IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID PATCHAK, **Plaintiff**, v. SALLY JEWELL, in her official capacity as SECRETRARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, **Defendant,**	**CASE NO. 1:08-CV-1331** **HON. RICHARD J. LEON**
MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, **Intervenor-Defendant.**	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant, S.M.R. Jewell, in her official capacity as Secretary of the Interior ("Secretary"), by undersigned counsel, hereby submits this Response in Opposition to Plaintiff's Motion for Summary Judgment. For the reasons described below, the United States respectfully requests that the Court deny Plaintiff's motion in its entirety.

Plaintiff challenges the Secretary of the Interior's May 13, 2005 decision to acquire property (the "Bradley Property") into trust for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indian's ("Gun Lake Band") pursuant to her authority under the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-479. Patchak Compl. at 7-9 (ECF No. 1

in Case No. 08-cv-1331). The Secretary acquired the land into trust on January 30, 2009. Since that date, the Band constructed and now operates a gaming facility pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

I. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

A. A BRIEF HISTORY OF THE GUN LAKE BAND

The Gun Lake Band descends from a Band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish, which resided near present-day Kalamazoo, Michigan. Under the terms of the Treaty of Chicago of 1821, signed by Chief Match-E-Be-Nash-E-Wish, the Gun Lake Band secured a three square mile tract of land at Kalamazoo, Michigan. 7 Stat. 218 (Aug. 29, 1821); see Proposed Finding for Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawtomi Indians of Michigan, 62 Fed. Reg. 38,113 (July 16, 1997); MichGO v. Kempthorne, 525 F.3d 23, 26 (D.C. Cir. 2008). However, the tract of land at Kalamazoo was ceded by the Pottawatomi in the Treaty of 1827, 7 Stat. 305 (Sept. 19, 1827), in return for enlargement of the Nottawaseppi Reserve. Pursuant to the 1833 Treaty of Chicago, 7 Stat. 431 (Sept. 26, 1833), and the Ottawa Treaty of 1836, 7 Stat. 513 (Sept. 20, 1836), to which the Band was not a signatory, all of the Tribe's land was eventually ceded to the United States, leaving the Tribe landless. MichGO v. Kempthorne, 525 F.3d at 26.

During the period from 1828 to 1838, the Gun Lake Band moved north of the Kalamazoo River and in 1839 placed itself under the protection of an Episcopalian mission, funded under the Treaty of 1836, in Allegan County, Michigan. This mission was known as the "Griswold Colony" or the "Bradley Colony/Settlement," and was located in Bradley, Michigan. 62 Fed. Reg. at 38,113-14; MichGO v. Kempthorne, 525 F.3d at 26. Despite the loss of its land, a

[1] Pursuant to LCvR 7(h)(2), a separate statement of material facts will not be filed.

majority of the Band's members remained in Allegan County. However, the Band was deemed ineligible to organize under the IRA because it had no commonly owned reservation land and due to limited resources, the Department ceased providing certain services to the Band. The 1940 decision by the Commissioner of Indian Affairs, John Collier, not to extend the IRA to the Indians of Michigan's Lower Peninsula effectively ended the Band's government-to-government relationship with the federal government. See, e.g., Reaffirming and Clarifying the Federal Relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as Distinct Federally Recognized Tribes, S. Rep. No. 103-260, at 3-4 (May 16, 1994) (discussing John Collier's decision not to extend the IRA to Indian tribal governments in Michigan's lower peninsula). Nevertheless, the Gun Lake Band's government-to-government relationship with the United States was never terminated by Congress.

On June 24, 1992, the Gun Lake Band began pursuing federal acknowledgment by submitting to the Branch of Acknowledgment and Research, Bureau of Indian Affairs ("BIA") a letter of intent requesting acknowledgment that it exists as an Indian tribe, in accordance with 25 C.F.R. Part 83. In accordance with 25 C.F.R. § 83.10(d), the Band's petition was placed on active consideration on December 24, 1996. On July 16, 1997, the Assistant Secretary—Indian Affairs ("Assistant Secretary") published notice of his proposed finding to acknowledge that the Band exists as an Indian tribe within the meaning of federal law. 62 Fed. Reg. 38,113. The notice of the final determination to acknowledge the Band was published on October 23, 1998. 63 Fed. Reg. 56,936 (Oct. 23, 1998); see In re Fed. Acknowledgment of Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Mich., 33 IBIA 291, 294 (May 21, 1999). The determination became effective on August 23, 1999. MichGO v. Norton, 477 F. Supp. 2d 1, 4 (D.D.C. 2007); MichGO v. Kempthorne, 525 F.3d at 26.

B. THE HISTORY OF THIS LITIGATION

The Gun Lake Band obtained federal recognition in 1998 and in 2001 the Band submitted an application to the Department of the Interior ("Department") in which it asked the United States to acquire two parcels comprising about 147 acres of land in Wayland Township, Allegan County, Michigan (the Bradley Property),[2] in trust for the Band. Its application was based on the IRA, 48 Stat. 984, 25 U.S.C. §§ 461-479, which authorizes the Secretary to acquire an interest in land "for the purpose of providing land for Indians." 25 U.S.C. 465. Under the IRA, title to such land is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." Id.

In May 2005, after an extensive administrative review, then Secretary Norton announced her decision to acquire the Property in trust for the Band. 70 Fed. Reg. 25,596-25,597 (May 13, 2005). The Gun Lake Band has been centered around the town of Bradley since the founding of the Griswold Colony in 1838 and has long historical, geographical and cultural ties to the area in which the two parcels are located. 63 Fed. Reg. 56,936. The announcement stated that "acceptance of the land into trust" would not occur for 30 days, so that "interested parties [would have] the opportunity to seek judicial review of the final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs." Id.; see 25 C.F.R. 151.12(b) (2005).

During that 30-day period, an organization known as Michigan Gambling Opposition (MichGO) sued the Secretary, alleging that her decision violated the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 et seq., as well as the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq., and that 25 U.S.C. 465 is an unconstitutional delegation of legislative

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[2] For a description of the parcels, see Notice of Final Agency Determination to Take Land Into Trust 25 CFR Part 151, 70 Fed. Reg. 25,457, 25,596 (May 13, 2005).

authority to the Executive. The district court rejected those claims in Michigan Gambling Opposition (MichGO) v. Norton, 477 F. Supp. 2d 1 (D.D.C. 2007).

