DOCKET NO. 12-2600

In the

United States Court of Appeals

For the

Eighth Circuit

SANDY LAKE BAND OF MISSISSIPPI CHIPPEWA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; KENNETH SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior; LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs for the United States Department of Interior; 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-Appellees,

_____

Appeal from a Decision of the United States District Court for the District of Minnesota, No.11-2786-DWF ● Honorable Donovan W. Frank

BRIEF OF APPELLANT

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Summary of the Case

The Sandy Lake Band, ("Tribe"), seeks an order directing the Secretary of the Interior to call an election for the Tribe, under 25 U.S.C.§ 476, which will allow it to form a tribal government under a written constitution approved by the Secretary. To be eligible for the election, the Tribe must be an "Indian tribe" pursuant to 25 U.S.C. § 479. Section 479 defines an Indian tribe as a "recognized Indian tribe now under Federal jurisdiction." In *Carcieri v. Salazar*, 555 U. S. 379 (2009), the Supreme Court held that Section 479 is clear and unambiguous, and that the word "now" in the statute means 1934. In 1981, the Secretary adopted 25 C.F.R. §81.1 (w), defining the word "recognized" in Section 479 to mean a tribe on the list of Indian entities that the Secretary publishes each year in the Federal Register. The Tribe is not on the current list, but was recognized and under Federal jurisdiction in 1934. The Tribe, therefore, seeks an order declaring the regulation void for being in conflict with the statute.

The Court should allow at least 30 minutes per side for oral argument. This case raises issues of first impression and deals with an issue that has created a split among the Circuit Courts. Oral argument is necessary to clarify the complex factual and legal issues presented in the case.

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Jurisdictional Statement

1. The United States District Court for the District of Minnesota ("District Court") had jurisdiction over Appellant Sandy Lake Band of Mississippi Chippewa's ("Tribe") claims based upon the following:

(a) 28 U.S.C. § 1331, in that the Tribe's claims arise under the Constitution and laws of the United States, and

(b) 28 U.S.C. § 1361, in that the Tribe seeks to compel officers and employees of the United States and its agencies to perform duties owed to the Tribe.

2. The Court of Appeals has jurisdiction over this appeal based upon:

(a) 28 U.S.C. § 1291, in that the Tribe is appealing a final judgment of the District Court;

(b) The final judgment ("Judgment") was entered by the District Court on May 7, 2012;

(c) The Tribe filed a notice of appeal on July 2, 2012 and because Appellees, Secretary of the Interior, Kenneth Salazar; Assistant Secretary–Indian Affairs, Donald Laverdure[1], Jodi Gillette, Acting Deputy

[1]Assistant Secretary, Echo Hawk, left office on April 27, 2012. Donald Laverdure is currently the Acting Assistant Secretary.

Assistant Secretary for Policy and Economic Development, Bureau of Indians Affairs, and Diane Rosen, Regional Director, Midwest Regional Office, Bureau of Indian Affairs (collectively "Federal Officials"), are officials of the United States who are being sued in their official capacities, the filing of the notice of appeal within sixty (60) days after the entry of the Judgment was timely; and

(d) The Judgment granting the Federal Officials' motion to dismiss, or, in the alternative, motion for summary judgment and denying the Tribe's motion for partial summary judgment constitutes a final judgment that disposed of the claims of all of the parties.

Statement of Issues Presented for Review

1. Is the phrase "recognized tribe now under federal jurisdiction", used by Congress in 25 U.S.C. § 479 ("Section 479"), to define an Indian tribe for purposes of 25 U.S.C. § 476, clear and unambiguous?

2. Is 25 C.F.R. § 81.1(w) (the "Regulation") void because it conflicts with the clear and unambiguous provisions of Section 479, as interpreted by the United States Supreme Court in *Carcieri v. Salazar*, 555 U. S. 379 (2009) ("*Carcieri*")?

3. Do the canons of statutory construction articulated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) ("*Blackfeet*") apply in cases

requiring the interpretation of a statute passed for the benefit of Indians, instead of the standard for deference to agency expertise stated in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*")?

4. Did the District Court properly implement the Indian canons of statutory construction ("Indian Canons" or "Canons") applicable to statutes enacted for the benefit of Indians and Indian Tribes, as required by *Blackfeet*?

5. Did the Federal Officials provide a legally sufficient explanation for the adoption of the Regulation, changed the Department of the Interior's ("DOI") long standing interpretating of the definition of "Indian Tribe" set forth in Section 479?

6. Is the Regulation invalid because it is inconsistent with the DOI's prior long standing policy interpreting and implementing Section 479?

Statement of the Case

On August 8, 2007, Terrence L. Verdin, then Midwest Regional Director ("Regional Director") for the Bureau of Indian Affairs ("BIA") rendered a decision ("Decision") upholding the decision of the Superintendent of the Minnesota Agency of the BIA, denying the Tribe's request for an election ("IRA Election") to adopt a constitution for the Tribe, pursuant to the

provisions of the Indian Reorganization Act, 25 U.S.C. § 476 ("Section 476"). In rendering the Decision, the Regional Director held that the Tribe was not a "Indian Tribe" as defined by the Regulation and, therefore, was ineligible for an IRA election. On September 25, 2007, the Tribe filed a timely appeal from the Decision to the Interior Board of Indian Appeals, Office of Hearing and Appeals ("IBIA"). On March 27, 2008, the IBIA dismissed the Tribe's appeal on the grounds that the Assistant Secretary for Indian Affairs, by letter dated September 25, 2007, had already denied the Tribe's request for an IRA Election, which was a final decision for the DOI that was not reviewable by the IBIA. The Regulation, which was the basis for the Decision, was first promulgated in 1981, years after the enactment of Section 479 by Congress in 1934. The Regulation, which requires a tribe to be on the list ("List") of Indian entities published by the Secretary in the Federal Register in order to be considered an "Indian tribe" for the purposes of 25 U.S.C. ¶ 479, is in conflict with 25 U.S.C. § 479, the case law interpreting Section 479, and the DOI's longstanding interpretation of Section 479.

On September 28, 2011, the Tribe filed suit in the District Court against the Federal Officials challenging the Decision. On November 28, 2011, the Federal Officials filed a motion to dismiss or, in the alternative, for summary

judgment ("Federal Motions"). On December 29, 2011, the Tribe filed a motion for partial summary judgment ("Tribal Motion"). The Court held a hearing on the parties' motions on February 10, 2012. On May 4, 2012, the Court issued a Memorandum Opinion and Order ("Order") denying the Tribal Motion, granting the Federal Motions, and dismissing the Tribe's complaint with prejudice. On May 7, 2012, the District Court entered the Judgment. On July 2, 2012 the Tribe filed a timely notice of appeal with the District Court.

Statement of Facts

The Sandy Lake Band of Mississippi Chippewa was recognized by the United States and under federal jurisdiction on June 18, 1934, the date of the enactment of the Indian Reorganization Act, 25 U.S.C. 461 et seq. ("IRA"). It has never disbanded or relinquished its status as a federal recognized tribe. Appendix ("App."), p. 163, ¶ 2.

The Tribe was initially recognized by the United States beginning on August 19, 1825, when the United States negotiated and concluded the Treaty of Prairie du Chien with various tribes, including the Sandy Lake Band ("1825 Treaty"), 7 Stats. 272 . The Tribe eventually entered into a total of nine treaties with the United States, all of which recognized the Tribe as a governmental entity with recognized title to the lands it occupied. App., p. 164, ¶ 3.

The Tribe was treated as a tribe by other tribes since before the Tribe had contact with the United States government. This treatment was acknowledged in the 1825 Treaty; the signatory tribes agreed to end wars between themselves by establishing boundaries for the territories of each of the signatory tribes, including Sandy Lake. Those boundaries were reaffirmed in the Treaty of 1826, 7 Stat. 290, in which the Tribe ratified the terms of the Treaty of 1825, which established the procedure for fixing the boundary line between the territory of the Chippewa and the territory of the Winnebagos and Menomonies, and denounced all connection with any foreign power, except the United States. App., p. 165, ¶ 6.

The Tribe has been denominated a tribe by executive order. In 1873, the President issued an Executive Order creating the White Oak Point Reservation on the Mississippi River for the "Sandy Lake and Rabbit Bands" of Mississippi Chippewa for the express purpose of removing the Indians to that reservation. On March 4, 1915, the President issued Executive Order No. 2144, in fulfillment of the terms of the May 7, 1864, "Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands" ("1864 Treaty"), 12 Stats. 1249, which guaranteed to "the [T]ribe residing on the Sandy Lake reservation" the right to remain on its formerly ceded reservation lands until

the President directs that they should be removed to the White Earth Reservation. App., p. 164, ¶ 4.

The Tribe has been treated as having collective rights in tribal lands or funds since the Treaty of 1826, when boundaries among various tribes, including the Tribe, were established. That treatment was repeatedly acknowledged in later treaties, beginning with the Treaty with the Chippewa concluded at St. Peters in the Territory of Wisconsin, dated July 29, 1837 ("1837 Treaty"), 7 Stats. 536 , in which the Tribe ceded land to the United States. App., p. 164, ¶ 5.

The Tribe was also the beneficial owner of three (3) reservations: the original Sandy Lake Reservation, which was created by the February 22, 1855, Treaty, 10 Stats. 1165, between the United States and the Chippewa of the Mississippi, including the Tribe, (App., p. 165, ¶ 6); the White Oak Point Reservation, subsequently created by Executive Order in 1873, (*Id.*), and the Executive Order reservation created on March 4, 1915, by President Woodrow Wilson pursuant to Executive Order No. 2144 ("Executive Order No. 2144"), which was issued in fulfillment of the terms of the 1864 Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 12 Stats. 1249, guaranteeing to "the [T]ribe residing on the Sandy Lake

reservation" the right to remain on its formerly ceded reservation lands until the President directs that they should be removed to the White Earth Reservation. Executive Order 2144, created the current Sandy Lake Reservation ("Reservation") for the Indians "now living thereon," which were the members of the Tribe, and for such other Indians as the President may choose. App., p. 068, ¶ 6.

In 1885, Congress passed "An Act for the Benefit and Civilization of the Chippewa Indians of Minnesota," 25 Stat. 642 ("Rice Act"), and directed the appointment of a commission ("Commission") to go and meet with the Chippewa Indians in Minnesota with a view toward their consenting to a cession of all their reservations and their removal to the White Earth Reservation. App., p. 068, ¶ 4.

In 1889, in fulfilling its duties under the Rice Act, the Commission conducted a census among the Chippewas of the Mississippi for the purpose of determining which Indians were enrolled with each band of the Mississippi Chippewa. The Commission conducted and prepared a tribal roll for the Tribe, separate and distinct from the tribal rolls that the Commission prepared for the other Bands of the Mississippi Chippewa, including but not limited to the Mille Lacs Band. App., p. 068, ¶ 5.

Before the enactment of the IRA, the Tribe was also the recipient of Congressional appropriations specifically designated for the Tribe. In order to fulfill the obligations of the United States under the Treaties of 1837, 1842, 1847, 1854, 1855, 1863, 1864, and 1867, Congress enacted numerous statutes between 1856 and 1874 for the benefit of the Chippewas of the Mississippi. A typical example of such statutes is the Act of July 5, 1862, 12 Stat. 514 ("1862 Act"), under which Congress appropriated money to be used to pay for annuities for the services of two carpenters; the purchase of goods; the support of schools; the purchase of provisions and tobacco; the hiring of two smiths and assistants; and the purchase of iron and steel for the Chippewas of the Mississippi and, in particular, the Sandy Lake Band. App., p. 165, ¶ 6.

On June 18, 1934, Congress adopted the IRA. The Secretary never conducted an IRA election among the Indians residing on the Reservation, even though, under the provisions of the IRA, the Secretary had an obligation to do so. The Tribe, through its members residing on the Reservation, never voted to exclude itself from the provisions of the IRA. App., p. 069, ¶ 7.

After passage of the IRA the Tribe did not submit a request to the Secretary to organize a tribal government under a written constitution

approved by the Secretary, pursuant to 25 U.S.C. § 476 of the IRA. App., p. 069, ¶ 8.

Between October 27, 1934, and November 17, 1934, the Secretary conducted elections on the Indian reservations in Minnesota for the purpose of allowing the tribes and Indians residing on each of those reservations to vote on whether they wanted the provisions of the IRA to apply to them and their respective reservations. There were two announcements for this election: one for the White Earth, Leach Lake, Grand Portage, and Boise Fort Reservations, and a second announcement for Fond du Lac and Red Lake Reservations. The BIA set up no polling places on the Reservation, but established polling places on the other six reservations. No announcement was ever published and no balloting was ever held for the purpose of allowing the Tribe's members to vote on the application of the IRA as required by law. App., p. 069, ¶ 9.

The Secretary held an election under the provisions of the IRA to allow various tribes and bands in Minnesota to organize a tribe called the Minnesota Chippewa Tribe ("MCT"). While a polling place was maintained at Sandy Lake to allow members of the Tribe living within the Mille Lacs district to vote on

the proposed Minnesota Chippewa Constitution, no member of the Tribe cast a ballot either for or against the passage of the Constitution. App., p. 070, ¶ 10.

On July 20, 1936, a majority of the tribes and bands of Chippewa Indians residing on Indian reservations in Minnesota organized a single tribal government under the Minnesota Chippewa Constitution which was approved by the Secretary on July 24, 1936, pursuant to 25 U.S.C. § 476 of the IRA. The Tribe, as opposed to certain Indians who were of Sandy Lake Chippewa Indian origin and who were eligible for membership in the Tribe, did not participate in the election to approve, nor did it organize a tribal government under, the Constitution of the MCT. The Constitution of the MCT does not mention the Tribe, nor does it contain any provisions purporting to exercise jurisdiction over the Tribe or its members. App., p. 070, ¶ 11.

From the time of the issuance of the 1915 Executive Order through the present, there have been members of the Tribe residing on the Reservation as well as in the vicinity of the White Oak Point Reservation who held themselves out and conducted themselves as an Indian tribe under a central tribal government. App., p. 071, ¶ 12.

Between the enactment of the IRA in 1934, and the issuance of the May 29, 1980, field solicitor's opinion issued by Field Solicitor Nitzschke opining

that the Tribe was not the successor to the historic Sandy Lake Band of Mississippi Chippewa, the Tribe was continuously recognized by the United States and received benefits from the federal government as a result of its status as a federally recognized Indian tribe. App., p. 166, ¶ 8.

On July 10, 2007, the Tribe submitted a letter to Eugene R. Verdin, Superintendent of the Minnesota Agency of the BIA, requesting that the Superintendent call and conduct an election for the Tribe to vote to organize a tribal government under a constitution, pursuant to the provisions of 25 U.S.C. § 476. App., p. 071, ¶ 14. By letter dated July 27, 2007, Superintendent Verdin denied the Tribe's request. App., p. 071, ¶ 15.

On August 8, 2007, the Tribe appealed Superintendent Verdin's July 27, 2007, decision to Terrence L. Verdin, Midwest Regional Director for the BIA. In a letter dated August 28, 2007, to Monroe Skinaway, Regional Director Verdin denied the Tribe's appeal on the grounds that the Tribe was not a "tribe" as "defined at 25 C.F.R. 81.1(w)" and, therefore, was ineligible for an IRA election. App., p. 072, ¶ 16.

On September 25, 2007, the Tribe filed a timely appeal of Regional Director Verdin's August 28, 2007, decision to the IBIA. App., p. 072, ¶ 17. On March 21, 2008, the IBIA entered an Order dismissing the Tribe's appeal

on the grounds that: (1) the Assistant Secretary for Indian Affairs, by letter dated September 25, 2007, had already denied the Tribe's request for an IRA Election; (2) the September 25, 2007, letter was a final decision of the DOI on that issue; and (3) therefore, the Decision was not reviewable by the IBIA. App., p. 072, ¶ 18.

Even though the Tribe has exercised political authority over its members since time immemorial, has never relinquished its political authority over its members, and the Tribe's current Tribal Councils are the direct descendants of the Tribe's traditional governing structures, the Tribe is currently not listed as a federally recognized Indian Tribe on the List of Indian Entities published in the Federal Register. App., p. 166, ¶ 7, and App., p. 163, ¶ 2.

Summary of Argument

In this Opening Brief, the Tribe will make the following arguments:

1. The District Court improperly concluded that Section 479 was ambiguous and that the Secretary's interpretation of the phrase, "recognized tribe now under federal jurisdiction," as used in Section 479, must therefore be given agency deference. The Secretary's interpretation, as set forth in the Regulation, is in direct conflict with the plain, clear and unambiguous wording of Section 479, which provides no textual basis for concluding that the phrase

"recognized tribe now under federal jurisdiction" means anything other than a tribe that was both recognized and under federal jurisdiction on June 18, 1934, the date that Congress adopted the IRA. It is also in conflict with the Supreme Court's decision in *Carcieri*, which held that the phrase "recognized Indian tribe now under federal jurisdiction" is clear and unambiguous and means a tribe recognized and under federal jurisdiction in 1934, and not a tribe on the List. *Carcieri v. Salazar*, 555 U.S. 379 (2009); see also, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, _ U.S. _, 132 S. Ct. 2199, 2204, n. 2; 183 L. Ed. 2d 211, 218, n. 2 (2012) .

2. Assuming that Section 479 is ambiguous, the District Court should have applied the Indian Canons, not the *Chevron* deference standard, in interpreting the statute. The Indian Canons require that, in light of the fiduciary relationship between the federal government and Indian tribes, statutes passed for the benefit of Indian tribes, where ambiguous, must be interpreted in the light most favorable to the Indians. *Blackfeet*, at766 (1985). The *Chevron* deference standard requires courts to give agency interpretations deference where the statute is ambiguous. Given that federal agencies are frequently the parties accused of failing to meet the federal government's fiduciary obligations to Indian Tribes, and given that Indian rights can only

be diminished by an explicit statement of Congressional intent to do so, the *Chevron* standard does not apply to the interpretation of statutes passed for the benefit of Indians and Indian tribes.

3. The longstanding interpretation of the DOI at the time of and immediately after passage of the IRA was that a federally "recognized Indian tribe," for the purposes of Section 479, was any group of Indians that met a majority of the five (5) criteria ("Criteria") adopted by the DOI to implement the IRA. The adoption of the Regulation eliminates the Criteria in favor of a single criterion: the group must be on the List of Indian entities currently published in the Federal Register by the Secretary. While agencies are permitted to change their interpretation of a statute under certain circumstances, they are not permitted to do so without a reasoned explanation for the change. Here, the Regulation conflicts with the DOI longstanding policy of interpreting Section479, and the DOI, at the time that it adopted the Regulation, gave no reason or justification for changing the prior policy.

Standard of Review

This case involves the Tribe's challenge to the Federal Officials' interpretation of the phrase "recognized tribe now under federal jurisdiction" set forth in 25 U.S.C. § 479. If the phrase means a tribe on the List, as required

by the Regulation, then the Tribe is not an Indian tribe entitled to an IRA Election under 25 U.S.C. § 476. If, on the other hand, the phrase means a tribe "recognized" and "under federal jurisdiction" in 1934, the Tribe is a tribe within the meaning of 25 U.S.C. § 476, entitled to an IRA Election.

In *Arizona State Board for Charter Schools v. U.S. Department of Education*, 464 F.3d 1003, 1006 (9th Cir. 2006), the Ninth Circuit Court of Appeals stated:

> We review both a district court's grant of summary judgment and questions of statutory interpretation de novo. *Robi v. Reed, 173 F.3d 736, 739 (9th Cir. 1999)*; *Wilderness Soc'y v. Dombeck, 168 F.3d 367, 370 (9th Cir. 1999)*. When reviewing an agency's interpretation of a statute it is charged with administering, we look first "to the statutory text to see whether Congress has spoken directly to the question at hand. '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.'" *Contract Mgmt., Inc. v. Rumsfeld, 434 F.3d 1145, 1146-47 (9th Cir. 2006)* (quoting *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*). Thus, "[t]he language of a statute is controlling when the meaning is plain and unambiguous." *United States v. Maria-Gonzalez, 268 F.3d 664, 668 (9th Cir. 2001)*.

The District Court ruled that the Federal Officials' interpretation is subject to agency deference, pursuant to *Chevron*, based on the conclusion that the relevant provisions of Section 479 are ambiguous. The Supreme Court has found, however, that those provisions are plain and unambiguous.

Carcieri v. Salazar, 555 U.S. 379 (2009); see also, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, _ U.S. _, 132 S. Ct. 2199, 2204, n. 2; 183 L. Ed. 2d 211, 218, n. 2 (2012) . In reviewing the District Court's Order and Judgment, therefore, the first issue is whether the language of the statute is plain and unambiguous. The review of that issue is subject to the de novo standard. *Arizona State Board for Charter Schools v. U.S. Department of Education*, *supra*, 464 F.3d at 1006.

To the extent that this Court concludes that the statutory provisions at issue in this case are ambiguous, the appropriate standard of review is not the agency deference standard stated in *Chevron*. As will be discussed in detail in Section VI, below, the Court is compelled to apply the Indian Canons applicable to federal Indian law: statutes are to be construed liberally in favor of Indians and Indian tribes with ambiguous provisions interpreted to their benefit. *Blackfeet; Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

Argument

I.

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

Title 25 of the United States Code § 476 provides:

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

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

Federal courts have interpreted this language as placing a mandatory duty on the Secretary to call an election under Section 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) ("Coyote Valley"). (Emphasis added.)

The Tribe presented the Superintendent of the Minnesota Agency and the Regional Director of the Midwest Regional Office 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. App., p. 071-072, ¶¶ 13-16.

Having received the Tribe's request for an IRA election, the Secretary had 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. § 476.

II.

THE TRIBE IS ELIGIBLE FOR AN IRA ELECTION IF IT IS A TRIBE AS DEFINED BY 25 U.S.C. § 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).

Pursuant to Section 479, in order to be eligible for an IRA election, an Indian group must demonstrate that its members are: (1) members of a "recognized tribe now under Federal jurisdiction", and/or (2) descendants of such members who were, on June 1, 1934, residing on any Indian reservation. 25 U.S.C. § 479.

If the members of the Tribe fall within either one of these two categories, then the Tribe is an Indian tribe as defined by Section 479, and eligible for an IRA election pursuant to 25 U.S.C. § 476.

III.

THE DISTRICT ERRED IN HOLDING THAT SECTION 479 WAS AMBIGUOUS.

Section 479 defines "Indian" as the "members of any recognized Indian tribe now under Federal jurisdiction. . . ." The Supreme Court in *Carcieri* defined the word "now" in Section 479 to mean June 18, 1934, the date the IRA was enacted by Congress. Based on *Carcieri*, the phrase reads: "members of any recognized Indian tribe now [on June 18, 1934] under Federal jurisdiction. . . ." *Id.* Thus, to be an Indian, as defined by Section 479, a person has to be: (1) a member of a tribe that was recognized in 1934, and (2) the tribe had to be under the jurisdiction of the federal government on June 18, 1934.

The phrase "now under federal jurisdiction" contained in Section 479, imposes a time limit on the phrase "recognized Indian tribe." It requires an eligible tribe to be both recognized and under federal jurisdiction in 1934.

> First, the Secretary and several amici argue that the definition of "Indian" in § 479 is rendered irrelevant by the broader definition of

> "tribe" in § 479 and by the fact that the statute authorizes the Secretary to take title to lands "in the name of the United States in trust for the *Indian tribe* . . . for which the land is acquired. . . . But the definition of "tribe" in § 479 itself refers to "any *Indian* tribe" . . . , **and therefore is limited by the temporal restrictions that apply to § 479's definition of "Indian."**

Carcieri v. Salazar, 555 U.S. at 403. (Emphasis added).

The Regulation, by restricting "recognized Indian tribes" to those tribes that were listed as recognized as of 1979, the date that the Secretary first published the List in the Federal Register, adds a criteria never contemplated by Congress and excludes from Section 479's coverage the very class of tribes that Congress intended would be covered by the statute: tribes, such as Sandy Lake, that were both recognized **and** under Federal jurisdiction in 1934, because they are not on the List currently published in the Federal Register by the Secretary. 75 Fed. Reg. 60, 81 (October 1, 2010).

> The Sandy Lake Band of Mississippi Chippewa ("Tribe") was recognized by the United States and under federal jurisdiction on June 18, 1934, the date of the enactment of the Indian Reorganization Act, 25 U.S.C. 461 et seq. ("IRA"). It has never disbanded or relinquished its status as a federal recognized tribe.

App., p. 163, ¶ 2.

The District Court's interpretation of Section 479 ignores the phrase "now under Federal jurisdiction" that immediately follows the phrase "recognized Indian tribes." It is absurd and a strained interpretation to think

that Congress, which enacted Section 479 in 1934, intended to grant to the Secretary the authority, through the adoption of the Regulation, to exclude from Section 479's coverage tribes like Sandy Lake that were "recognized" and "under Federal jurisdiction" in 1934. App., p. 163, ¶ 2. But, that is exactly the interpretation that the District Court adopted: "Section 81.1 (w)'s requirement that an Indian tribe be included or eligible to be included on the list of federally recognized tribes is consistent with the requirement that an eligible tribe be "recognized" and is based on a permissible construction of the statute". App., p. 021 - 022.

The Tribe does not dispute the District Court's reasoning on the requirement that the Tribe be recognized. But Section 479, requires an eligible tribe to be "recognized" as of June 18, 1934. Section 479 does not require that an eligible tribe be on the List: that List was first published by the Secretary in the Federal Register in 1979. Congress at the time that it enacted the IRA could not have contemplated that its definition of "Indian tribe" would mean an Indian entity whose name appeared on the List because that List did not come into existence until 45 years later.

The proper way to read Section 479 is to simply give the words of the statute their ordinary dictionary meaning. *Rumsey v. Wilson*, 64 F.3d 1250,

1257 (9th Cir. 1994) (holding that in interpreting a statute, a court must give effect to the plain wording of the statute). Applying this canon of statutory construction, the phrase "recognized Indian tribe now under Federal jurisdiction" is clear. It means a tribe that, at any time prior to and including 1934, was initially federally recognized, and who, in 1934, was under the jurisdiction of the Federal government. The Regulation excludes a class of tribes that fall within the plain wording of Section 479. It is, therefore, in direct conflict with Section 479.

IV.

THE DISTRICT COURT'S INTERPRETATION OF SECTION 479 CONFLICTS WITH THE SUPREME COURT PRECEDENT INTERPRETING THE STATUTE.

In order to justify the adoption of the Regulation, the District Court held, as it must, that Section 479 is ambiguous, thus requiring the Secretary to promulgate the Regulation in order to define the phrase "recognized Indian tribe" to mean a tribe whose name appears on the current List of Indian entities published in the Federal Register by the Secretary. App., p. 020.

The problem with the District Court's conclusion that Section 479 is ambiguous is that it conflicts with the United States Supreme Court's decision in *Carcieri*.

In *Carcieri*, the Supreme Court expressly held that Section 479 was unambiguous and left no gaps for the Secretary to fill through the adoption of regulations. *Id.*, at 392.

The District Court found that the focus of the Court's decision in *Carcieri* was on defining the phrase "now under Federal jurisdiction" in Section 479. The Supreme Court's holding was not that limited. The Supreme Court examined the entire statute and concluded that all of Section 479 is unambiguous, not just the phrase "now under Federal jurisdiction." *Id.* ("But, as explained above, Congress left no gap in 25 U.S.C. § 479 for the agency to fill.")

The District Court's holding that Section 479 is ambiguous is contrary to the holding in *Carcieri* and for this reason alone should be reversed by this Court.

V.

THE DISTRICT COURT'S INTERPRETATION OF SECTION 479 CONFLICTS WITH THE DEPARTMENT OF INTERIOR'S LONGSTANDING POLICIES DEFINING WHAT CONSTITUTED A RECOGNIZED INDIAN TRIBE.

Since its enactment, the Department of the Interior has had to make determinations as to whether a group was a "tribe" within the meaning of Section 479. Over the years, the DOI has consistently concluded that a group

constituted an IRA tribe or band if the group met a majority of the following criteria: (1) the group had treaty relations with the United States; (2) the group had been denominated a tribe by Act of Congress or executive order; (3) the group had been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe; (4) the group had been treated as a tribe or band by other Indian tribes, and (5) the group had exercised political authority over its members, through a tribal council or other government forum (hereinafter referred to collectively as the "Criteria"). See, Memo. Sol. Int., Feb. 8, 1937 (Mole Lake Band of Chippewas); *Cohen's Hand Book of Federal Indian Law*, 2005 Edition, pp. 149- 151.

After the passage of the IRA, issues of tribal existence for purposes of determining federal recognition within the meaning of the IRA continued to arise and were resolved by the DOI by applying the Criteria. See, e.g., Memo. Sol.. Int., Feb. 8, 1937 (finding that Mole Lake Band of Chippewas can be recognized as a tribe or band within the meaning of the IRA); Memo. Sol. Int., Mar. 6, 1937 (concluding that although Wisconsin Winnebago Indians were only part of the Winnebago Tribe that possessed homestead allotments instead of a reservation, they were a tribe within the meaning of the IRA for purposes of 25 U.S.C. § 468). The DOI continued to use the Criteria to

determine whether a group was a recognized tribe within the meaning of Section 479 up until the Secretary adopted the Regulation.

Thus, the longstanding policy of the DOI at the time of and immediately after passage of the IRA was that a federally "recognized Indian Tribe" for purposes of the Section 479, was a group that met the Criteria. The adoption of the Regulation eliminated the Criteria in favor of a single criterion: the group must be on the List of Indian entities currently published in the Federal Register by the Secretary.

While agencies are permitted to change their interpretation of a statute under certain circumstances, they are not permitted to do so without a reasoned explanation for the change. "[T]he 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.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). "'. . . [W]here policy has been altered, the court should be satisfied both that the agency was aware it was changing its views and has articulated permissible reasons for that change, and also that the new position is consistent with the law.'" *Center for Science in Public Interest v. Department of Treasury*, 573 F. Supp. 1168, 1173 (D.C. Cir. 1983). See also, *Burlington*

Truck Lines, Inc. v. United States, 371 U. S. 156, 168 (1962); *Morton v. Ruiz,* 415 U. S. 199 (1974); *Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Com.*, 734 F.2d 1486 (D.C. Cir. 1984); *Formula v. Heckler*, 779 F.2d 743 (D.C. Cir. 1985).

Here, the Federal Officials have not articulated a sufficient basis for adopting the Regulation purportedly implementing Section 479, other than that the phrase "recognized Indian tribe" is ambiguous and needs to be defined. The Federal Officials have failed to offer any explanation as to why the DOI's longstanding policy interpreting Section 479 changed or why the Secretary decided to effectively overrule the DOI's longstanding interpretation of Section 479. See, 46 Fed. Reg. 1668 (January 7, 1981).

The Federal Officials' failure to offer such a reasoned explanation for the Secretary's departure from the prior longstanding interpretation by the DOI of Section 479 was arbitrary and capricious for two reasons. First, it eliminates a whole class of tribes, such Sandy Lake, that would otherwise be eligible for an IRA election, from the definition of Indian tribe set forth in Section 479. Second, the Regulation conflicts with Section 479 by adding a criteria that Congress never contemplated at the time that it enacted the statute in 1934, that an eligible tribe had to be on the List of Indian entities published by the

Secretary in the federal Register for the first time in 1979. The Regulation, therefore, is invalid.

VI.

THE DISTRICT COURT ERRED BY FAILING TO APPLY THE INDIAN CANONS OF STATUTORY CONSTRUCTION IN INTERPRETING 25 U.S.C. §476.

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

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and

> trust. **Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards**.

Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). (Emphasis added).

The federal government's fiduciary responsibility toward Indians exists independent of an express provision of a treaty, agreement, executive order or statute. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 991 (Ct. Cl. 1980).

Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *Morton v. Ruiz*, 415 U.S. 199 (1974); *McNabb v. Bowen*, 829 F. 2d 787 (9th Cir. 1987); *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).

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

White v. Califano, at 557. (Emphasis added).

Based on the federal government's fiduciary obligations to Indians and Indian tribes, the Supreme Court has developed canons of construction requiring that federal law must be read as protecting Indian rights and in a manner favorable to Indians ("Indian Canons"). The Supreme Court adheres to "the general rule that statutes passed for the benefit of the dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89 (1918); *Blackfeet,* 471 U.S. at 766.

When Indian rights are shown to exist, later federal action which might arguably abridge them is construed narrowly in favor of preserving Indian rights. The Supreme Court requires a "clear and plain statement" of Congressional intent before abrogating Indian treaty rights or Indian rights arising from statutes. *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). See *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982).

The Circuit Courts of Appeal have consistently held that the Indian Canons are

> somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an

> interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian - a status accompanied by fiduciary obligations. . . . While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

Based on the fiduciary obligations of the federal government, the Supreme Court has ruled that courts must apply the Indian canons of statutory construction to resolve ambiguities in statutes passed for the benefit of Indians, rather than canons of construction applicable in other contexts:

> **[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law**. . . . [T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

Blackfeet, 471 U.S. at 766. (Emphasis added).

The Supreme Court's conclusion that "standard principles of statutory construction" are not to be applied to statutes passed for the benefit of Indians encompasses the deference given to an agency's interpretation of a statute

under decisions such as *Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984) ("*Chevron*"), decided a year before *Blackfeet*. This is so because the Indian Canons are not merely canons of construction, but a fundamental aspect of the trust relationship between the federal government and Indian tribes.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court recognized that Indians have faced outrageous treatment and deprivations of property and rights at the hands of officials of the federal government, state governments, and private persons and entities. Federal Courts have repeatedly found that federal officials and agencies cannot be trusted to consistently make fair decisions with regard to the interests of Indians. The Indian Canons arise from the Court's conclusion that Indians and their interests must be protected from, among others, federal officials. See, e.g. *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977).

Chevron deference is premised on the notion that agencies and their officials have expertise that others, including the courts, lack with regard to the matters within the agencies' jurisdiction. "[An] agency's interpretation is generally accorded *Chevron* deference because the agency has superior expertise in the particular area." *Williams v. Babbitt*, 115 F.3d 657, 662 (9th

Cir. 1997). Allowing that premise to protect federal agency decisions that are damaging to the interests of Indians is in direct conflict with the foundation of the Indian Canons: federal officials *cannot be trusted* to make the right decision on matters of Indian rights and property. See, e.g. *Cobell v. Norton*, *supra*.

Chevron deference to interpretations that conflict with the interests of Indians is also incompatible with the fiduciary relationship between the federal government and Indian tribes upon which the Indian Canons are based. As fiduciaries, federal officials are not permitted to interpret treaties, statutes, or regulations to the detriment of the Indians they are required to protect. To do so would be to violate their fiduciary obligations. *Seminole Nation v. United States*, 316 U.S. at 296-297.

The Indian Canons must be applied, moreover, not because the Indian's interpretation is always the best interpretation of the statute, but because the Indian Canons require this Court to adopt the Indians interpretation.

> Application of the *Blackfeet* presumption is straightforward. We are confronted by an ambiguous provision in a federal statute that was intended to benefit Indian tribes. One construction of the provision favors Indian tribes, while the other does not. We faced a similar situation in the context of Indian taxation in *Quinault Indian Nation v. Grays Harbor County, 310 F.3d 645 (9th Cir. 2002).* In choosing between two characterizations of a tax law "plagued with ambiguity," we adopted the construction that

> favored the Indian Nation over the one that favored Grays Harbor County, noting that "it is not enough to be persuaded that the County's is a permissible or even the better reading." *Id. at 647.* Here, we must follow a similar approach. We adopt Defendants' construction, not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes.

Artichoke Joe's Ca. Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

The District Court in this case held that Section 479 of the IRA was ambiguous and that the ambiguity was not resolved by the plain wording of the statute. At that point, instead of applying the Indian Canons to resolve the ambiguity and accepting the Tribe's interpretation, the District Court applied the agency deference canon under *Chevron*. In failing to apply the Indian Canon's to resolve any ambiguity in Section 479 in favor of Tribe, the District Court committed a clear error of law.

Interpreting Section 479 of the IRA in the Tribe's favor, furthermore, is consistent with the decisions of the other Circuit Courts of Appeal that have squarely addressed the issue of which canons should be applied to resolve ambiguities in Indian legislation.

In *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Lujan*") the Tenth Circuit Court of Appeals specifically held that the Indian

Canons, and not the agency deference canon should be applied to resolve ambiguities involving legislation enacted for the benefit of Indians.

> When faced with an ambiguous federal statute, we typically defer to the administering agency's interpretation as long as it is based on a permissible construction of the statute at issue. . . . In cases involving Native Americans, however, we have taken a different approach to statutory interpretation, holding that "normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue." . . . . Instead, we have held that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.

Id., at 1461 (10th Cir. 1997). (Citations omitted.)

The District of Columbia Court of Appeals in *Cobell v. United States, supra*, followed the Tenth Circuits decision in *Lujan*:

> While ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, *Chevron* deference is not applicable in this case. The governing canon of construction requires that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." . . . . Therefore, even where the ambiguous statute is one entrusted to an agency, we give the agency's interpretation "careful consideration" but "we do not defer to it." . . . **This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but "from principles of equitable obligations and normative rules of behavior," applicable to the trust relationship between the United States and the Native American people.**

Id. at 1100, (Emphasis added). See *Muscogee Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991). See also *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. 2d 838, 841-842 (W. D. Mich. 2008).

This Court has never squarely addressed the issue of whether the Canons, rather then *Chevron* deference, should be applied to resolve ambiguities in statutes passed for the benefit of Indians, but it should do so now.

> Two other circuits have avoided the issue in creative ways. For example, in *Shakopee Mdewakanton Sioux Community v. Hope,* the Eighth Circuit determined that the NIGC had interpreted the IGRA in favor of the Indians in accordance with the Indian canon of construction by protecting "Indian gaming from corrupting influences," despite the fact that the relevant Indian tribe in the case strongly disagreed with the outcome. *16 F.3d 261, 264-65 n.6 (8th Cir. 1994). See also, Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075, 1090 n.15 (Fed. Cir. 2003)* (noting that "[b]ecause we conclude that the 'shall remain available' language was not ambiguous, we need not address what role, if any, the Indian canon of statutory construction, or the *Chevron* doctrine, would have here" (citations omitted)).

Sault Ste. Marie Tribe of Chippewa Indians v. United States, 576 F. Supp. 2d at 849.

Consistent with the Supreme Court's directive in *Blackfeet*, this Court should join the Tenth and D.C. Circuit Courts of Appeal in holding that the District Court committed a clear error of law in failing to apply the Canons to

resolve any ambiguities in Section 479.[2] This Court should then interpret Section 479 in favor of the Tribe and as the Tribe interprets the statute by holding that the phrase "recognized tribe now under Federal jurisdiction" means an Indian entity, such as the Tribe, that was both "recognized" and "under Federal jurisdiction" on June 18, 1934.

VII.

THE TRIBE WAS UNDER FEDERAL JURISDICTION ON JUNE 18, 1934.

After passage of the IRA, the Department of the Interior had to determine which tribes were under its jurisdiction in 1934 and, therefore, eligible to receive the benefits of the IRA.

> However, the fact that the Government did not publish a list of Federally recognized tribes when the IRA was enacted does not mean that the Federal Government did not explicitly or implicitly recognize certain entities, e.g., through its dealings with them, as constituting pre-existing and semi-sovereign political tribal entities, and therefore as constituting "Indian tribes" as that term was understood in the IRA.

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[2]A split between the Circuit Courts appears to exist on this issue. See, e.g., *Seldonia Native Ass'n v. Lujan*, 904 7. 3d. 1335, 1342 (9 th Cir. 1990). However, a more recent *en banc* decision in *Navajo Nation v. Dept. Health & Human Services*, 325 F. 3d. 1133, 1136, n. 4 (9 th Cir. 2003) (*en banc*) implies that the issue is still unresolved in the Ninth Circuit ("we leave for another day consideration of the interplay between the *Chevron* and *Blackfeet Tribe* presumptions").

Estate of Elmer Wilson, Jr.,, 47 Interior Board of Indian Appeals 1, 11 (2008).

When the IRA was enacted, the United States had an established practice of recognizing a tribe if it met any or all of the following criteria: (1) the tribe had treaty relations with the United States; (2) the Congress enacted legislation or the President issued an Executive Order pertaining to the tribe; (3) a reservation had been created for the tribe; (4) the tribe had been treated as a tribe by other Indian tribes; and (5) the tribe exercised political authority over its members, through some government forum. "Status of St. Croix Chippewas," 1 DOINA 724, 725-727 (Feb. 8, 1937). The Tribe doesn't just meet one of these criteria, it meets all of them.

First, between 1825 and 1867, the United States entered into nine treaties ("Treaties") with the Tribe. App., p. 164, ¶ 3. The Treaties were between the United States and various tribes or bands of the Mississippi Chippewa which the United States recognized and dealt with as separate and distinct tribes:

> Although the names "Chippewa Nation" or "Chippewa Tribe" were used in some of the early treaties made with Chippewa Indians, they were never organized as a single political entity with a central authority to act for all Chippewas. The Chippewas were rather divided into various bands or groups which in many instances were grouped under larger divisions or sub-tribes, each of which occupied separate and distinct areas of land.
>
> * * * *
>
> However, there were five areas set apart for the permanent homes of the Mississippi bands, which were described in Article 2 of the

> Treaty as Mille Lac, Rabbit Lake, Gull Lake, Pohegama Lake, and *Sandy and Rice Lakes*.

Minnesota Chippewa Tribe, et al., v. United States, 8 Ind. Cl. Comm. 781, 825 (1960) (Emphasis added).

The Tribe was a separate signatory to each of the Treaties and many of the Treaties had provisions that related solely to the Tribe or its leaders. App., p. 164, ¶ 3.

The Treaties are evidence that the United States "recognized" and maintained a government to government relationship with the Tribe separate and apart from the other Mississippi Chippewa Bands. *Id.*

Second, in order to fulfill its obligations under the Treaties, the United States enacted various statutes between 1856 and 1974 ("Legislation") for the benefit of the Chippewas of the Mississippi. A typical example of such a statute is the Act of July 5, 1862. App., p. 165, ¶ 6.

Under the Legislation, the United States fulfilled specific obligations that it owed solely to the Tribe or the representatives of the Tribe. *Id.* The legislation is additional evidence that the United States recognized and maintained a government to government relationship with the Tribe separate and apart from the other Mississippi Chippewa Bands. *Id.*

Third, both Congress and the President created no less than three reservations for the Tribe. On February 22, 1855, the Chippewas of the Mississippi entered into a treaty with the United States creating a reservation solely for the Tribe. App., p. 165, ¶ 5. In 1873, the President issued an Executive Order creating the White Oak Point Reservation again solely for the Tribe. *Id.* Finally, on March 4, 1915, the President issued an Executive Order creating a reservation ("1915 Reservation") for the Chippewa Indians "now living thereon." *Id.* At the time the 1915 Reservation was created, the only Indians living on the Reservation were members of the Tribe. *Id.*

By creating three separate reservations for the Tribe and its members, Congress and the President expressly recognized the Tribe as a separate governmental entity with the authority to exercise jurisdiction over its reservations.

Fourth, the Tribe has been recognized by other tribes as a government with the authority to exercise control over its lands and members. The Tribe has specifically entered into treaties with other tribes pursuant to which those other tribes recognize not only the Tribe, but the Tribe's territory and jurisdiction over that territory. See, e.g., Treaty of Prairie du Chien, dated

August 19, 1825, by which the Sac and Fox, Menominee, Winnebago, and other tribes recognized the Tribe and the Tribe's territory. App., p. 164, ¶ 3.

Thus, other tribes have recognized and maintained a government to government relationship with the Tribe. *Id.*

Finally, throughout its history, the Tribe's elected leaders have acted on behalf of the members of the Tribe in its relations with the United States.

The Tribe's Treaties, signed by representatives of the Tribe, are evidence that the Tribe had leaders who were recognized by the Tribe's membership as having the authority to act on behalf of the Tribe. *Id.*

From 1889 until 1914, members of the Rice Commission and officials of the Indian Office continued to recognize the representatives of the Tribe for the purpose of providing services to the Tribe's members. App., p. 068, ¶ 5.

From 1915 until 1934, the BIA continued to recognize and deal with the Tribe's Tribal Council in the administration of the Tribe's 1915 Reservation. App., p. 166, ¶ 8.

Given these facts, there is no question that the Tribe, from its first interaction with the United States, until passage of the IRA had a formal government that acted on behalf of its membership which the United States

recognized. The Tribe, therefore, was "recognized" and under "Federal jurisdiction" on June 18, 1934.[3]

VIII.

HAVING BEEN RECOGNIZED BY THE UNITED STATES AND CONGRESS ON JUNE 18, 1934, THE DEPARTMENT OF THE INTERIOR IS PRECLUDED FROM TERMINATING OR DENYING THE TRIBE'S PRE-1934 RECOGNIZED STATUS.

The facts of this case make it clear that prior to June 18, 1934, the United States, had recognized the Tribe. Federal courts have long held that "once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease." *Joint Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975); *United States v. Nice*, 241 U.S. 591, 598 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911). "We agree that if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose

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[3]The District Court held that the Secretary did not exceed his authority in requiring the Tribe "to be included or eligible to be included on a list of federally recognized tribes". App., p. 022. The Tribe submitted the uncontroverted Declaration of Monroe Skinaway in support of the Tribe's Motion. The declaration contained evidence showing that the Tribe was both "recognized" and "under federal jurisdiction" in 1934, and therefore, "eligible" to be included on the List. The District Court's decision is therefore, contrary to the evidence in the record. This factual error, standing alone, warrants remand to the District Court with directions to reconsider its analysis in light of these uncontrovered facts.

those rights absent a voluntary decision made by the tribe and by its guardian, Congress, on its behalf." *Mashpee Tribe v. New Seabury Corp.*, 592 (1st Cir.1979). (Even where a tribe has been terminated, it does not lose the benefits of trust status unless those benefits are specifically terminated by Congress. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564 (1974). Congress has never taken any action to terminate the Tribe's recognized status. That pre-1934 recognized status still exists despite the fact that the Secretary of the Interior has not listed the Tribe on the List of Indian entities or currently considers the Tribe to be presently recognized. *Joint Council of the Passamaquoddy Tribe v. Morton, supra,* 528 F.2d at 380.

IX.

A TRIBE AS DEFINED BY SECTION 479 DOES NOT HAVE TO EXHAUST ADMINISTRATIVE REMEDIES BUT MAY FILE SUIT DIRECTLY IN FEDERAL COURT TO ENFORCE THE PROVISIONS OF 25 U.S.C.§ 476.

By alleging in its amended complaint that the Secretary had failed to call and conduct an IRA election, as requested by the Tribe, and delayed calling the Tribe's IRA election to amend its constitution in violation of 25 U.S.C. § 476, the Tribe stated claims arising under federal law for purposes

of 28 U.S.C. § 1331 jurisdiction and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

> Federal jurisdiction exists over actions arising under the laws of the United States. 28 U.S.C. § 1331. Petitioners' claims involve 25 U.S.C. § 476 and its accompanying regulations which authorize and regulate Secretarial elections. . . . Therefore, federal question jurisdiction exists over this matter.

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

> Applying these principles to this case, the court finds defendants' actions subject to review. *See* 5 U.S.C. § 706 (1) and (2)(A). Whether the Secretary has any discretion under section 476 to withhold elections once a tribe has requested an election on a final draft of its constitution is the precise question to be resolved by this court.

Coyote Valley, 639 F. Supp. at 169.

The APA usually requires exhaustion of administrative remedies prior to judicial review. *Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940, 942 (9th Cir. 1979). Exhaustion of administrative remedies is not required where the available administrative remedy is inadequate, *United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1253 (9th Cir. 1982). Here, the District Court contended that the only remedy available to the Tribe would have been to file a petition for federal acknowledgment with the DOI, Branch of Acknowledgment and Research, pursuant to 25 C.F.R. Part

83. App., p. 022. However, exhausting the federal acknowledgment process can take up to 15 years. App., pp. 168-169.

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

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

25 U.S.C. § 476(c)(1)(A).

Requiring an eligible Indian tribe to exhaust the federal acknowledgment process conflicts with the time periods imposed upon the Secretary under Section 476, and is, therefore, inadequate. *United Farm Workers v. Arizona Agricultural Employment Relations Board, supra.*

In addition, Section 476 states explicitly that an eligible tribe may bring an action in "the appropriate Federal district court" to "enforce the provisions of" Section 476, including but not limited to, the time periods imposed upon the Secretary to call and conduct an IRA election: "Actions to enforce the provisions of this section may be brought in the appropriate Federal district court." 25 U.S.C. § 476(d)(2).

There is no language in Section 476 requiring an eligible tribe to exhaust administrative remedies. Instead, Section 476 expressly authorizes an eligible tribe to bring an action directly in the "appropriate Federal district court" "to enforce the provisions of" Section 476. 25 U.S.C. § 476(d)(2).

To require the Tribe to appeal the Decision would render the time periods prescribed by Congress in Section 476 a nullity. Surely, Congress would not have required the Secretary to call and conduct an election within 180 days, only to allow the Secretary to delay the election process for up to fifteen (15) years while the requesting tribe exhausts a petitioning process under 25 C.F.R. Part 83.

There would be no need to include the enforcement language of Section 476(d)(2), if tribes had to exhaust administrative remedies as a precondition to filing suit. If an aggrieved tribe had to exhaust administrative remedies, and did so, it would have the right to bring an action against the Secretary under the APA to compel the Secretary to perform his duties under the statute. The district court would have jurisdiction over such action pursuant to 28 U.S.C. §1331, regardless of whether Section 476(d)(2) was enacted or not. Thus, there would be no reason for Congress to include Section 476(d)(2) in Section 476, unless Congress intended the language to give an aggrieved tribe something

more, something that it did not already have, such as the right to bring an action directly in the federal district courts to enforce the provisions of Section 476, without the necessity of exhausting administrative remedies.

As was discussed above, the Supreme Court has ruled that courts must apply the Indian canons of statutory construction to resolve ambiguities in statutes passed for the benefit of Indians, rather than canons of construction applicable in other contexts. *Blackfeet*, 471 U.S. at 766.

Applying the Indian canons of statutory construction to Section 476(d)(2), the only plausible interpretation of the statute is that an aggrieved tribe can go into federal court without exhausting any administrative remedies and seek review of the Secretary's actions in failing to comply with any of the time periods set forth in Section 476. Such an interpretation is consistent with the purposes of the IRA, to strengthen tribal self-government, and the language of Section 476 that imposes mandatory duties on the Secretary with specific time deadlines. *Coyote Valley* at 173-174.

The provisions of 25 C.F.R. Part 83 do not provide an eligible tribe, as defined by Section 479 with an adequate administrative remedy that would address its claims within the time periods prescribed by Congress under Section 476 for completing the election process. Because the Tribe is an

"Indian tribe" as defined by Section 479, it did not have to exhaust any available administrative remedy prior to filing suit in the District Court.

CONCLUSION

The Secretary cannot be permitted to rewrite the IRA through the promulgation of the Regulation that is in conflict with the plain wording of the IRA, the Supreme Court precedent interpreting the IRA, and the DOI's longstanding interpretation of the IRA .

The sole basis for denying the Tribe's request for an IRA election was that it did not meet the criteria set forth in the Regulation. If the Regulation is invalid, then the Tribe need not petition the Secretary for federal acknowledgment, because the Tribe is already an Indian tribe eligible for an IRA election.

The uncontroverted evidence in the record supports this conclusion, that the Sandy Lake Band of Mississippi Chippewa was both recognized and under the United States jurisdiction in 1934. As such, the Tribe is an Indian tribe within the meaning of 25 U.S.C. § 479, eligible for an IRA election under 25 U.S.C. § 476.

For those reasons, the Tribe respectfully requests that this Court reverse the decision of the District Court and hold that it is an Indian Tribe as defined

by Section 479, eligible for an IRA election.

Dated: August 28, 2012

Respectfully submitted,

RAPPORT AND MARSTON

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,662 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: August 28, 2012

s/Lester J. Marston
LESTER J. MARSTON, Attorney for

Appellant, Sandy Lake Band of Mississippi Chippewa

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lester J. Marston
LESTER J. MARSTON, Attorney for
Appellant/Plaintiff