake I stems from two substantively identical letters sent by individuals purporting to represent the Sandy Lake Band to both the Assistant Secretary and to the Superintendent of the Minnesota Agency of the BIA on July 10, 2007. In those letters, Plaintiff requested the Assistant Secretary call and conduct a Secretarial Election for the Tribe to vote on a constitution to organize a tribal government under the provisions of the IRA." 2011 Compl., ¶ 13; *see also* 2010 Compl., Ex. 25 at 1. Both the Assistant Secretary and the Superintendent denied Plaintiff's request for a Secretarial Election, with the Assistant Secretary advising Plaintiff they were not eligible to request such an election until there is a final determination through 25 C.F.R § 83 (federal recognition process) or legislative recognition of the group. *Sandy Lake I*, 2011 WL 2601840, * 2; 2010 Compl., Ex. 26. Plaintiff subsequently brought suit in this Court.

B. Plaintiff's First Complaint and This Court's Dismissal for Failure to Exhaust Administrative Remedies in *Sandy Lake I*.

Plaintiff initially filed suit challenging the Assistant Secretary's denial alleging six causes of action: 1) Violation of the Federally Recognized List Act of 1994; 2) Violation of the IRA; 3) Violation of the Administrative Procedures Act; 4) Violation of the Fifth Amendment; Breach of Trust, List Act, and IRA; 5) Breach of Trust, Treaty Rights; and 6) Money Damages. 2010 Compl.

In response to Plaintiff's lawsuit, the United States moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) contending, *inter alia*, that: 1) Plaintiff was not

eligible to request a Secretarial Election because they were not federally recognized; and 2) this Court lacked subject matter jurisdiction because Plaintiff had failed to exhaust their administrative remedies by failing to avail themselves of their sole administrative remedy: the federal acknowledgment process. Dkt. No. 15 (filed Feb. 8, 2011).

In opposition to the United States' motion to dismiss, Plaintiff argued for the first time in litigation that the regulatory scheme governing Secretarial Elections should be overturned, premised largely on the theory that the "regulation conflicts with the plain wording of the IRA," Dkt. No. 26 at 6, and that the "Secretary, therefore, exceeded his authority in promulgating the regulation and the regulation is void." As support, Plaintiff relied largely on *Carcieri* for the proposition that the "Secretary has no authority to promulgate any regulations defining the term 'Indian tribe' contained in § 479." *Id.* at 8.

Because Plaintiff's underlying complaint did not challenge the Secretary's promulgation of the regulations governing Secretarial Elections, Plaintiff filed an amended complaint requesting this Court declare the regulatory scheme in its entirety null and void. The amended complaint was filed as a matter of course under Fed. R. Civ. P. 15(a) on June 2, 2011, the day before the hearing on the Motion to Dismiss but ninety four days after the time to file an amended complaint had elapsed pursuant to Fed. R. Civ. P. 15(a). That amended complaint and the operative complaint at issue in the present suit are identical in almost every respect. *Compare* Dkt. No. 38, *with* 2010 Compl, Dkt. No. 1 (Civ. No. 11-cv-2786).

On July 1, 2011, this Court dismissed without prejudice Plaintiff's complaint in its entirety stating:

> The Court concludes that the Sandy Lake Band has failed to exhaust its administrative remedies. The Court respectfully rejects the Band's contention that 25 C.F.R. § 81.1(w) contradicts the definition of Indian tribe in 25 U.S.C. § 479. Rather, by requiring an entity seeking an IRA election to first request federal acknowledgment, the regulations ensure that the evidence the Sandy Lake Band offers in support of its claim that it qualifies as an Indian tribe under Section 479 will be presented to the appropriate agency with the requisite expertise and established regulatory process . . .

Sandy Lake I, 2011 WL 2601840, at *4. Accordingly, this Court held that "the Band has failed to exhaust its administrative remedies and this Court lacks subject matter jurisdiction over the Band's claims that relate to the requested IRA election." *Id.*

In dismissing Plaintiff's complaint, this Court not only rejected Plaintiff's contention that the regulations contradicted the language of § 479, but also opined that the "effect of [*Carcieri's*] holding is that the Secretary may not expand the definition of Indian tribes eligible for an IRA election to include those not under Federal jurisdiction in 1934." *Sandy Lake I*, 2011 WL 2601840, at *4, n.3. This Court continued on and stated "[i]t does not follow from this result that requiring an entity to first seek federal acknowledgment before requesting an IRA election exceeds the authority granted to the Secretary." *Id.* This Court also observed that "while the Complaint is dismissed without prejudice, the proposed Amended Complaint," – which is identical to the operative Complaint at issue here – "fails to cure the lack of subject matter jurisdiction over the

Sandy Lake band's claims. *Id.* at *5, n.4. Plaintiff did not appeal the dismissal of their lawsuit.

Following dismissal, on September 28, 2011, Plaintiff initiated another lawsuit. Claims Two and Three are identical to claims that were dismissed in *Sandy Lake I*, while claim Four, although new, is a claim that is nonetheless related to the previous challenge to the Assistant Secretary's denial of the request for a Secretarial Election. Claims One, Five, and Six are identical to claims included in the amended complaint that this Court determined failed to cure subject matter jurisdiction.