MichGO appealed, and after oral argument, it attempted to add a claim that the land acquisition was not authorized under Section 465 because, according to MichGO, the Gun Lake Band was not under federal jurisdiction in 1934. See Carcieri v. Salazar, 129 S. Ct. 1058, 1061 (2009) (holding that the IRA limits the Secretary's authority "to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934"). The court of appeals denied MichGO's motion to supplement the issues on appeal, Michigan Gambling Opposition v. Kempthorne, No. 07-5092 (D.C. Cir. Mar. 19, 2008), and then affirmed the district court's decision, Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009).

Plaintiff Patchak lives in Wayland Township, Michigan, "in close proximity to" the Bradley Property. Patchak Compl. at ¶ 9 (Dkt. No. 1). In 2008, a week after the court of appeals denied rehearing en banc in Michigan Gambling Opposition, he brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., making the argument that MichGO had attempted to raise in its appeal—i.e., that the acquisition was not authorized by the IRA because the Band was not under federal jurisdiction in 1934. At the time Patchak filed his suit, title to the land had not yet been transferred to the United States in trust for the Band. When the Secretary announced the intent to accept the land once the court of appeals issued its mandate in Michigan Gambling Opposition, Patchak sought what he called an "administrative stay of proceedings," which this Court denied. (Dkt. No. 23; Minute Order November 13, 2008). Patchak subsequently moved for a temporary restraining order prohibiting the trust acquisition. (Dkt. No. 36). This Court denied that motion as well, (Dkt. No. 56), and on January 30, 2009,

the Secretary of the Interior accepted title to the Bradley Property in trust for the Band, (Dkt. No. 49).

This Court then dismissed Patchak's complaint. (Dkt. No. 56). The Court held that Patchak lacked prudential standing because the injury he alleged— namely, that the gaming facility the Band proposed to operate "would detract from the quiet, family atmosphere of the surrounding rural area," id. at 4 n.5—was not arguably within the zone of interests protected by the IRA, id. at 8-10. This Court stated that its subject-matter jurisdiction was "seriously in doubt" for the additional reason that the United States has not waived its sovereign immunity to suits challenging its title to Indian trust lands. Id. at 10 n.12.

The court of appeals reversed and remanded. 632 F.3d 702, 704-707 (2011). The court of appeals held that Patchak had prudential standing, reasoning that the IRA "limit[s] the Secretary's trust authority," and "[w]hen that limitation blocks Indian gaming, as Patchak claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected." Id. at 706. The court explained that, in reaching that conclusion, it "ha[d] not . . . viewed the IRA provisions in isolation." Id. Instead, because the court viewed those provisions as "linked" to IGRA, it evaluated Patchak's interests in light of the Band's intended use of the property for gaming. Id. "Taken together," the court concluded, "the limitations in [the IRA and IGRA] arguably protected Patchak from the negative effects of an Indian gambling facility." Id. (internal quotation marks omitted).

The court of appeals also held that Patchak was a "proper entity to police the Secretary's authority to take lands into trust under the IRA." 632 F.3d at 707. The court reasoned that if the interests of a State or municipality—which might lose regulatory authority or tax revenue as a

result of a trust acquisition—are within the zone of interests protected by the IRA, "then so are Patchak's interests," because his alleged injuries "may be different, but they are just as cognizable." Id. The court stated that the injuries Patchak alleged, including loss of property value, loss of "the rural character of the area," and loss of "the enjoyment of the agricultural land surrounding the casino site," are the "sorts of injuries [that] have long been considered sufficient for purposes of standing." Id.

The court of appeals next held that 5 U.S.C. 702 waived the government's sovereign immunity from Patchak's suit. Id. at 712. Section 702 waives sovereign immunity for any "action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702. The United States contended that Patchak's suit was barred by the last sentence of Section 702, which provides that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." Id. at 707. The United States argued that the Quiet Title Act (QTA), 28 U.S.C. 2409a, is such a statute. The QTA provides that the United States may be sued "to adjudicate a disputed title to real property in which the United States claims an interest," but it goes on to say that "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. 2409a(a).

The court of appeals rejected the government's argument. Observing that "a common feature of quiet title actions is missing from this case" because Patchak was not claiming title to the land at issue, id. at 709, the court concluded that "the type of action contemplated in the Quiet Title Act does not encompass Patchak's lawsuit," id. at 710. In so holding, the court acknowledged that its decision created a conflict with decisions of three other circuits. Id. at 711

(citing Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956 (10th Cir. 2004); Metropolitan Water Dist. v. United States, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court sub nom. California v. United States, 490 U.S. 920 (1989); Florida Dep't of Bus. Regulation v. United States Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)).

The Supreme Court granted certiorari to review both of the D.C. Circuit's holdings and affirmed, stating that Patchak's claim is a "garden-variety APA claim" that is not barred by the Quiet Title Act. Match-E-Be-Nash-She-Wish Band of Pottawatomi v. Patchak, 132 S.Ct. 2199, 2204, 2208 (2012). The Court also found that Patchak has prudential standing because although the text of the IRA contains no reference to gaming, "§ 465 encompasses land's use," id. at 2202, and therefore, Patchak's claim was, "within the zone . . . protected or regulated by statute." Id. at 2211.

Although the Supreme Court remanded the matter for further proceedings, Plaintiff did not request that this Court take action on the remand until two years later. At Plaintiff's request, this Court held a status conference on September 4, 2014, where Plaintiff requested that a briefing schedule be set for summary judgment motions. At the time of the status conference, counsel for the United States informed the Court that the case was not suitable for summary judgment at this stage because there is no determination in the record that the Gun Lake Band was under Federal jurisdiction in 1934 in the original administrative record. [3] The United States also informed the Court that the Secretary recently determined that the Gun Lake Band was under Federal jurisdiction in 1934 in the context of approving the Band's request to have

[3] Plaintiff could have requested a remand based on the lack of a determination on the Gun Lake Band's status in the administrative record, but instead Plaintiff requested a summary judgment briefing schedule, which this Court granted. (Sept. 4, 2014 Dkt. Entry).

additional parcels of land taken into trust under the IRA. The Court then ordered the parties to propose a summary judgment briefing schedule within 10 days of the hearing. (Sept. 4, 2014 Dkt. Entry). Because the sole issue remaining in this case is whether the Gun Lake Band was under Federal jurisdiction in 1934, on October 27, 2014, Interior provided the parties with copies of the documents from the recent land into trust decision that pertain to that issue. (Dkt. No. 75). The supplemental documents are the Notice of Decision for that acquisition of additional land and the documents relied on by the Secretary in determining that the Gun Lake Band was under Federal jurisdiction in 1934.

On October 27, 2014, Plaintiff filed a motion to strike those documents and that motion is still pending. However, the determination that the Gun Lake Band was under Federal jurisdiction is not specific to a trust acquisition of a particular parcel of land and therefore, the analysis does not depend on the location of the land. The Secretary's determination of the Gun Lake Band's status is for purposes of the Band's eligibility for all IRA benefits, not just for a single land acquisition decision. Furthermore, the issue of whether the Gun Lake Band was under Federal jurisdiction is a mixed question of law and fact and the supplemental documents are thus relevant and necessary for the Court's determination. Moreover, many of the documents that the Secretary relied on for his determination are already in the administrative record in this litigation. Therefore, the Court can rely on the supplemental documents to decide the issue before it.[4]

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[4] If the Court concludes that Plaintiff's motion to strike the documents should be granted and that the Secretary's decision is flawed due to the failure of the Secretary to address whether the Gun Lake Band was under Federal jurisdiction in 1934, then a limited remand to Interior for the sole purpose of making a determination on that issue is appropriate. See generally State v. Salazar, 2012 U.S. Dist. LEXIS 136086 (N.D.N.Y. Sept. 24, 2012) (remand to the agency for a determination of whether the Oneida Nation was under Federal jurisdiction in 1934).

II. STATUTORY AND REGULATORY BACKGROUND

A. INDIAN REORGANIZATION ACT

Section 5: Acquisition of Land Into Trust. In deciding to accept the Property into trust, the Secretary acted pursuant to the IRA. In 1934, Congress enacted the IRA to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973). This "sweeping" legislation, Morton v. Mancari, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." United States v. Celestine, 215 U.S. 278, 290 (1909). The IRA thus repudiated the previous land policies of the General Allotment Act, which sought to end tribal organization and communal land ownership. See e.g. 25 U.S.C. § 461 (prohibiting further allotment of land); id. § 462 (extended indefinitely the periods of trust or restrictions on alienation of Indian lands); id. § 464 (prohibiting any transfer of Indian lands except exchanges authorized by the Secretary).

The "overriding purpose" of the IRA, however, was broader and more prospective than remedying the negative effects of the General Allotment Act. Morton, 417 U.S. at 542. Congress sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Id. Congress thus

authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, id. § 477.[5]

Of particular relevance here, Section 5 of the IRA provides in pertinent part that:

> [t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> …
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id. § 465.

Section 19: The Definition of Indian. Section 19 defines those who are eligible for the IRA's benefits. The first definition of "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." Id. § 479.[6]

In February 2009, the Supreme Court issued its decision in Carcieri v. Salazar, 555 U.S. 379. Carcieri involved a challenge to DOI's decision to accept land into trust for the benefit of the Narragansett Tribe. Id. at 384. The Court interpreted the word "now," in the phrase "recognized Indian tribe now under Federal jurisdiction" in the first definition of Indian in Section 19 to mean "under federal jurisdiction in 1934," when the IRA was enacted. Finding that the Narragansett Tribe was not under federal jurisdiction in 1934, the Court concluded that

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[5] Congress also authorized or required the Secretary to take specified steps to improve the economic and social conditions of Indians, including: 25 U.S.C. § 466 (regulations for forestry and livestock grazing); id. § 469 (creation of federal Indian-chartered corporations); id. § 470; id. § 472 (preferences to Indians for employment in positions relating to Indian affairs).

[6] The IRA also includes within its definition of "Indian" "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479.

the Secretary lacked authority under the IRA to take the parcel at issue into trust. The majority did not elaborate on how a tribe might demonstrate that it "was under federal jurisdiction" at the time of the IRA's enactment because it concluded that the parties in effect had conceded that the Narragansett Tribe was not under federal jurisdiction in 1934. Id. at 395-96. Nor did the majority address the term "any recognized Indian tribe" that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian."

In his concurrence, Justice Breyer addressed the relationship between these two terms, noting that the word "now" in the IRA modifies "under Federal jurisdiction" not "recognition," and concluded that the IRA "imposes no time limit upon recognition." Id. at 397-98. Moreover, Justice Breyer noted that "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." Id. at 397.

In response to the Carcieri decision, the Solicitor for the Department of the Interior issued an opinion titled The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, M-37029 ("M-Opinion"). After closely reviewing the text of the IRA, the Department's early practices, as well as the Indian canons of construction, the Solicitor construed the phrase "under Federal jurisdiction" as entailing a two-part inquiry. Id. at 19. The first part examines whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under Federal jurisdiction. Id. The second inquiry is whether the tribe's jurisdictional status remained intact until 1934. Id.

In short, Carcieri requires that for any "recognized Indian tribe" that applies for land to be taken into trust under the first definition of "Indian" in Section 19 of the IRA, the Secretary must determine that the tribe was "under Federal jurisdiction" at the time of the passage of the IRA in 1934. Because the term "now" in the IRA does not modify the term "recognized Indian tribe,"

however, there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not" recognize it "at the time." Id. at 397 (Breyer, J.).

B. THE GUN LAKE TRUST LAND REAFFIRMATION ACT

On September 18, 2014, Congress passed the Gun Lake Trust Land Reaffirmation Act, which reaffirms the Secretary's action at issue in this case and provides:

> (a) In General.--The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25,596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
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> (b) No Claims.--Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Public Law 113-179.

III. STANDARD OF REVIEW

A. STANDARD OF REVIEW UNDER THE APA

Plaintiff brings his claim under the APA, 5 U.S.C. § 706. Section 706(2)(A) provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard encompasses a presumption in favor of the validity of agency action. "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see also Small Refiner Lead Phase-Down v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983). A court is only to assess whether the agency's decision is "within the bounds of reasoned decisionmaking," Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983). "[T]he

agency is required to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made'…[and] the reviewing court 'consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" Center for Auto Safety v. Peck, 751 F.2d 1336, 1373 (D.C. Cir. 1985) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416. In making this determination, the Court's review is limited to the administrative record. See TOMAC v. Norton, 193 F. Supp. 2d 182, 194 (D.D.C. 2002) (citing Overton Park, 401 U.S. at 420). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). In interpreting an agency's construction of a statute it administers, a Court must "give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843

B. THE INDIAN CANONS OF CONSTRUCTION

In reviewing an agency interpretation of a statute governing Indian tribes, courts must consider canons of construction relevant to Indian law. Conn. ex rel. Blumenthal v. United States Dep't of Interior, 228 F.3d 82, 92-93 (2d Cir. 2000); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C. Cir. 2003). To the extent that the court finds the IRA to be ambiguous, any

ambiguity must be construed in favor of the Gun Lake Band. See, e.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

ARGUMENT

This Court should first determine whether it continues to have jurisdiction over Plaintiff's claim after the enactment of the Gun Lake Trust Land Reaffirmation Act, P.L. 113-179, 128 Stat. 1913 (Sept. 26, 2014). In Public Law 113-179, Congress reaffirmed the Secretary's decision to acquire the Bradley Property into trust for the benefit of the Gun Lake Band, thereby eliminating any basis for Plaintiff's claim regarding whether the Secretary had authority to acquire the Bradley Property under the IRA, and directing the Court to dismiss Plaintiff's case. This alone constitutes a Congressional designation of the Bradley Property as trust land and therefore, it is irrelevant whether the Gun Lake Band was under Federal jurisdiction in 1934.

Even if Plaintiff's claim is not moot, to the extent Plaintiff alleges that the IRA does not apply to the Gun Lake Band because the Band was neither under Federal jurisdiction nor recognized at the time of the statute's enactment, Plaintiff's motion for summary judgment should be denied. The Gun Lake Band have been under Federal jurisdiction since at least 1795, when the United States entered into a treaty with the Band for cession of their lands and the IRA only requires a tribe to be federally recognized at the time of the Secretary's trust acquisition decision, not in 1934. Therefore, Plaintiff's motion should be denied and his case dismissed.

I. THE GUN LAKE BAND TRUST REAFFIRMATION ACT IS CONSTITUTIONAL

A. THE GUN LAKE BAND TRUST REAFFIRMATION ACT DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES

Congress passed the Gun Lake Band Trust Reaffirmation Act, Public Law 113-179, pursuant to its authority under the Indian Commerce Clause of the U.S. Constitution. The "central function of the Indian Commerce Clause is to provide Congress with plenary power to

legislate in the field of Indian affairs." U.S. v. Lara, 541 U.S. 193, 200 (2004), citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192, (1989); see also, e.g., Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M., 458 U.S. 832, 837 (1982) ("broad power" under the Indian Commerce Clause); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)). Despite the backdrop of this broad Congressional power and the presumption of constitutionality of Congressional acts, see, e.g., United States v. Morrison, 529 U.S. 598, 607 (2000), Plaintiff argues the Act is unconstitutional. Neither the principles nor the case law support Plaintiff's argument.

Plaintiff contends that Public Law 113-179 conflicts with United States v. Klein, 80 U.S. (22 Wall.) 128 (1871), because it fails to amend the underlying law and withdraws federal court jurisdiction over a pending case. Pl. Br. at 28-31. That contention is without merit. Under the Constitution, Congress has broad power "to define and limit the jurisdiction of the inferior courts of the United States." Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938). That power includes broad authority to withdraw jurisdiction previously given to the lower courts, and to subject pending cases to the new jurisdictional limitation. As the Supreme Court has explained, "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fail." Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922). Other decisions have applied that basic principle. See Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); Bruner v. United States, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the

rule that "when a law conferring jurisdiction is repealed without any reservations as to pending cases, all cases fall within the law"); Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 575 (1869) (holding that "[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress."); Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."). These decisions are consistent with Article III, Section 1 of the Constitution, which says that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Indeed, Congress has discretion whether "[t]o constitute Tribunals inferior to the supreme Court." U.S. Const. Art. I, § 8, cl. 9.

Under those cases, Congress's withdrawal of federal court jurisdiction to review a challenge to the acquisition of land into trust for the benefit of the Gun Lake Band does not raise any constitutional issue under Article III. Instead, it falls well within Congress's recognized authority to withdraw jurisdiction from the lower federal courts and to direct the application of the new jurisdictional limitation to pending cases.

Plaintiff nonetheless contends, Pl. Br. at 28-31, that Public Law 113-179 conflicts with Klein. Plaintiff's reliance on Klein is misplaced. In Klein, the executor of an estate sought to recover the value of property seized by the United States during the Civil War. The executor relied on a statute that authorized such a recovery upon proof that the decedent did not give aid and comfort to the enemy. In United States v. Padelford, 76 U.S. (9 Wall.) 531, 542-543 (1869),

the Supreme Court had held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and that if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. The Supreme Court held that the statute "passed the limit which separates the legislative from the judicial power." Klein, 80 U.S. (22 Wall.) at 147. The Court explained that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." Id. at 146. The Court further concluded that Congress had exceeded its authority by changing the effect of a Presidential pardon that had previously been granted. Id. at 148.

Klein does not hold that Congress lacks authority to withdraw a court's jurisdiction and apply that jurisdictional limitation to a pending case. Rather, Klein condemned a statutory withdrawal of jurisdiction that impermissibly invaded the President's constitutional pardon power and had as its predicate a rule of decision that required the courts to give an effect to a Presidential pardon that was contrary to the effect that this Court had already decided that such a pardon should have. Public Law 113-179 does not have any such defects. Courts consistently decline invitations to invalidate legislation on the basis of Klein. See, e.g., National Coal. to Save our Mall v. Norton, 269 F.3d 1092, 1097 (D.C. Cir. 2001); Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1432 (9th Cir. 1989). Moreover, "[w]hatever the precise scope of Klein, . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (quoting Robertson

v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992)).[7] In Public Law 113-179, Congress changed the applicable law, affirming the acquisition of land into trust for the benefit of the Gun Lake Band "[n]otwithstanding any other provision of law," and foreclosing judicial review relating to the land. Public Law 113-179. See, e.g. Neighbors of Casino San Pablo v. Salazar, 773 F. Supp. 2d 141, 143-44 (D.D.C. 2011) (discussing Section 819 of the Omnibus Indian Advancement Act, Pub. L. 106-568, which directs the Secretary to acquire land into trust for the benefit of the Lytton Rancheria of California), aff'd 442 Fed. Appx. 579 (D.C. Cir. 2011).

Robertson demonstrates that the Court broadly construes what constitutes an amendment of substantive law. There, several environmental organizations filed lawsuits to stop timber harvesting in old-growth forests in alleged violation of certain federal statutes. See 503 U.S. at 431-32. In response, Congress enacted legislation amending the governing law by allowing timber harvesting in old growth forests under certain conditions. Id. at 433-34. The measure further provided that compliance with those conditions would satisfy the statutory requirements that were at issue in the two lawsuits, which the measure specifically identified. Id. at 434-35. The Ninth Circuit held that Congress had run afoul of Klein, but the Supreme Court reversed. The Court held that since Congress had amended the law applicable to timber harvesting in old growth forests, for both pending cases and cases commenced after the date of enactment, the measure "compelled changes in law, not findings or results under old law." Id. at 438.

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[7] In Plaut, the Supreme Court held that Congress may not legislate to require federal courts to reopen suits for money damages after final judgment, id. at 240, but distinguished between pending cases and final judgments, stating that"[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly," id. at 226, 115 S.Ct. 1447 (citing United States v. Schooner Peggy, 1 Cranch 103, 5 U.S. 103, 2 L.Ed. 49 (1801)).

Even if Public Law 113-179 does not amend applicable law, contrary to Plaintiff's suggestion, Pl. Br. at 29, the D.C. Circuit has not decided the issue of whether Klein can be read as requiring the amendment of substantive law:

> Further, to the extent that *Klein* can be read as saying that Congress may not direct the outcome in a pending case without amending the substantive law*, a proposition on which we express no view*, Public Law No. 107–11 presents no more difficulty than the statute upheld in *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992), as Public Law No. 107–11 similarly amends the applicable substantive law. See *id*. at 441, 112 S.Ct. 1407.

National Coalition to Save Our Mall v. Norton, 269 F.3d 1092, 1096-1097 (D.C. Cir. 2001) (emphasis added). In National Coalition to Save Our Mall, the D.C. Circuit upheld an act with similar language to that used in Public Law 113-379 that Congress enacted while a lawsuit was pending in district court. The statute at issue in that case exempted construction of the World War II Memorial on the National Mall from statutory obstacles and barred judicial review of agency decisions underlying the construction, and the same result should occur here. Klein and its progeny are therefore inapposite here.

B. SEVERABILITY

Section (a) of the Gun Lake Trust Land Reaffirmation Act states that, "[t]he land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25,596 (May 13, 2005)) is reaffirmed as trust land . . . ." Gun Lake Trust Land Reaffirmation Act, P.L. 113-179, 128 Stat. 1913 (Sept. 26, 2014). This alone constitutes a Congressional designation of the Bradley Property as trust land and therefore, it is irrelevant whether the Gun Lake Band was under Federal jurisdiction in 1934 or whether Section (b) of the Act is unconstitutional. As a result of this Congressional reaffirmation of the trust status of the Bradley Property, Plaintiff's claim that the Secretary lacked authority to acquire the Property into

trust is now moot. Therefore, even if the Court finds Section (b) of the Gun Lake Trust Land Reaffirmation Act unconstitutional because it directs the dismissal of his case under Klein, it is severable from Section (a), which operates independently and affirms the Secretary's agency action. Indeed, as the district court in Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002), aff'd, 333 F.3d 228 (D.C. Cir. 2003),[8] a case relied upon by Plaintiff, recognized, courts should apply "the 'cardinal principle' of avoiding such a determination [holding an act of Congress unconstitutional] where it is possible to decide the case on other grounds." Roeder, 195 F. Supp. 2d at 166.

Section (a) operates independently of Section (b), so the issue of constitutionality of Section (b) does not alter Congress's ratification of the trust status of the Bradley Property. The Supreme Court has repeatedly held that, "when confronting a constitutional flaw in a statute," a court must "try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S.Ct. 3138, 3161 (2010) (internal quotation marks and citations omitted). Accordingly, even if this Court were to find that Section (b) is unconstitutional, it "must retain those portions of the act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress's basic objective in enacting the statute." United States v. Booker, 543 U.S. 220, 258-259 (2005) (internal quotation marks and citation omitted). In this case, Section (a) alone affirms the trust status of the Bradley Property and as a result, Plaintiff's lawsuit is moot.

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[8] In the act at issue in Roeder, Congress not only directed the act at specific litigation, "[it] frankly and problematically admitted that by this legislation they intended to 'quash' the United States' motion to vacate the judgment," but the court still upheld the act. Id. (citations omitted).

C. THE GUN LAKE TRUST REAFFIRMATION ACT DOES NOT VIOLATE PLAINTIFF'S RIGHT TO PETITION

Plaintiff next argues that Public Law 113-179, by requiring dismissal of the lawsuit, significantly and unlawfully burden's his right to petition. Pl. Br. at 32. As discussed above, Congress has the constitutional authority to withdraw jurisdiction from the courts. Furthermore, the cases that Plaintiff relies on stand for the proposition that Plaintiff has the right to petition the agency as the decision-maker, not the federal district court. In an APA case, the decision-maker is the agency, not the court, and nothing in Public Law 113-179 prevents Plaintiff from filing a petition with the Department of the Interior, any other federal agency, or with Congress regarding the acquisition of land into trust for the benefit of the Gun Lake Band and nothing prevents the Secretary from granting a remedy to Plaintiff.[9] Therefore, Public Law 113-179 does not violate Plaintiff's right to petition the government.

D. DISMISSAL OF PLAINTIFF'S LAWSUIT DOES NOT OFFEND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Contrary to Plaintiff's assertion, Pl. Br. at 34-35, under the U.S. Constitution, there is no vested property right until there has been a final and unreviewable judgment. Plaintiff argues that dismissal of his pending case would violate his right to due process and his right to access to the courts. In doing do, Plaintiff relies on Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), asserting that "Mr. Patchak has a right to pursue his request to have judicial review of the Secretary of Interior's actions placing the Bradley Property into trust." Pl. Br. at 35. However, the Supreme Court in Logan did not conclude that litigants have a due process right to an adjudication on the merits. Plaintiff has no constitutionally protected property interest in his

[9] Indeed, Plaintiff submitted comments during the administrative process. AR010944, AR011100 (to President George W. Bush); AR01132, AR011529 (to Secretary Gale Norton); AR011324 (to the Bureau of Indian Affairs Midwest Regional Office).

unlitigated cause of action. The Due Process and Takings Clauses protect only causes of action that have been reduced to final and unappealable judgments. The overwhelming weight of federal appellate precedent establishes that the U.S. Constitution did not vest Plaintiff with a property right in a cause of action that has not been reduced to a final and unreviewable judgment.[10] Therefore, Plaintiff's reliance on Logan is misplaced. The Court's decision in Logan was premised on the right, guaranteed by the State, to use adjudicatory procedures to redress potentially discriminatory practices. Although the Supreme Court in Logan suggested that a cause of action is a "species of property," 455 U.S. at 428, "a party's property right in any cause of action does not vest "'until a final unreviewable judgment is obtained.'" Grimesy v. Huff, 876 F.2d 738, 743-44 (9th Cir. 1989) (citations omitted), cert. denied, 499 U.S. 975 (1991). And the Court in Logan made clear that the Due Process Clause leaves the government "free to . . . eliminate its statutorily created causes of action altogether." Logan, 455 U.S. at 432.

[10] See, e.g., Fields v. Legacy Health Sys., 413 F.3d 943, 956 (9th Cir. 2005) (holding that although causes of action are a species of property protected by the Due Process Clause, "a party's property right in any cause of action does not vest until final unreviewable judgment is obtained" (internal quotation omitted)); In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996) (explaining that "a pending tort claim does not constitute a vested right"), cert. denied, 519 U.S. 1077 (1997); In re Jones Truck Lines, Inc., 57 F.3d 642, 651 (8th Cir. 1995) ("Causes of action are also not fully vested interests until reduced to final judgment."); Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269, 273 n.11 (1st Cir. 1993) ("It is well established that a party's property right in a cause of action does not vest 'until a final, unreviewable judgment has been obtained.'") (citation omitted), cert. denied, 514 U.S. 1082 (1995); Salmon v. Schwarz, 948 F.2d 1131, 1143 (10th Cir. 1991) (holding that a legal tort claim "affords no definite or enforceable property right until reduced to final judgment") (citations and internal quotation marks omitted); Arbour v. Jenkins, 903 F.2d 416, 420 (6th Cir. 1990) ("The fact that the statute is retroactive does not make it unconstitutional [because] a legal claim affords no definite or enforc[ea]ble property right until reduced to final judgment.") (citation and internal quotation marks omitted); Sowell v. American Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989) ("[A] legal claim affords no definite or enforceable property right until reduced to final judgment."); Keller v. Dravo Corp., 441 F.2d 1239, 1242 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972); Adams v. Bowsher, 946 F. Supp. 37, 41 (D.D.C. 1996) ("a cause of action, while a 'species of property' protected by due process, nonetheless is 'inchoate, and affords no definite or enforceable property right until reduced to final judgment.'") (citation omitted).

Even if Plaintiff could demonstrate a constitutionally protected property interest in his unlitigated claim, Public Law 113-179 would nonetheless satisfy both the procedural and substantive components of the Due Process Clause as well as the Takings Clause. The legislative process underlying the enactment of Public Law 113-179 "provides all the process that is due." Logan, 455 U.S. at 433. Moreover, prior to the dismissal of his claim, Plaintiff has been afforded the opportunity to persuade this Court that his claim falls outside the scope of the Act and to challenge the statute's constitutionality. The judicial process made available to Plaintiff plainly satisfies the Due Process Clause.

E. THE GUN LAKE TRUST REAFFIRMATION ACT DOES NOT CONSTITUTE A PROHIBITED BILL OF ATTAINDER

Finally, Plaintiff fails to state a plausible claim that Public Law 113-179 amounts to a bill of attainder against him. Pl. Br. at 36-39. A bill of attainder is a "law that legislatively determines guilt and *inflicts punishment* upon an identifiable individual without the provision of the protections of a judicial trial." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977) (emphasis added); see also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984) (the "proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group"). Those two elements are distinct: no regulation, no matter how specific, is a bill of "attainder" unless it is actually "punitive." See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. at 239 n.9; Nixon, 433 U.S. at 472-473; Bell South Corp. v. FCC, 144 F.3d 58, 64 (D.C. Cir. 1998).

To determine whether a law constitutes a bill of attainder, courts consider whether: (1) the challenged statute falls within the historical meaning of legislative punishment; (2) the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) the "legislative record evinces an intent to

punish." Nixon, 433 U.S. at 473, 475-76, 478. Public Law 113-179 cannot be considered punitive against Plaintiff under any of these inquiries. Public Law 113-179 does not provide for any criminal or civil penalty against Plaintiff. Furthermore, the legislative history of Public Law 113-179 demonstrates that Congress affirmed the trust status of the Bradley Parcel pursuant to the Indian Commerce Clause. Congress's clear goal was not to punish Mr. Patchak, but to "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." To Reaffirm That Certain Land Has Been Taken Into Trust For the Benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, and For Other Purposes, S. Rep. No. 113-194 at 2 (June 17, 2014).

For the foregoing reasons, Public Law 113-179, the Gun Lake Trust Reaffirmation Act, is constitutional and pursuant to the Act, the Plaintiff's lawsuit should be dismissed.

II. THE SECRETARY'S DETERMINATION THAT THE GUN LAKE BAND WAS "UNDER FEDERAL JURISDICTION" IN 1934 IS CONSISTENT WITH THE SUPREME COURT'S DECISION IN CARCIERI V. SALAZAR AND SHOULD BE UPHELD

If this Court finds that the Gun Lake Trust Reaffirmation Act is unconstitutional and does not render Plaintiff's claim as moot, it should nonetheless find against Plaintiff because the Gun Lake Band was under Federal jurisdiction in 1934.

A. THE SECRETARY'S LEGAL INTERPRETATION OF THE FIRST DEFINITION OF "INDIAN" IN SECTION 19 OF THE IRA IS CONSISTENT WITH THE SUPREME COURT'S DECISION IN CARCIERI V. SALAZAR AND IS ENTITLED TO CHEVRON DEFERENCE

As discussed above, in Carcieri the Supreme Court interpreted the word "now" in the phrase "now under Federal jurisdiction" to mean under federal jurisdiction in 1934. Carcieri, 555 U.S. at 395-96. The majority did not elaborate on how a tribe might show that it "was under federal jurisdiction" at the time of the IRA's enactment because it concluded that the parties in

effect had conceded that the Narragansett was under state, not federal, jurisdiction in 1934. Id. at 395-96.[11]

The text of the IRA does not define or otherwise establish the meaning of the phrase "under federal jurisdiction," M-Opinion at 16, nor does the legislative history clarify the meaning of the phrase. Id. at 17. Indeed, in a 1934 memorandum drafted by Assistant Solicitor of the Interior Felix Cohen that compared the Senate and the House versions of the bill, Cohen stated that the Senate bill "limit[ed] recognized tribal membership to those tribes 'now under [f]ederal jurisdiction,' whatever that may mean," and recommended removal of the phrase because it would likely provoke too many questions regarding interpretation. Id. at 12 (emphasis added).

Because the phrase "under Federal jurisdiction" is ambiguous and the statute does not define its meaning, the Secretary appropriately applied the Chevron rules of statutory construction and interpreted the phrase "under federal jurisdiction." Under Chevron, "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." Chevron, 467 U. S., at 842.[12] First, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. But "if the statute is silent or ambiguous with

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[11] As discussed infra p. 34, the majority does not address the term, "any recognized Indian tribe" that precedes the term "under Federal jurisdiction" in the IRA definition of "Indian."

[12] The Chevron analysis is frequently described as a two-step inquiry. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) ("If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'").

respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843.

In exercising the Secretary's delegated authority to interpret and implement the IRA, and having closely considered the text of the IRA, its remedial purposes, legislative history, the Carcieri decision, and the Department's early practices, as well as the Indian canons of construction, the Secretary construed the phrase "now under federal jurisdiction" as entailing a two-part inquiry: 1) whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, and 2) whether the tribe's jurisdictional status remained intact in 1934. M-Opinion at 19.

In articulating the two-part test, the Department carefully construed an ambiguous statutory phrase in a manner that relied on the agency's regulatory expertise and was consistent with its past practices and policies. Accordingly, its interpretation and the application of the test to the Gun Lake Band are entitled to a high degree of deference from this Court. The first inquiry in the two-part test is whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, *i.e.,* whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions, through a course of dealings or other relevant acts, for or on behalf of the tribe that are sufficient to establish, or that reflect, federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Id. The Secretary explained that some federal actions may in and of themselves demonstrate that a tribe was at some identifiable point or period in its history under federal jurisdiction. In other cases, an array of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction. Id.

Once having established that the tribe was historically under federal jurisdiction, the second question is to ascertain whether there is evidence or circumstances sufficient to demonstrate that the tribe's jurisdictional status remained intact in 1934. Id. Significantly, the Department noted that "the Federal Government's failure to take any actions towards, or on behalf of a tribe during a particular time period does not necessarily reflect a termination or loss of the tribe's jurisdictional status." Id. at 20. Moreover, "evidence of executive officials disavowing legal responsibility in certain instances cannot, in itself, revoke jurisdiction absent express congressional action." Id.

The Secretary carefully and properly reviewed all the historical documents submitted by the Gun Lake Band, the factual and historical evidence produced as part of the Gun Lake Band's federal acknowledgment under Interior's procedures for acknowledging tribes at 25 C.F.R. Part 83, and documents pertinent to types of actions that could constitute evidence of a tribe being under federal jurisdiction. SUPP-AR000621-22. Applying the correct legal standard for "under Federal jurisdiction," the Secretary concluded that the record reflects a course of dealings between the United States and the Gun Lake Band beginning in 1795 and that there is sufficient subsequent evidence that the Tribe remained under federal jurisdiction through the passage of the IRA in 1934. SUPP-AR00623-48.[13]

[13] Most of the documents that the Secretary relied upon in making the determination are in the original administrative record and citations to those documents are provided along with the citations to the supplemental documents. Because these documents are already in the record, the Court can rely upon those documents in making its decision. As discussed in the United States' response to Plaintiff's motion to strike the supplemental documents, (Dkt. No. 77) if the Court concludes that Plaintiff's motion to strike the documents should be granted and that the Secretary's decision is flawed due to the failure of the Secretary to address whether the Gun Lake Band was under Federal jurisdiction in 1934 in the original administrative record, then a limited remand to Interior for the sole purpose of making a determination on that issue is appropriate. See generally State v. Salazar, 2012 U.S. Dist. LEXIS 136086 (N.D.N.Y. Sept. 24,

B. THE FEDERAL GOVERNMENT FIRST ASSERTED JURISDICTION OVER THE GUN LAKE BAND IN 1795

In accordance with step one of the two-part "under Federal jurisdiction" inquiry, the Secretary reasonably concluded that the first clear expression that the Gun Lake Band was under federal jurisdiction is when the Band entered into the Treaty of Greenville with the United States in 1795. SUPP-AR00623-24. In this treaty, the Band ceded a large portion of land following conflicts with the United States Army. Id. In consideration for the relinquished lands, Article IV of the Treaty of Greenville guaranteed the annual payment of goods to the signatory tribes and promised payments of 1,000 dollars each to the Chippewa, Ottawa, and Potawatomis.[14] The Treaty "acknowledged [the signatory tribes] to be under the protection of the said United States and no other power whatever." Id.; 7 Stat. 49, 52. Matchebenashshewish, the Band's leader, signed the Treaty of Greenville. Id. Over the course of several decades, the Band continued to sign treaties with the United States, including the Treaty of Springs Wells, 7 Stat. 131 (restoring the signatory tribes to the rights and privileges prior to the War of 1812 and placing them under the protection of the United States again), the Treaty of Chicago, 7 Stat. 218 (August 19, 1821) (ceding four million acres of land, largely in Michigan territory, south of the Grand River and promising payments to both the Ottawa and Potawatomi). It is pursuant to the 1821 Treaty of Chicago that the Gun Lake Band received a three-mile square reserve at Kalamazoo, Michigan (the Prairie Ronde village). 62 Fed. Reg. 38,113 (July 16, 1997).

The Gun Lake Band continued to enter into additional treaties, including the Treaty of St. Josephs, 7 Stat. 305 (1827) (ceding a tract in "village of Match e be nash she wish at the head of

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2012) (remand to the agency for a determination of whether the Oneida Nation was under Federal jurisdiction in 1934).

[14] Throughout history, various spellings of Potawatomi have been used. For purposes of this brief, the spelling used in the historical document referenced is maintained.

the Kekalamazoo river"), and the Treaty of Chicago, 7 Stat. 431 (Sept. 26, 1833) (the Chippewa, Ottawa, and Pottawatomi bands ceded approximately five million acres). SUPP-AR000626. Although neither Matchebenashshewish nor his son Penassee signed this last treaty, Sagamah, the leader of the Prairie Ronde village, reserved for the Band by the 1821 Treaty, signed the supplementary articles to the 1833 Treaty of Chicago. Id. The 1833 Treaty of Chicago gave the signing bands a sum of one hundred thousand dollars, including annuities to certain individuals. Id. Matchebenashshewish and Penassee received annuity payments under the Treaty and the Kalamazoo village was listed as receiving an annuity payment. Id. The Chippewa and Ottawa bands later entered into the Treaty of Washington, 7 Stat. 491 (March 28, 1836), to which the Band was not a signatory, but "Penasee or Gun Lake" is listed as one of the third class of chiefs entitled to one hundred thousand dollars under the treaty. SUPP-AR000627.

The Gun Lake Band was also a signatory to the 1855 Treaty of Detroit, which was signed by the Band's leader Shau-bau-quong. Final Determination to Acknowledge the Match-e-be-nash-she-wish Band of Pottawtomi Indians of Michigan, 63 Fed. Reg. 56,936 (Oct. 23, 1998). The Band received annuity payments under this and prior treaties until the final commutation payment in 1870. It is this date that was used as the last date of previous unambiguous Federal acknowledgment for the Gun Lake Band during the Federal acknowledgment process. Id.[15]

As a party to and beneficiary of the treaties discussed above, the Gun Lake Band was under Federal jurisdiction since the earliest days of the Nation. These treaties provide definitive evidence that the Band was under Federal jurisdiction prior to 1934. Treaty relations between

[15] As discussed infra at p. 37, contrary to Plaintiff's assertions, this date is not the last date of Federal acknowledgment, but the last date of unambiguous acknowledgment such that a petitioner need only document its existence from that date forward. The purpose of that date is to ease the burden of documenting tribal existence during the Federal acknowledgment process, but it does not establish the date at which a tribe was terminated or the date at which the United States severed its relationship with a tribe.

the United States and the Band reflect both the recognition of the Band as a sovereign entity capable of a government-to-government relationship with the United States and evidence of the United States' jurisdictional relationship with the Band.

This evidence based on treaties definitively establishes that the Gun Lake Band was under federal jurisdiction prior to 1934. In addition, other evidence also supports this determination. For example, the Federal government actively sought to remove the Potawatomi living in Michigan beginning in the1830s. SUPP-AR000632. The Band avoided removal by taking asylum with a church mission near the town of Bradley, referred to as the Griswold Indian Colony in Allegan County, which was established on property acquired with federal funds. Id. The Griswold Indian Colony is approximately four miles west of Gun Lake and several miles northeast of Bradley. Furthermore, the Michigan Superintendent continued to extend benefits to the Gun Lake Band and the Band continued to receive annuity payments and Band members were included in Indian censuses and continued to receive educational services. SUPP-AR00634.[16]

C. THE FEDERAL GOVERNMENT'S COURSE OF DEALING WITH THE GUN LAKE BAND CONTINUES UP TO AND BEYOND 1934

The Secretary further concluded that through the rest of the 19th Century, the Federal government continued to identify the Gun Lake Band as under its jurisdiction and provided services to the Band. SUPP-AR000632-37. Significantly, an 1890 Act of Congress granted jurisdiction to the United States Court of Claims for claims arising out of the treaties with the Pottawatomie Indians of Michigan and Indiana. SUPP-AR000634. This legislation, along with the federal courts' decisions in favor of the Band for financial compensation, indicate that the Band was under Federal jurisdiction and that the United States had money-mandating duties to

the Band, even though the Federal government did not acknowledge it at the time. Id. As Interior's Office of Federal Acknowledgment recognized in its proposed finding for acknowledgment of the Band:

> The court records generated by this suit [Potawatomi Indians v. The United States and Phineas Pam-To-Pee and 1,371 Other Potawatomi v. The United States] in the period 1882-1904 included numerous depositions identifying and describing the Allegan County Indian Community, specifying its ties to Match-e-be-nash-she-wish's Band from the former Kalamazoo Reserve.

SUPP-AR000634-35. The Supreme Court decision in Pam-to-pee v. United States, 148 U.S. 691 (1893), was ultimately the basis for the preparation of the 1904 "Taggart Roll" to determine the Potawatomi individuals eligible for payment under the decision. SUPP-AR000636; AR002078; AR002080. The Taggart Roll included the majority of the Gun Lake Band's member living in Allegan County. AR002080. Because the Band was closely associated with the Grand River Ottawa, it was also included in the 1908 "Durant Roll" compiled for the distribution of claims awards to the Ottawa and Chippewa tribes of Michigan. AR002081. The Gun Lake Band's children regularly attended the Mount Pleasant Indian Industrial School established on the Isabella Reservation in Michigan, until its closing in 1934. Id. at 113, 130; see also An Act Granting Certain Property to the State of Michigan for Institutional Purposes, Pub. L. 73-95 (Feb. 19, 1934). In 1900 and 1910, the Gun Lake Band's members were also listed on the special Indian Population schedules. Proposed Finding for Acknowledgment of the Match-e-be-nash-she-wish Band of Pottawtomi Indians of Michigan, 62 Fed. Reg. 38,113. Although the Federal government's interactions with the Gun Lake Band became more sporadic in the 20th Century, the government-to-government relationship between the Band and the United States was never severed. As the Department has stated, "[i]ndeed there may be periods where federal jurisdiction exists but it is dormant." M-Opinion at 20. Furthermore, "the absence of any probative evidence

that a tribe's jurisdictional status was terminated or lost prior to 1934 would strongly suggest that this status was retained in 1934." Id.

D. THE DEPARTMENT'S DECISION TO DENY IRA BENEFITS TO INDIANS IN MICHIGAN'S LOWER PENINSULA

After the passage of the IRA, the Gun Lake Band participated with both the Potawtomis and the Chippewa and Ottawas of Lower Michigan in their attempts to organize under the IRA. SUPP-AR000640. Two groups of Potawatomis filed petitions seeking inclusion in IRA efforts: the Nottawaseppi Band at Athens in 1934 and the Potawatomis of Michigan and Indiana in 1938. The latter group included members of the Allegan County Potawatomis. Id. Over the course of the next several years, the Department's officials had conflicting views as to whether the Chippewa, