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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The arguments advanced by the Federal Appellees ("Government") in its Answering Brief ("Opposition Brief") boil down to five arguments: (1) the Appellant, Sandy Lake Band of Mississippi Chippewa ("Tribe") failed to exhaust its administrative remedies by not going through the federal acknowledgment process, therefore its claims are barred; (2) all of the Tribe's claims are barred by the doctrine of res judicata; (3) all of the Tribe's claims are barred by the "political question doctrine", (4) the Tribe's claims are not ripe for review and present no Article III case or controversy and (5) 25 C.F.R. § 81.1(w), defining the phrase "any recognized tribe" contained in 25 U.S.C.§ 479 ("Section 479"), as any group on the current list of federally recognized Indian tribes published by the Secretary of the Interior ("Secretary") under the List Act, 25 U.S.C. § 479a-479a-1, is not in conflict with the definition of "Indian tribe" contained in 25 U.S.C. § 479, and therefore is valid.

In this reply brief the Tribe will demonstrate that:(1) as an "Indian tribe" defined by Section 479, the Tribe need not exhaust any administrative remedy in order to bring an action against the Secretary to enforce the provisions of the IRA; (2) the Tribe's claims challenging the validity of 25 C.F.R. § 81.1(w) as being inconsistent with Section 479, are not barred by the doctrine of res

judicata; (3) because the Government did not timely appeal the United States District Court for the District of Minnesota's ("District Court"), May 7, 2012, Memorandum Opinion and Order and Judgment ("Decision"), it is precluded from challenging that portion of the District Court's Decision holding that the Tribe's Claims One, Five and Six were not barred by the doctrine of res judicata; (4) none of the Tribe's claims pose a non-justiciable political question; (5) all of the Tribe's claims are ripe for review; (6) Section 479 is unambiguous, and defines an Indian tribe as any recognized tribe under Federal jurisdiction in 1934, thus the Tribe does not have to be on the current list of federally recognized tribes in order to be eligible for an IRA election, and (7) to the extent that 25 C.F.R. § 81.1(w) (the "Regulation") is relied upon by the Government to preclude tribes that were recognized and under Federal jurisdiction in 1934 from availing themselves of the benefits of the IRA, the Regulation is in conflict with the IRA and void.

I.

THE GOVERNMENT IS PRECLUDED FROM CHALLENGING THE DISTRICT COURT'S RULING ON CLAIMS ONE, FIVE AND SIX.

In the District Court below, the Government argued that the Tribe's Claims One, Five, and Six ("Claims") were barred by the doctrines of res

judicata and failure to exhaust administrative remedies. Appendix ("App."), pp.15-17. The District Court rejected those arguments:

> Defendants now argue that because the Court opined that the proposed Amended Complaint failed to cure the lack of subject matter jurisdiction, Plaintiff is barred from relitigating Claims One, Five and Six. In *Sandy Lake I* , the Court's discussion of subject matter jurisdiction as it related to the proposed Amended Complaint was brief and noted in a footnote. Therefore, the Court will reach the viability of Claims One, Five and Six on the merits.

App., pp. 17-18.

The issue of the District Court's jurisdiction over the Tribe's Claims was determined by the District Court. The District Court considered and rejected the Government's arguments that the Tribe's Claims were barred by the doctrine of res judicata and failure to exhaust administrative remedies. *Id.* The Government is now attempting to challenge that ruling. The Government never filed a notice of appeal in this case, appealing the District Court's ruling on those issues. The Government is barred therefore from raising those issues in this appeal.

> [A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought [to an appellate court] by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924), see also *Dalle-Tezze v. Director, Office of Workers' Compensation Programs*, 814 F. 2d 129, 132 (3rd Cir. 1987); *Johnson v. United States Fire Insurance Company*, 586 F. 2d 1291, 1294 (8th Cir. 1978).

The Government is, therefore, now precluded from raising again in this appeal, the issue of the District Court's ruling that the Tribe's Claims are not barred by res judicata or failure to exhaust administrative remedies. *Id.*

II.

RES JUDICATA DOES NOT BAR THE TRIBE'S CLAIMS.

The Government asserts that the doctrine of res judicata compels the Court to dismiss the Tribe's Claims for lack of jurisdiction. Even assuming that the Government could raise this argument on appeal, the Government's argument fails, for a number of reasons.

First, the present case does not meet the requirements for dismissal pursuant to the doctrine of res judicata. The Supreme Court has summarized the elements of res judicata in the following manner: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Thus, the analysis must begin

with the question of whether there has been a final judgment on the merits of the action. Here, a final judgment was never entered on the merits in *Sandy Lake Band of Mississippi Chippewa v. United States,* Civ. No. 10-3801, 2011 WL 2601840, (D. Minn. July 1, 2011) ("*Sandy Lake I").*

"The phrase 'final judgment on the merits' is often used interchangeably with 'dismissal with prejudice.'" *Stewart v. U.S. Bancorp,* 297 F.3d 953, 956 (9th Cir. 2002). The District Court's July 1, 2011, Memorandum Opinion and Order ("Order") specifically states: "Plaintiff's Complaint (Doc. No. [1]) is **DISMISSED** *without prejudice*." App., p.16; *see also Sandy Lake I,* at 10. (Emphasis added.) The Order is, therefore, not a judgment on the merits. *Id.*

This point is underscored by the Federal Rules of Civil Procedure. Rule 41(b) of the Federal Rules of Civil Procedure states: "Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--*except one for lack of jurisdiction*, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits." (Emphasis added.)

> "*Fed.R.Civ.P. 41(b)* provides, generally, that unless the court 'otherwise specifies' any dismissal 'operates as an adjudication on the merits.' The Rule also provides, however, that when a dismissal is for 'lack of jurisdiction,' the effect is not an adjudication on the merits, and therefore the res judicata bar does not arise."

Johnson v. Boyd-Richardson Co., 650 F.2d 147, 148 (8th Cir. 1981).

The District Court's Order, thus, was not an adjudication of the merits of the Tribe's claims. Res judicata does not apply to the claims set forth in the Tribe's original complaint. Because the dismissal was based on the District Court's conclusion that it lacked jurisdiction over the Tribe's original claims, furthermore, res judicata does not apply to the Tribe's new claims set forth in its Complaint for Declaratory Relief and Money Damages ("Second Complaint"). "Where the second suit presents new theories of relief, admittedly based upon the same operative facts as alleged in the first action, it is not precluded because the first decision was not on the merits of the substantive claim." *McCarney v. Ford Motor Co.*, 657 F.2d 230, 234 (8th Cir. 1981).

Under certain circumstances, res judicata can apply to rulings on jurisdiction. *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Association,* 455 U.S. 691 (1982); *Johnson v. LaSalle Bank Nat. Ass'n*, 663 F. Supp. 2d 747, 754-55 (D. Minn. 2009)("'a judgment dismissing an action for lack of jurisdiction ordinarily has no preclusive effect on the cause of action originally raised,' but . . . that the judgment will 'have preclusive effect as to matters actually adjudicated, including the precise issue of jurisdiction that led to the initial dismissal.'"); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. Homestake Mining*

Co., 722 F.2d 1407, 1411 (8th Cir. 1983)("Dismissal of a suit for lack of federal subject matter jurisdiction precludes re-litigation of the *same issue of subject matter jurisdiction* in a second federal suit on the same claim."); and *Bui v. IBP, Inc.*, 205 F.Supp.2d 1181, 1188 (D. Kan. 2002). It is on this basis that the Government is attempting to argue that the Tribe's Claims set forth in the Second Complaint must be dismissed. Opposition Brief, pp.22-25. Res judicata does not apply to the Tribe's Claims, however, because the basis for jurisdiction alleged in the Second Complaint is not the same as that addressed by the District Court in its Order.

In the Second Complaint, the Tribe plead the Claims as new causes of action. In the Claims, the Tribe alleged that the Regulation promulgated by the Secretary to implement Section 479 of the IRA violated the provisions of the IRA. If the Regulation is invalid, the Tribe is a tribe within the meaning of Section 479 and is eligible for an IRA election pursuant to 25 U.S.C. § 476 without exhausting the federal acknowledgment process. The federal acknowledgment process required for unrecognized tribes is, therefore, irrelevant to the Tribe.

The Government attempts to get around this argument by arguing that the District Court ruled on the issue of jurisdiction over the claims by refusing to file the Tribe's Amended Complaint. Opposition Brief, pp.12-13. Their

argument is disingenuous at best. The Government repeatedly endeavors to blur the distinction between the original complaint and the proposed amended complaint that the Tribe attempted to file with the District Court ("Proposed Amended Complaint") during the course of the original proceedings. "The amended complaint and the operative complaint at issue in the present suit are identical in almost every relevant respect." Opposition Brief, p. 12.

The District Court refused to allow the Tribe to file the Proposed Amended Complaint and specifically ruled in the Decision that the Proposed Amended Complaint was not before the Court when it issued the Order dismissing the Complaint, App., p. 17. The Proposed Amended Complaint, therefore, has no application to the present proceedings.

Res judicata does not apply to the issue of jurisdiction generally, but to "*the precise issue of jurisdiction that led to the initial dismissal.*" *Johnson v. La Salle Bank Nat. Ass'n, Supra*.

Clearly, the District Court's ruling that it lacked subject matter jurisdiction over the Tribe's claims in its Original Complaint because the Tribe failed to exhaust its administrative remedies, is not a ruling on the Court's jurisdiction over the allegations set forth in the Second Complaint. Nor were the District Court's observations concerning the Proposed Amended Complaint,

which was not before the District Court at the time it issued its Order, a ruling on the "precise issue of jurisdiction" addressed in the Order.

The Claims One, Five and Six are not barred by res judicata.

III.

THE GOVERNMENT'S FAILURE TO SUPPORT THE FACTUAL ASSERTIONS IN ITS ANSWERING BRIEF COMPELS THIS COURT TO REJECT THE GOVERNMENT'S LEGAL ARGUMENTS.

In the District Court, the Government filed a motion to dismiss and, in the alternative, a motion for summary judgment. ("Government's Motion"). App., pp. 5-6. However, the Government never filed any affidavits or declarations in support of either motion. The Government's failure to properly support its factual assertions in the District Court precludes the Government from attempting to supplement the record on appeal. This Court should not consider any assertions of fact contained in the Government Opposition Brief or Supplemental Appendix that are not contained in the declarations filed by the Tribe in support of its motion for partial summary judgment. ("Tribe's Motion"). App., pp.5-6.

A. The Government's Failure To Properly Support Its Factual Assertions In the District Court Precludes This Court From Considering Those Facts On Appeal.

Rule 56 of the Federal Rules of Civil Procedure requires that all allegations of fact or assertions that a fact is in dispute be supported by an affidavit or evidence. Rule 56(c)(1) states:

> (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. . . .
>
> (4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

The District Court's Civil Local Rule 7-1 also requires support of factual allegations in a motion or opposition and prohibits the District Court from considering any motion not supported by affidvits: "No motion shall be heard by a District Judge unless the moving party files and serves the following documents at least 42 days prior to the hearing: . . . (D) affidavits and exhibits."

In their Opposition Brief, the Government asserts various facts pertaining to the organization of the Minnesota Chippewa Tribe ("MCT"), the alleged participation of the historic Sandy Lake Band in the MCT's process of

organizing under the IRA, and the failure of the Tribe to file a petition under the federal acknowledgment process. Opposition Brief, pp. 9-11. The Government did not, however, file in the District Court any affidavit or declaration under penalty of perjury supporting those facts or alleging facts that contradict those presented by the Tribe in its Complaint, (Supplemental Appendix of the Federal Appellees ("Supp. App."), pp.1-28,) the Declaration of Monroe Skinaway In Support of Plaintiff's Motion For Partial Summary Judgment ("Skinaway Declaration"), App., pp. 67-161, or any properly authenticated document that contradicts any of the facts alleged by the Tribe in the Complaint. The Government submitted nothing to the District Court beyond the factual assertions contained in the Government's briefs filed in support of the Government's Motion.[1] Instead, the Government has cited, in support of its assertions of fact, as it did in the District Court, the conclusory and unsupported statements of a Field Solicitor contained in a 1982 memorandum. ("Nitzschke Opinion."), Opposition Brief, p. 10; Supp. App., p. 48. The Government submitted no declaration or any other document to the District Court to authenticate the document or verify the factual assertions contained

[1] A number of the factual assertions made by the Government in its Opposition Brief are demonstrably false. The Tribe has chosen not to specifically rebut those assertions because the Government has failed to support those assertions and the Court has no basis for considering them.

in the Nitzschke Opinion. There is nothing in the Nitzschke Opinion that states that the factual assertions of Field Solicitor Nitzschke were based upon personal first-hand knowledge, were made under penalty of perjury, or were supported by documents that would be admissible under the Federal Rules of Evidence. Likewise, there is nothing in the Nitzschke Opinion to demonstrate that Field Solicitor Nitzschke had the education, training, or experience to render expert opinions on the ethno-history of the Tribe or the Mille Lacs Band. The facts contained in the Nitzschke Opinion are assertions that meet none of the requirements of Rule 56, Local Rule 7-1, or the Federal Rules of Evidence.

Moreover, the District Court specifically rejected the assertions of fact contained in the Nitzschke Opinion as conclusive evidence that the Tribe participated in the IRA election to organize the MCT.

> Having considered the parties arguments on the matter, as well as the materials cited in support, the Court declines to determine whether the 1980 opinion is conclusive on the matter of whether Plaintiff participated in an IRA election. Instead, the Court turns to the parties' arguments on the merits of the present motions.

App., p.15.

In contrast, the Tribe submitted to the District Court the uncontradicted Skinaway Declaration, the Supplemental Declaration of Monroe Skinaway in Support of Plaintiff's Motion for Partial Summary Judgment ("Skinaway

Declaration II") and the Declaration of Lester J. Marston in Support of Plaintiff's Motion For Partial Summary Judgment ("Marston Declaration"), setting forth detailed, specific allegations of fact. App., pp. 25-166. Those allegations are supported by documentary evidence contained in the declarations of Monroe Skinaway and the Marston Declaration, and the exhibits attached thereto. The Skinaway Declaration and the Skinaway Declaration II directly contradict and refute the Government's assertions of fact contained in their Opposition Brief and Supplemental Appendix. Opposition Brief , pp. 9-11; Supp. App., 46-49. Based upon his personal knowledge, and under penalty of perjury, Monroe Skinaway states: (1) the Tribe, through its members residing on the Sandy Lake Reservation, never voted to exclude itself from the provisions of the IRA; (2) 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; (3) no members of the Tribe cast a ballot either for or against the passage of the MCT constitution, and (4) the Tribe did not participate in the election to approve the MCT constitution, nor did it organize a tribal government under the Constitution of the MCT. App., pp. 70-71.

Moreover, even if it is assumed that the factual assertions in the Government's Opposition Brief are true, and they are not, nowhere does the

Government explain or cite to any authority to support the proposition that a tribe's federally recognized status can be terminated, and its status as an Indian tribe hijacked by another tribe and its members by voting to approve language in an IRA constitution asserting jurisdiction over the other tribe, its members, and a reservation originally established for that other tribe.

That is exactly what happened in this case. With the stroke of a pen, without citing any factual or legal authority for his position, Field Solicitor Nitzschke concluded that, because the Mille Lacs Band's IRA constitution contains a provision purporting to assert jurisdiction over the Sandy Lake Reservation and the members of the Tribe, the Tribe's existence as a separate, federally recognized Indian tribe was terminated, and its members, without their consent or approval, were members of the Mille Lacs Band. Such an assertion flies in the face of the well settled principle of Federal Indian Law, that, once Congress has recognized a tribe, that tribe's status as a federally recognized tribe can only be terminated by a treaty or Act of Congress. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

In addition, Rule 56(e) of the Federal Rules of Civil Procedure provides: "If a party fails to properly support an assertion of fact or fails to properly

address another party's assertion of fact as required by Rule 56(c), the court may: . . . (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it. . . ."

The Tribe submitted to the District Court allegations of fact that were fully supported by the Skinaway Declaration, Skinaway Declaration II, and the Marston Declaration, which were submitted to the Court under penalty of perjury, and were clearly admissible documentary evidence. App., pp. 67- 166. As a result of the Government's failure to submit any counter declarations putting in dispute the facts contained in those declarations, the facts contained in the Skinaway Declaration, Skinaway Declaration II and the Marston Declaration are undisputed, part of the factual record of this case and binding on the Government and this Court.

B. The Government's Failure To Provide Any Factual Support For Their Motions Filed In the District Court Requires This Court To Reject the Government's Claim that the Tribe's Appeal is Barred By Res Judicata And Failure To Exhaust Administrative Remedies.

The Government's failure to submit to the District Court an affidavit or declaration under penalty of perjury or other legally cognizable evidence in support of the Government's Motions also has the effect of compelling this

Court not to consider any of the Government's arguments on appeal. As cited above, Civil Local Rule 7-1(b)(1) requires that factual contentions made in support of a motion must be supported by an affidavit or declaration and, therefore, any motion to dismiss unsupported by an affidavit or declaration cannot be considered by the Court. (**"No motion shall be heard by a District Judge** unless the moving party files and serves the following documents at least 42 days prior to the hearing: . . . (D) affidavits and exhibits.") (emphasis added.)

If Civil Local Rule 7-1(b)(1) prohibited the District Court from considering the arguments raised by the Government's Motions, the Government should now be precluded from raising those same arguments on appeal. For this Court to hold otherwise would be to allow parties to violate the Local Rule, and submit no declarations or affidavits in support of their motions, knowing all along that they are free to have this Court consider any factual assertions that they include in their briefs on appeal. Such a result would render the Local Rule a nullity, and thus cannot be allowed by this Court consistent with Local Rule 7-1(b)(1). For this reason, the Court should not consider any factual assertions contained in the Government's Opposition Brief or Supplemental Appendix that were not

submitted to the District Court in the form of declarations, affidavits or requests for judicial notice.

IV.

THE TRIBE WAS NOT REQUIRED TO EXHAUST ANY ADMINISTRATIVE REMEDIES IN THIS CASE.

Despite the fact that the Government never appealed the District Court's Decision holding, among other things, that the Tribe's Claims were not barred for failure to exhaust the Federal acknowledgment process established by the Secretary, pursuant to 25 C.F.R. Part 83, the Government asserts this argument in its Answering Brief. Opposition Brief, pp. 25-38. In response to the Tribe's argument that it is an Indian tribe as defined by Section 479, and therefore can bring an action to enforce the provisions of 25 U.S.C. § 476 ("Section 476") directly in the District Court, pursuant to Section 476 (d), without having to exhaust any administrative remedy, the Government advances a number of jurisdictional arguments: (1) there is no final agency action in this case to review because the Tribe has not exhausted the Federal Acknowledgment process; (2) the issue of whether the Tribe is federally recognized is a political question not subject to review by a court; (3) the Tribe's case is not ripe for review, because there has been no final agency action in this case; (4) the Tribe does not have standing to bring this lawsuit because it has suffered no legal

harm as a result of the Secretary's refusal to call the IRA election requested by the Tribe; (5) the Court should defer to the federal acknowledgment process, and (6) the Tribe is precluded from raising for the first time on appeal that exhaustion of the acknowledgment process is not an adequate remedy because it takes years to complete the process.[2] None of these arguments has merit.

The Government's argument that the Tribe must complete the Federal acknowledgment process and become federally recognized before it can sue to compel the Secretary to call an IRA election for the Tribe, raises the question that is at the very heart of this case: Does the Tribe have to be on the current list of federally recognized Indian tribes, published by the Secretary in the Federal Register, pursuant to the List Act, in order to be eligible for an IRA election? It is the Tribe's position that it does not. Based upon the plain wording of Section 479 it is the Tribe's position that it is an Indian tribe eligible for an IRA election because it was a recognized tribe under the jurisdiction of the United States in 1934, the date of enactment of the IRA. If the Tribe is correct, fulfilling the acknowledgment process is unnecessary because being on the current list of recognized tribes is not a requirement for eligibility for an IRA election.

[2]This statement is not true. See e.g., App., pp. 168-169.

Moreover, as the Tribe demonstrated in its opening Brief, in enacting the 1988 amendments to the IRA, Congress expressly provided that an Indian tribe meeting the definition of Section 479 did not have to exhaust any administrative remedies prior to bringing an action in the appropriate Federal district court to compel the Secretary to call an IRA election ("Actions to enforce the provisions of this section may be brought in the appropriate Federal district court"). Section 476 (d). Thus, because the Tribe is an "Indian tribe" as defined by Section 479, it does not have to go through the federal acknowledgment process to be eligible for an election under Section 476, and further does not have to exhaust any administrative remedies, including the acknowledgment process, in order to sue the Secretary, to enforce the provisions of Section 476.

V.

THE TRIBE'S CLAIMS ARE NOT BARRED BY THE POLITICAL QUESTION DOCTRINE, THEY DO CREATE A CASE OR CONTROVERSY AND ARE RIPE FOR REVIEW.

The Government argues that the Court has no authority to determine whether the Tribe is an "Indian tribe" as defined by Section 479, because such a determination will result in the Tribe being recognized, which is a "political question" not subject to judicial review. This argument is meritless. When Congress or the executive branch has found that a tribe does or does not exist,

courts normally will not disturb that determination. Some older cases have characterized such determinations as political questions outside the scope of judicial review. *United States v. Holiday,* 70 U.S. 407 (1865). However, an exception to the doctrine exists, where Congress, through legislation, or the executive branch, through the promulgation of regulations, has established standards or criteria for determining when a group should be recognized or otherwise eligible for some service or benefit from the United States. Under those circumstances, the actions of the Government are reviewable by a court to ensure that the Government is complying with the applicable statute or its own regulations.

> But this conclusion assumes that the executive branch has not sought to canalize the discreation of its subordinate officials by means of regulations that require them to base recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make. By promulgating such regulations the executive brings the tribal recognition process within the scope of the Administrative Procedure Act...

Miami Nation of Indians v. United States, 255 F. 3d 342, 348 (Fed. Cir. 2001).

In this case Congress has enacted legislation to determine whether a group of Indians is an "Indian tribe" for purposes of the IRA. In addition, Congress has delegated to the Secretary the authority to promulgate regulations to implement Section 476. Pursuant to that authority the Secretary has

promulgated the Regulation. Both the IRA and the Regulation establish criteria against which the Secretary's conduct can be judged and a determination made as to whether the Secretary's conduct violates the IRA. Where, as here, the IRA and the Regulation establish standards and criteria requiring Government officials to make factual and legal determinations consistent with the IRA and the Regulation, judicial review of those determinations is appropriate. *Coyote Valley Band of Pomo Indians v. United States,* 639 F. Supp. 165 (N.D. Cal. 1986) (holding that review of the Secretary's decision not to call an IRA election under Section 476, was reviewable under the Administrative Procedure Act, 5 U.S.C. §701 et seq. ("APA").)

The Government also argues that the Tribe's Claims are barred because: (1) they are not "ripe" for review until the Secretary makes a final decision on whether to recognize the Tribe through the federal acknowledgment process and (2) the Tribe has no "standing" to bring this case because it has suffered no harm as a result of the Secretary refusing to call its IRA election as requested since the Tribe is not an "Indian tribe" defined by Section 479 that is eligible for an election. Opposition Brief, pp. 29-35.

Standing and ripeness under Article III are closely related. For a suit to be ripe within the meaning of Article III, it must present "'concrete legal issues,

presented in actual cases, not abstractions.'" *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947). "The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing injury in fact prong." *Colwell v. HHS*, 558 F.3d 1112, 1122 (9th Cir. 2009). The question of prudential ripeness "is best seen in a twofold aspect." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The first criterion is whether the controversy is fit for judicial decision; secondly, the courts determine the impact on the parties of withholding judicial consideration. *Id.*; *Colwell v. HHS*, 558 F.3d at 1124. A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Tex. v. United States*, 523 U.S. 296, 300 (1998).

Here, the Tribe has suffered a particularized injury that is directly traceable to the Government. The Tribe has been deprived of its right to an IRA election to form a tribal government under a written constitution approved by the Secretary, which would make the Tribe eligible for all of the benefits afforded to it under the IRA, including, but not limited to, having the Secretary take land into trust for the Tribe and chartering a federal corporation for the Tribe to engage in economic development. Pursuant to Section 476, the Tribe

has an absolute right to organize under the IRA, and the Secretary has a mandatory duty to call an IRA election for the Tribe within 180 days of receipt of the Tribe's request for an IRA election. The Tribe clearly has been harmed as a direct and proximate result of the Secretary's refusal to call the Tribe's IRA election. The Tribe, therefore, clearly meets the first element for establishing a case or controversy under Article III of the Constitution.

As discussed *supra,* to satisfy the second element of the case-or-controversy limitation of Article III, it must be "likely," as opposed to merely "speculative," that the Tribe's injury will be "redressed by a favorable decision" by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). An injury is likely to be redressed by a favorable decision if it involves specifically identifiable government violations of law, appropriate for federal-court adjudication. *Allen v. Wright*, 468 U.S. 737, 759-760 (1984). Cases in which courts have held there was no case or controversy are clearly distinguishable from the present case because, in those cases, any relief that the court could provide was limited and could not remedy the plaintiffs' injuries. See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); *Lujan v. Defenders of Wildlife*, 504 U.S. at 568. In *Lujan*, the plaintiffs sought relief against the Secretary of the Interior for promulgating unlawful regulations,

which would be binding against a third party. The United States Supreme Court held that plaintiffs injuries were not redressable, as it was uncertain that the regulations actually would be binding on these third parties. *Lujan v. Defenders of Wildlife*, 504 U.S. at 568. The Court concluded that ordering the Secretary to revise the regulations would not remedy plaintiffs' injury. *Id.*

There is no doubt that a favorable ruling for the Tribe in this case would redress the harm that the Tribe has suffered. If the Court determines that the Secretary's implementation of the Regulation is inconsistent with Section 479, and that the Tribe does not have to meet the requirements of the Regulation, then the Tribe would be eligible for IRA election, and its right to an IRA election would be vindicated. Thus the tribe meets the second element of the case and controversy limitation of Article III.

Finally, with respect to the Article III ripeness inquiry, withholding a remedy would "impose significant practical harm" on the Tribes. See *Natural Resource Def. Council v. Abraham*, 388 F.3d 701, 706-07 (9th Cir. 2004) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733-34 (1998)). As discussed above, the Tribe has suffered an actual, particularized injury that will persist without judicial resolution. Unless the Tribe obtains a favorable ruling from the Court, the Tribe will be denied its right to establish a

constitutional form of government, will be deprived of the benefits of the IRA, and, more importantly, will be deprived of its right of self-government. Without a doubt "significant practical harm" will befall the Tribe if it is denied the relief that it is requesting from this Court.

As the above arguments illustrate, the Tribe has standing to bring this lawsuit, a real and actual case or controversy exists between the Tribe and the Government and the Tribe's case was and is "ripe" for judicial review.

VI.

THE SECRETARY HAS AUTHORITY TO CALL ELECTIONS FOR TRIBES THAT WERE "RECOGNIZED" AND UNDER FEDERAL JURISDICTION" IN 1934.

Based upon the plain and unambiguous language of Section 479, as informed by the applicable legislative history of the IRA, it is evident that Congress intended to limit the authority of the Secretary to call IRA elections for Indian tribes that were both recognized and under Federal jurisdiction in 1934, when the IRA was enacted.

The District Court improperly determined that the Secretary has the authority to exclude from the provisions of the IRA the very class of tribes that Congress intended to include within the purview of the IRA. In doing so, the District Court's interpretation ignores the word "now" in the statutory phrase

"now under federal jurisdiction," in Section 479, the applicable definitional section. That word and phrase, like all words and phrases of a statute, must be given effect. *Negonsott v. Samuels,* 507 U.S. 99 (1993). The intentional insertion of the word "now" and the phrase "under federal jurisdiction" that follow the phrase "recognized tribe", clearly and unambiguously evinces Congress's intent to limit the reach of the provisions of the IRA, including Section 476, to tribes that were recognized **and** under Federal jurisdiction "now," i.e., in 1934, when the IRA was enacted.

The determination of this issue is a question of statutory interpretation. It is axiomatic that in interpreting a statute, the Court's "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonsott v. Samuels*, 507 U.S. at 105; see also *Textron, Inc. v. Commissioner*, 336 F. 3d 26, 31 (1st Cir. 2003); *United States v. Meede*, 175 F. 3d 215, 219 (1st Cir. 1999).

Section 476 of the IRA provides that "any **Indian tribe** shall have the right to organize for its common welfare...." (emphasis added).

The words "Indian" and "tribe" are expressly defined under Section 479 of the IRA. It is commonly understood that, where a term is defined in an act, that definition controls the construction of that term. 2A Norman J. Singer,

Statutes and Statutory Construction, 47:07 (6th ed. 2000) ("As a rule, a definition which declares what a term means is binding on the court.") *Id.*

Section 479 of the IRA defines the words "Indian" and "tribe" for the purpose of Section 476 as follows:

> The term "Indian" as used in sections ...476...and 479 of this title 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).

The definition of the word "tribe" expressly incorporates the word "Indian" and provides "[t]he term "tribe" **whenever used in said sections** shall be construed to refer to any **Indian tribe**, ... or the **Indians** residing on one reservation..." (emphasis added). Where the identical word or phrase is used more than once in the same act, there is a presumption it has the same meaning throughout. *Textron, Inc. v. Commissioner*, 336 F. 3d at 33; 2A Norman J. Singer, *Statutes and Statutory Construction*, 47:07 (6th ed. 2000). Thus the definition of "tribe" must be read to incorporate the definition of "Indian."

The word "recognized" and the phrase "now under Federal jurisdiction" contained in Section 479, are not defined in the IRA. It is fundamental that unless words are otherwise defined, they "will be interpreted as taking their

ordinary, contemporary common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979). Historically under federal law, an Indian group has been treated as "recognized" for federal purposes where:

> (a) Congress or the executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has some continuing political relationship with the group...

See Felix Cohen, *Handbook on Federal Indian Law* (1982), p.13.

The Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009), held that the word "now" in Section 479 meant in 1934. The word "now" is joined with the phrase "under Federal jurisdiction". The phrase "under Federal jurisdiction" presumes that the federal government exercised some control or oversight over the Indian Tribe in 1934. The "now under Federal jurisdiction" requirement of Section 479 similarly denotes Congress' intent to limit tribal eligibility for an IRA election to tribes that were both recognized and under Federal control and jurisdiction.

The Court of Appeals for the Fifth Circuit has adopted this interpretation:

> The language of section 19 [25 U.S.C. §479] positively dictated that tribal status is to be determined as of June, 1934, as indicated by the words "any recognized Indian tribe *now* under Federal jurisdiction" and the additional language to like effect.

United States v. State Tax Comm'n of State of Miss., 505 F. 2d 633, 642 (5th Cir. 1974) *(emphasis in original); see also City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980).

In addition, the legislative history of Section 479, demonstrates that the "now under Federal jurisdiction" language in Section 479 was inserted into the statute for the precise purpose of limiting the reach of the IRA to then existing tribes. See e.g. *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

In testifying before the Senate Indian Affairs Committee, Commissioner of Indian Affairs, John Collier responded to questions from the committee members. In proposing a limitation on the reach of the draft of the IRA under consideration, Collier suggested:

> Would this not meet your thought, senator. After the word "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction'? That **would limit the act to the Indians now under Federal jurisdiction**, ...

Hearings before Committee on Indian Affairs, U.S. Senate, 73rd Cong. 2d Sess. part 2, p. 266 (emphasis added).

The definition of "Indian" adopted by Congress included Commissioner Collier's suggested phrase "now under Federal jurisdiction", thereby limiting the reach of the statute. Accordingly, both the language and legislative history of the IRA confirm the Tribe's interpretation that Sections 476 and 479 only

apply to tribes, like the Sandy Lake Band, that were recognized and under the Federal governments jurisdiction in 1934.

CONCLUSION.

Section 479 is clear, plain and unambiguous. It limits the Indian groups eligible to organize under Section 476 of the IRA to tribes, like Sandy Lake, that were recognized and under federal jurisdiction in 1934. The Secretary's Regulation excludes the very tribes that the IRA was intended to benefit. As such, the Regulation is in violation of Section 479, and is void.

For this reason and the reasons set forth above, the Decision of the District Court must be reversed.

Dated: October 26, 2012

Respectfully submitted

RAPPORT AND MARSTON

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font and contains 6,842 words.

/s/ Lester J. Marston
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Chippewa

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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.

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