In total, Plaintiff's current Complaint includes the following six claims: 1) Violation of the IRA - The Secretary of the Interior acted in excess of his authority when he promulgated 25 C.F.R. § 81.1, *id.* at ¶ 22; 2) Violation of the IRA - The Assistant Secretary's denial of Plaintiff's requested Secretarial Election was a "direct violation of 25 U.S.C. § 476 . . . ." *id.* at ¶ 33; 3) Violation of the APA – "[t]he failure of the Secretary to call a special IRA election for the Tribe until the Tribe becomes federally recognized, as required by 25 C.F.R. § 81.1(w), constitutes arbitrary and capricious action inconsistent with [the IRA and the APA]," *id.* ¶ 38; 4) Violation of the APA – "The Secretary's refusal to consider the Tribe's argument advanced in support of its position that it was under Federal jurisdiction on June 18, 1934, and therefore eligible for an IRA Election under 25 U.S.C. § 476, prior to making his Decision, constitutes arbitrary and capricious action, is an abuse of discretion, and is in direct violation of the provisions of both the IRA and the APA," *id.* at ¶ 47; 5) Violation of the APA – The

"promulgation of 25 C.F.R. § 81.1(w) is void because it conflicts with 25 U.S.C. § 479, and, in the alternative, because the regulation codified at 25 C.F.R. § 81.1(w) conflicts with the provisions of the IRA, it is beyond the authority of the Secretary to promulgate," *id.* ¶ 51; and 6) Breach of Trust – "the defendants have a fiduciary duty in the nature of a continuing trust obligation to assist the Tribe in organizing a tribal government by interpreting the provisions of the IRA in favor of the Tribe and to the Tribe's benefit," *id.* ¶ 59.

STANDARD OF REVIEW

A. Subject Matter Jurisdiction

Under the Federal Rules of Civil Procedure, a complaint may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A party may make either a facial or factual challenge to a court's subject matter jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729, n.6. (8th Cir. 1990). When considering a factual challenge, as is the case here, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* at 730. Furthermore, "no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Id.* The plaintiff has the burden of proof that jurisdiction does in fact exist. *Id.* Lack of subject matter jurisdiction, unlike many other objections to the jurisdiction of a particular court, cannot be waived. "It may be raised at any time by a party to an action,

or by the court *sua sponte*." *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993) (citing Fed. R. Civ. P. 12(h)(3))

B. Failure to State a Claim

A complaint may also be dismissed under Fed. R. Civ. P. 12(b)(6) when it fails to state a claim upon which relief can be granted. In evaluating a motion to dismiss for failure to state a claim, a court must accept as true all allegations contained in the complaint and must view the complaint in the light most favorable to the plaintiff. *Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995). Moreover, the plaintiff must allege factual allegations beyond the speculative level, and the court must accept the allegations of the complaint as true and dismiss the case only when a plaintiff fails to demonstrate that a cause of action exists upon those allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (internal citations and quotation marks omitted).

C. Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted when it is demonstrated that "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Questions of statutory construction and legislative history present legal questions which are properly resolved

by summary judgment. *UnitedHealth Grp. Inc. v. Wilmington Trust Co.*, 548 F.3d 1124, 1128 (8th Cir. 2008).

ARGUMENT

I. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, BECAUSE THE HISTORIC SANDY LAKE BAND ALREADY PARTICIPATED IN AN IRA ELECTION, ELECTING TO ORGANIZE DURING THE 1930s AS A PART OF THE MINNESOTA CHIPPEWA TRIBE AND THE COMPONENT MILLE LACS BAND

The thrust of Plaintiff's contention that they are entitled to a Secretarial Election hinges upon the single false premise that they never participated in organization under the IRA. The Chippewa of Minnesota then residing in the Sandy Lake area, however, voted not to reject the IRA, subsequently organized in 1936 as a part of the six component reservations that comprise the Minnesota Chippewa Tribe, and participated in the 1939 approval of the Mille Lacs Band's local governance charter. *See Sandy Lake I*, 2011 WL 2601840, at *1-2.

Thus, Plaintiff is not entitled to a another Secretarial Election until: 1) They petition the Mille Lacs Band and Minnesota Chippewa through the tribes' established, internal tribal mechanisms; or 2) They complete the federal acknowledgment process and the BIA determines they are a federally recognized tribe separate and apart from the Mille Lacs Band. Section 16 cannot, however, serve as a mechanism whereby splinter, non-federally recognized groups break off and establish new tribes; such a reading would result in tribes disintegrating from within, despite previously participating in organization under the IRA as a confederation of tribes.

Because the residents of the Sandy Lake area already participated in organization under the IRA, it is not necessary to reach Plaintiff's novel interpretation of *Carcieri*. *See Wyman v. James*, 400 U.S. 309, 345 n.7 (1971) (Marshall, J., Brennan, J. dissenting) ("It is a time-honored doctrine that statutes and regulations are first examined by a reviewing court to see if constitutional questions can be avoided," and courts are not bound by the "litigation strategies" of parties that "may prefer a decision on constitutional grounds.") (citations omitted).

II. PLAINTIFF IS BARRED BY RES JUDICATA FROM RELITIGATING CLAIMS THAT WERE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION AND WHERE PLAINTIFFS FAILED TO CURE THE JURISDICTIONAL DEFECTS

Plaintiff's Complaint suffers from the same jurisdictional infirmities that warranted dismissal previously. Far from introducing new theories of relief or bases for jurisdiction, Plaintiff instead improperly relies on recycled arguments as to why this Court should have reached a different result. Indeed, Claims Two and Three are simply lifted in their entirety from the Original Complaint that was dismissed for lack of subject matter jurisdiction, while Claims One, Five, and Six are copied wholesale from Plaintiff's Proposed Amended Complaint that failed to cure subject matter jurisdiction. *See Sandy Lake I*, 2011 WL 2601840, at *5 n. 4 ("The Court notes that while the Complaint is dismissed without prejudice, the proposed Amended Complaint fails to cure the lack of subject matter jurisdiction over the Sandy Lake Band's claims."). Accordingly, this Court's previous dismissal bars Plaintiff from relitigating claims since dismissed and never appealed.

A. Under the doctrine of res judicata, Plaintiff is barred from relitigating claims Two, Three, and Four, which were the same claims previously dismissed for lack of subject matter jurisdiction.

Claims Two and Three are identical to claims this Court dismissed for lack of subject matter jurisdiction. While Claim Four is new,[6] it fails to provide any basis for subject matter jurisdiction and merely presents an additional argument as to why this Court should have previously reached a different conclusion. Plaintiff is therefore barred from relitigating Claims Two, Three, and Four.

It is well settled that dismissal of a lawsuit for lack of subject matter jurisdiction bars plaintiffs from relitigation of that same jurisdictional issue in a subsequent federal lawsuit. *Ins.Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982) ("It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal."); *accord Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Homestake Mining Co.*, 722 F.2d 1407, 1412 (8th Cir. 1983). If plaintiffs assert identical claims and jurisdictional grounds as a prior lawsuit that was dismissed, but in so doing fail to cure the jurisdictional defect, then principles of res judicata, often referred to as issue preclusion, bar the second lawsuit. *Id*.[7]

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[6] Claim 4, which was not included in the original action, alleges an additional violation of the APA but on the basis that the "Secretary refused to consider the Tribe's argument," that it was an "Indian tribe within the meaning of 25 U.S.C. § 479, and, therefore, was eligible for an IRA Election under 25 U.S.C. § 476." 2011 Compl. ¶¶ 46-47.

[7] "To determine the applicability of res judicata to the facts before us, we must decide first if the cause of action that the [plaintiffs] now seek to assert is the same cause of action that they

A comparison of Plaintiff's claims in the present case with those set forth in *Sandy Lake I* "makes it clear that the essential nature of this action is no more than an elaboration upon the claims the Tribe made in [*Sandy Lake I*]." *Oglala Sioux*, 722 F.2d at 1409. In *Sandy Lake I*, Plaintiff challenged the Assistant Secretary's denial of Plaintiff's request for a Secretarial Election, alleging both a "Violation of the IRA" and a "Violation of the Administrative Procedures Act." *Sandy Lake I*, 2011 WL 2601840, at *3; 2010 Compl., 22. Plaintiff "characterize[ed] these claims as 'seek[ing] review of the Federal Defendants' Decision denying the Tribe's request for an IRA Election' and as 'aris[ing] from the Federal Defendants' denial of the Tribe's request for an IRA Election." *Sandy Lake I*, 2011 WL 2601840, *3 (quoting Plaintiff's Opposition to the Motion to Dismiss). This Court, however, dismissed these challenges to the Assistant Secretary's determination, finding that Plaintiff had failed to exhaust its administrative remedies: Namely, the federal acknowledgment process. *Id.* at *4.

Following dismissal, Plaintiff was free to either allege new theories of relief thereby establishing subject matter jurisdiction or cure the jurisdictional defect by availing themselves of their sole administrative remedy. Plaintiff failed to accomplish either. Until Plaintiff engages in the Federal acknowledgment process, they will have failed to exhaust their administrative remedies. *See e.g.*, *Price v. U.S.*, 466 F.Supp. 315

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asserted in [the first lawsuit]; we must then decide whether the parties in this proceeding are identical to or in privity with the parties in [the current lawsuit]." *Oglala Sioux*, 722 F.2d at 1409. As to the second prong, there is no doubt that Plaintiff in both *Sandy Lake I* and the current lawsuit are one and the same.

(D. Pa. 1979). Moreover, Plaintiff has introduced no new theory of relief that overcomes the problem of justiciability. Instead, they have simply copied claims Two and Three, or, as in the case of claim Four, introduced a new theory that is simply an "additional argument[] why this Court should have reached a different result." *Oglala Sioux*, 722 F.2d at 1411-12.

Thus, it is clear from the current Complaint that the basis for Plaintiff's Claims Two, Three, and Four are identical to those asserted in *Sandy Lake I*. This Court's dismissal based on a lack of subject matter jurisdiction "precludes a second action on the same claim unless 'the justiciability problem can be overcome.'" *Oglala Sioux*, 722 F.2d at 1411 (citations omitted). As a result, this Court's prior dismissal of Plaintiff's challenge to the Assistant Secretary's denial of the Secretarial Election serves as res judicata and bars Plaintiff's attempted relitigation of claims Two, Three, and Four.

B. This Court Already Concluded That Claims One, Five, and Six Failed to Cure the Jurisdiction Defects.

Plaintiff failed to establish subject matter jurisdiction in *Sandy Lake I*, and this Court already determined that the complaint that forms the basis of the present action fails to cure the jurisdictional defects. Accordingly, Claims One, Five, and Six should also be dismissed.

In *Sandy Lake I*, Plaintiff did not initially challenge the Secretary's promulgation of regulations governing Secretarial Elections. Instead, Plaintiff merely sought "review only of the Defendants' decision denying the election request." *Sandy Lake I*, 2011 WL 2601840, at *4. However, in opposition to the United States' motion to dismiss, Plaintiff

challenged for the first time in litigation the Secretary's authority to promulgate those regulations. Plaintiff subsequently attempted to file an amended complaint, which included new allegations that "[b]y enacting 25 C.F.R. § 81.1(w), the Secretary acted in excess of the Secretary's authority, in violation of the IRA," Dkt. No. 33 ¶ 22, and that Section 81.1(w) is void "because it conflicts with 25 U.S.C. § 479, and, in the alternative, because the regulation codified at 25 C.F.R. § 81.1(w) conflicts with the provisions of the IRA, it is beyond the authority of the Secretary to promulgate." *Id.* ¶ 51.

This Court rejected Plaintiff's proposed amended complaint, however, observing that "the Amended Complaint was not filed within the time limit permitted for amending as a matter of course under Fed. R. Civ. P. 12(a)(1)," and because Plaintiff failed to obtain the consent of the Defendants' or leave of the Court, "the original Complaint [] remains the operative complaint in this action." *Sandy Lake I*, 2011 WL 2601840, at *1 n. 1. But this Court further opined that although the Amended Complaint challenging the promulgation of the regulations was not operative, that the "proposed Amended Complaint fails to cure the lack of subject matter jurisdiction over the Sandy Lake Band's claims." *Id*. at *5 n. 4. That proposed amended complaint is identical to the complaint in the present action.

Accordingly, Plaintiff is barred from relitigating Claims Two, Three, and Four because those claims were previously dismissed for failure to exhaust administrative remedies. Moreover, Plaintiff's new theories of relief incorporated into Claims One,

Five, and Six also fail to overcome the hurdle of subject matter jurisdiction. *Johnson v. LaSalle Bank Nat. Ass'n*, 663 F.Supp.2d 747, 754-55 (D. Minn. 2009), citing *Oglala Sioux*, 722 F.2d at 1411, and *Bui v. IBP, Inc.*, 205 F.Supp.2d 1181, 1188 (D. Kan. 2002)[8] ("stating that 'a judgment dismissing an action for lack of jurisdiction ordinarily has no preclusive effect on the cause of action originally raised,' but concluding that the judgment will 'have preclusive effect as to matters actually adjudicated, including the precise issue of jurisdiction that led to the initial dismissal.'"). Because principles of res judicata bar Plaintiff from raising the six claims before this Court, Plaintiff's Complaint should be dismissed in its entirety.

III. EVEN IF THIS COURT OTHERWISE HAD JURISDICTION TO HEAR PLAINTIFF'S CLAIMS ONE, FIVE, AND SIX, THE SECRETARY'S REGULATIONS GOVERNING SECRETARIAL ELECTIONS COMPORT WITH THE TEXT, STRUCTURE, AND PURPOSE OF THE IRA

Even if this Court has subject matter jurisdiction, that jurisdiction extends, at most, to claims One, Five, and Six; these claims challenge the Secretary's authority to promulgate the regulations governing Secretarial Elections. Accordingly, should Plaintiff carry their burden and establish jurisdiction, the only question before this Court is whether the Secretary properly promulgated regulations restricting the availability of

[8] The district court in *Bui*, evaluating on the basis of collateral estoppel, also rejected the plaintiffs' arguments they did not have a full and fair opportunity to litigate the issue of subject matter jurisdiction that was raised *sua sponte*, observing that plaintiffs' submission of briefs reflected that plaintiff made an effort to litigate the jurisdictional issue. 205 F.Supp.2d at 1186. In regards to dismissal without prejudice for lack of jurisdiction, the court further opined that the "judgment ordering dismissal [without prejudice], will, however, have preclusive effect as to matters actually adjudicated, including the precise issue of jurisdiction that led to the initial dismissal." *Id.*

Secretarial Elections to those tribes that are either federally recognized or eligible for federal recognition. *See* 25 C.F.R. § 81.1(w). Because the regulations comport with the plain language and purpose of the IRA, summary judgment should be granted in favor of Federal Defendants with respect to Claims One, Five, and Six.

Plaintiffs' challenge comes in two forms: First, Plaintiff contends the Secretary was without authority to promulgate the regulations. Second, Plaintiff attacks Part 81.1(w) on the basis that the requirement of federal recognition "imposes conditions for the conducting of IRA Elections that Congress never intended and conflicts with judicial interpretations of the IRA . . . ." 2011 Compl. ¶ 21.

Plaintiff's arguments are without merit. First, as to Plaintiff's argument that the Secretary lacked authority to promulgate regulations, not only does the Executive possess expansive authority to manage all Indian Affairs, *see* 25 U.S.C. §§ 2, 9, but Congress explicitly directed the Secretary promulgate rules and regulations governing Secretarial Elections. Section 16 of the IRA, 25 U.S.C. § 476(a)(1).

Just as Plaintiff fails to undermine the Secretary's authority to promulgate regulations which require federal recognition, so too does Plaintiff fail to demonstrate that the Part 81 regulations conflict with IRA Sections 16 and 19. Congress restricted eligibility for Secretarial Elections to those Indian tribes eligible under Section 19 of the IRA, which includes "**any recognized Indian tribe** now under Federal jurisdiction." *See* 25 U.S.C. § 479 (emphasis added); *see also Carcieri*, 555 U.S. at 405. But Plaintiff fails to demonstrate how a regulation which requires federal recognition is manifestly contrary

to a statute that restricted eligibility to "any recognized Indian tribe." Plaintiff's argument that "Congress included all tribes who were under Federal jurisdiction on June 18, 1934," 2011 Compl. ¶ 20, ignores that federal recognition is a prerequisite to eligibility, even assuming *arguendo* Plaintiff was under Federal jurisdiction by virtue of being a part of the Minnesota Chippewa in 1934. Finally, substantial federal benefits are made available to those Indians that are eligible under the IRA, and the Secretary's requirement that tribes be federally recognized by the United States government is in keeping with Congress' intent that eligibility be explicitly limited to "any recognized tribe now under Federal jurisdiction."

A. Section 19 is silent as to what constitutes a "recognized Indian tribe."

The controlling issue in this case is whether the Secretary's requirement that a tribe be federally recognized under Part 81 is reasonable and entitled to deference. In order to resolve this issue, the Court must follow the traditional two-step *Chevron* process. Under *Chevron* "Step One," the Court must determine whether the statute makes the clear the intent of Congress as to the meaning of "recognized tribe." *See Regions Hosp. v. Shalala*, 522 U.S. 448, 458 (1998); *accord Baptist Health v. Thompson*, 458 F.3d 768, 774 (8th Cir. 2006). However, where there exists ambiguity or where the statute is silent because Congress has not expressly defined the term, then under "Step Two" courts give "controlling weight" to the interpretation of the agency charged with administering the statute as long as that interpretation does not conflict with the statute. *Baptist Health*, 458 F.3d at 774; *accord Fast v. Applebee's Int'l., Inc.*, 638 F.3d 872 (8th

Cir. 2011) ("Where a statute does not define a term and 'Congress has delegated authority to an agency to implement an ambiguous statute, [the courts] are required to accept the agency's statutory interpretation, so long as it is reasonable.'") (citations omitted).

As the Supreme Court explained in *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*"), *Chevron* deference applies "[w]hen Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'" 533 U.S. at 227, (citing *Chevron, U.S.A., Inc. v. NRDC*, 497 U.S. 837, 843-844 (1984). Thus, "any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id*. (also citing *United States v. Morton*, 467 U.S. 822, 834 (1984); APA, 5 U.S.C. §§ 706(2)(A), (D)). "A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed." *Id*. at 219.

Here, Section 19 authorizes the Secretary to call a Secretarial Election, but Congress limited eligibility to "any recognized Indian tribe now under Federal jurisdiction." Neither the general provisions of the IRA nor the definitions give context as to how the Secretary should make judgments as to whether a group of Indians constitute a "recognized tribe." Indeed, the statute is silent, and the plain language of

"recognized tribe"[9] fails to resolve important questions that are part and parcel of the Assistant Secretary's duty to determine which tribes are, in fact, "recognized." *See Sierra Club v. Johnson*, 541 F.3d 1257, 1266 (11th Cir. 2008) (observing that where a statute was silent, Congress delegated to EPA some discretion in determining whether, in its expert opinion, a petitioner had presented sufficient evidence under the Clean Air Act). However, as discussed below, the historic understanding of recognition has evolved into the modern notion of federal recognition, which is embodied in the standardized and comprehensive regulatory framework establishing procedures pursuant to which tribal entities can demonstrate their status as Indian tribes. *See* 25 C.F.R. § 83, *et seq*.

B. The Part 81.1 regulations are a permissible construction of the IRA and are neither arbitrary nor capricious

If the Court finds, under *Chevron's* Step One analysis, that the IRA is ambiguous – specifically, "any recognized tribe" – a review of the statute under *Chevron* Step Two illustrates that the Part 81.1 regulations are born of a reasonable interpretation of IRA.

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[9] At the time of passage of the IRA, "recognized Indian tribe" was used in at least two distinct senses:

> First, in the earlier materials, "recognize" and "recognition" were used in the *cognitive* sense, i.e., that federal officials simply "knew" or "realized" that an Indian tribe existed, as one would "recognize," . . . and in some earlier judicial decisions, "recognize" and "recognition" were used in a formal *jurisdictional* sense, i.e., that the federal government formally acknowledges a tribe's existence as a "domestic dependent nation" with tribal sovereignty and deals with it in a special relationship on a government-to-government basis.

William W. Quinn, *Federal Acknowledgment of American Indian Tribe: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 333 (1990) (cited in *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring)); *see also* Felix Cohen, *Handbook of Federal Indian Law*, 268 (1942 ed.) ("The term 'tribe' is commonly used in two senses, "an ethnological sense and a political sense.").

The second part of the *Chevron* analysis is "whether the agency's answer is based on a permissible construction of the statute. If Congress has explicitly or implicitly delegated authority to an agency, legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Maier v. U.S. Envtl. Prot. Agency*, 114 F.3d 1032, 1040 (10th Cir. 1997) (*quoting Chevron*, 467 U.S. at 842-44 (1984)) (internal quotation marks and citations omitted).

In Section 16 of the IRA, Congress expressly delegated to the Secretary the authority to promulgate rules and regulations governing Secretarial Elections. Moreover, the Part 81.1 regulations that require federal recognition plainly harmonizes with the statutory language limiting eligibility to "any recognized tribe," comport with purpose of the IRA, and are consistent with the Supreme Court's holding in *Carcieri*.

1. The Assistant Secretary Had the Requisite Authority Under 25 U.S.C. §§ 1, 2, 9, and 476 to Promulgate Regulations Prescribing the Methods, Manners, and Eligibility for IRA Secretarial Elections.

Plaintiff alleges that the Secretary was without authority to promulgate the regulations, curiously contending that "[d]espite the lack of specific authority of the Secretary to promulgate 25 C.F.R § 81.1(w), the Secretary has promulgated the regulation in direct violation of the IRA." 2011 Compl, ¶ 51. But Plaintiff ignores two broad and explicit bases of the Secretary's authority for promulgating these regulations. First the Secretary has the broad power to manage "*all* Indian affairs and [ ] *all* matters

arising out of Indian relations." 25 U.S.C. § 2 (emphases added). [10] The exercise of this expansive authority "is especially vital when, as is the case here, the government is determining whether a tribe is organized, and the receipt of significant federal benefits turns on the decision." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008).

Accordingly, the Secretary's authority to implement and manage Secretarial Elections is underpinned by both Congress' expansive delegation of authority to the Assistant Secretary with respect to all Indian affairs, as well as Congress' explicit directive that the Assistant Secretary promulgate regulations governing Secretarial Elections. When Congress grants an agency authority to promulgate regulations it deems necessary to implement the provisions of an Act, it necessarily grants broad discretion. *See Mourning v. Family Publ'ns. Service, Inc.*, 411 U.S. 356, 365 (1973); *Coal Emp't. Project v. Dole*, 889 F.2d 1127, 1129 (D.C. Cir. 1989). Thus, such a delegation ensures that the "rules will be written by the 'masters of the subject.'" *Nat'l. Muffler Dealers Ass'n., Inc. v. United States*, 440 U.S. 472, 478 (1979) (internal citation omitted). Plaintiff ignores this well-established principle when it argues that Assistant Secretary was without authority to promulgate regulations to fulfill the purposes of Secretarial Elections under the IRA.

[10] Under 25 U.S.C. § 9, Congress expressly authorized the Executive Branch to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs . . . ." This was in turn delegated

25 U.S.C. §§ 2, 9, and 476 unambiguously grant the Secretary the authority to promulgate Interior's 25 C.F.R. Part 81 regulations; therefore, there should be no real question that Secretary's interpretation is entitled to deference under *Chevron*. The Secretary is vested with authority by Congress to promulgate regulations to implement the IRA, specifically, Secretarial Elections and reorganization. As this Court observed, "[i]t does not follow from [*Carcieri's* holding] that requiring an entity to first seek federal acknowledgment before requesting an IRA election exceeds the authority granted to the Secretary." *Sandy Lake I*, 2011 WL 2601840, at *4, n. 3.

2. The regulatory requirement requiring federal recognition comports with and is reasonably related to the purposes of the IRA.

Recognition was traditionally the exclusive province of the political branches, however, for the past three decades, the Bureau of Indian Affairs has been tasked with the duty of determining which tribes are federally recognized. The historical basis and subsequent evolution of federal recognition into the comprehensive regulatory framework that exists today, in addition to the original purpose of the IRA, further support the propriety of requiring a tribe first be federally recognized.

In 1934, Congress enacted the IRA with the "overriding purpose" of "establish[ing] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Indeed, at the time of enactment, Congress was seeking to limit the expansive control of the BIA "over the lives and destinies of the federally recognized

Indian tribes." *Id*. This sweeping legislation represented a sharp change in direction in federal Indian policy, and replaced the assimilationist policies whose design was to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." *United States v. Celestine*, 215 U.S. 278, 290 (1909). The eventual solution, the IRA, ultimately sought to strengthen tribal governments while continuing the active role of the BIA by, *inter alia*, authorizing Indian tribes to request secretarial elections and adopt their own constitutions and bylaws. Section 16 (25 U.S.C. § 476).

If a tribe can satisfy the discrete criteria included in Section 19 – which includes federal recognition – then that Tribe not only qualifies for Secretarial Elections, but additional federal benefits established by the IRA. These benefits are substantial. In addition to land that the United States purchase and takes into trust for the benefit of the tribe, 25 U.S.C. § 465, the IRA authorizes the Secretary to take steps to improve the economic and social conditions of Indians, including: loans to Indian-chartered corporations "for the purpose of promoting . . . economic development," § 470, paying expenses for Indian students at vocational schools, § 471, and giving preference to Indians for employment in government positions relating to Indian affairs, § 472. So it is no surprise that Congress required the tribes that were eligible for this bundle of federal benefits first be "recognized Indian tribes now under Federal jurisdiction."

Although "recognized tribe" is nowhere defined within the IRA, it makes perfect sense that Congress would defer to the Department of the Interior as those determinations were, historically, within the exclusive province of the political branches. *See, e.g.*,

United States v. Rickert, 188 U.S. 432, 445 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). Indeed, for decades, determinations were largely conducted on a case by case basis for a large number of Indian groups.[11] However, the formal, ad hoc political act of federal recognition is now incorporated into a comprehensive set of regulations requiring the tribe satisfy seven mandatory requirements, including the following: that the entity "has been identified as an American Indian entity on a substantially continuous basis since 1900;" the "group comprises a distinct community and has existed as a community from historical times to the present"; and the entity "has maintained political influence or authority over its members as an autonomous entity from historic times to the present." 25 C.F.R § 83.7(a), (b), (c).

As Congress has stated, "[r]ecognized is more than a simple adjective; it is a legal term of art." H. R. Rep. No. 103-781, at 2103rd Cong., 2d Sess., at 3 (1994). It bears emphasizing that recognition is a "formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members." *Cohen*, 3.01[3]. Indeed, recognition is "vital in determining eligibility for programs and services created by Congress under its

[11] For example, in the 1930s alone, the Department of the Interior's Solicitor's office was called upon repeatedly to determine the status of groups seeking to organize under the IRA. They included the following: Siouan Indians of North Carolina, Sol. Op. April 8, 1935; Mississippi Choctaq, Sol. Op. August 31, 1936, Nahma and Beaver Island Indians, May 1, 1937; St. Criox Chippewa, Sol. Op. February 6, 1937, March 15, 1937; Mole Lake Chippewa, Associate Solicitors's Op. February 8, 1937.

constitutional power to legislate for the benefit of Indian tribes;" *id.* 3.02[3], not only is it a prerequisite to receiving BIA services, but it "establishes tribal status for all federal purposes." *Id.* at 3.02[3].

And Congress has delegated this "formal political act" to Interior – the department equipped with the resources to handle these complex, factual determinations. Whether a group of Indians constitutes a tribe that is federally recognized "lies at the heart of the task assigned by Congress to the DOI." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 839 F.Supp. 130, 135 (D. Conn. 1993). These inquiries are intricate, exhaustive, and extremely technical; therefore, the BIA employs an expert staff of historians, anthropologists, and genealogists. *See e.g., id*. at 135 (explaining that the inquiries such as the ones here "involve[] extensive and diverse historical, anthropological, and genealogical evidence reaching back more than three centuries," and that the "adversarial process is not conducive" to resolving such inquiries,"); *see also Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) ("It cannot be denied that the BIA has special expertise and extensive experience in dealing with Indian affairs.").

Now, following *Carcieri*, it is more important than ever that groups not federally recognized, such as Plaintiff, engage the administrative agency tasked with investigating and establishing federal recognition. These intensive factual inquiries will not only be conducted by the agency with the requisite expertise and experience, but will establish the historical record for any future request that the Secretary call and conduct Secretarial

elections, take land into trust for the tribe, or confer upon the tribe the substantial federal benefits incorporated within the IRA.

3. The Secretary's interpretation of "recognized" and the Part 81.1 regulations requiring federal recognition harmonize with the plain language of Sections 16 and 19.

The Part 81.1(w) regulations requiring a tribe be federally recognized[12] harmonizes with the language of the first definition of Indian in Section 19 that limits eligibility to "any recognized Indian tribe now under Federal jurisdiction." Plaintiff's interpretation that "Congress included all tribes who were under Federal jurisdiction on June 18, 1934," Compl. ¶ 20, requires this Court ignore the preceding clause limiting eligibility to "any recognized Indian tribe." Indeed, "courts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The IRA and the accompanying regulations, 25 C.F.R. §§ 81.1–81.24, set forth the procedures for calling and conducting Secretarial elections. Pursuant to 25 U.S.C. § 476, "[a]ny Indian tribe shall have the right to organize for its common welfare, and may

[12] Which states: "(w) Tribe means: (1) Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and is included, or is eligible to be included, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the FEDERAL REGISTER pursuant to § 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs; 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. Such tribes may consist of any consolidation of one or more tribes or parts of tribes."

adopt an appropriate constitution and bylaws, and any amendments thereto . . . ."

However, "Indian" and "Indian tribe" are, in turn, defined in Section 19:

> The term "Indian" as used in this Act shall include 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, and shall further include all other persons of one-half or more Indian blood . . . The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.

25 U.S.C. § 479 (emphasis added). Accordingly, to be included within Section 16 and eligible to request a Secretarial Election, an Indian tribe must satisfy the definitions included within Section 19: "[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." *Carcieri*, 555 U.S. at 391-92 (emphasis added) (citing Section 19).

Plaintiff's own pleading acknowledges that to satisfy the definition of tribe included within Section 19, a tribe must be both federally recognized as well as under federal jurisdiction on June 18, 1934 – the date of passage of the IRA. 2011 Compl. ¶ 20 (Section 19 "defines the term 'Indian tribe,' for purposes of 25 U.S.C. § 476, as 'any *recognized Indian tribe* now under Federal jurisdiction.'") (emphasis added). But Plaintiff disregards the explicit prerequisite of recognition and goes on to draw an overly broad construction such that the statute applies to "*all tribes* who were under Federal jurisdiction on June 18, 1934." *Id.* (emphasis added). If Congress had intended Section

19 to include all tribes, without the limitation that tribes be recognized, then Congress would not have incorporated such an explicit restriction. *See Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (observing that courts are "obliged to give effect, if possible, to every word Congress used.").

4. The Secretary's requirement that a tribe be recognized and under federal jurisdiction is consistent with *Carcieri*.

Moreover, the Part 81.1(w) requirement that a tribe be included or eligible to be included on the list of federally recognized tribes is consistent both with the language of the statute and with the Supreme Court's interpretation of Section 19 in *Carcieri*, where the Court acknowledged that a tribe must be both recognized and under federal jurisdiction.[13] In 1983, following the Narragansett's completion of the federal acknowledgement process, the BIA determined that the Tribe was a federally recognized tribe. *See* Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983). Following federal recognition, the Narragansett Tribe requested that lands be taken into trust with the United States pursuant to Section 5 of the IRA (25 U.S.C. § 5).

With the Tribe's request that land be taken into trust as the backdrop, in a 6-3 ruling (J. Breyer concurring, J. Souter and J. Ginbsurg concurring in part and dissenting in part, J. Stevens dissenting), the Supreme Court interpreted the term "now" in the

[13] Nothing in the Court's opinion, or in the concurrences, supports Plaintiff's assertion that the Supreme Court somehow questioned or invalidated Part 81.1(w). *Carcieri* dealt with an application of the Narragansett Indian Tribe of Rhode Island for the acquisition of land into trust.

statutory phrase "any recognized tribe now under Federal jurisdiction" in Section 19 to unambiguously refer to "those tribes that were under Federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395. In the absence of any indicia that the Tribe was under federal jurisdiction, it was incumbent upon the tribe to demonstrate that the later federal recognition reflected federal jurisdiction. Because none of the parties argued the Tribe was under federal jurisdiction in 1934, indeed, evidence in the record was to the contrary, the Court concluded that the Narragansett was not included within the definition of Section 19.

Importantly, in a concurring opinion joined by two other justices, Justice Breyer agreed with Justices Souter and Ginsburg that "recognized" and "under Federal jurisdiction" are distinct concepts. Justice Breyer's opinion supports a requirement that a tribe first complete the federal acknowledgment process and be federally recognized by the BIA as a prerequisite for eligibility under the first category of Indians in Section 19. In explaining the proposition that the two concepts are separate, Justice Breyer referenced several examples of tribes that were not viewed as under Federal jurisdiction in 1934, but had a relationship with the United States that could be "described as jurisdictional." *Id.* at 399. He observed that the majority's interpretation that understood "now" as meaning "in 1934" "may prove somewhat less restrictive than it first appears." *Id.* at 398. That is because the statute, which Justice Breyer quoted with emphasis as "*any recognized* Indian tribe now under Federal jurisdiction," "imposes no time limit upon recognition . . .

[a]nd administrative practice suggests that the Department has accepted this possibility." *Id.*

Justice Breyer then cited the Stillaguamish Tribe as an example. *Id.* The Stillaguamish Tribe was not recognized until 1976, but the reasons and evidence in support established that the Tribe had maintained treaty rights against the United States since 1855. As a result, the Stillaguimish Tribe met the restrictions of Section 19 and the Department concluded land could be taken into trust. The Stillaguamish tribe was only one of several examples Justice Breyer cited where a tribe could have been under Federal jurisdiction in 1934 even though it was not formally recognized at the time. However, unlike those tribes, the Narragansett were unable to demonstrate significant contact with the federal government until the 1970s.

Just as the Stillaguimish Tribe worked through the federal acknowledgment process and later established both federal recognition and federal jurisdiction as of 1934, so too can Plaintiff, if they can qualify under the regulations' standards. But until Plaintiff fully engages in the federal acknowledgment process and gain federal recognition, they will be ineligible to request a Secretarial Election. As this Court observed in upholding the regulations, "by requiring an entity seeking an IRA election to first request federal acknowledgment, the regulations ensure that the evidence the Sandy Lake Band offers in support of its claim that it qualifies as an Indian tribe under Section 19 will be presented to the appropriate agency with the requisite expertise and established regulatory process . . . ." *Sandy Lake I*, 2011 WL 2601840, at *4. That Plaintiff chooses

to ignore an explicit statutory prerequisite does not render the regulation promulgated thereunder as inconsistent or outside the broad scope of authority granted the Executive Branch.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court grant the United States' Motion to Dismiss, or, in the alternative, Motion for Summary Judgment.

Dated this 28th day of November, 2011.

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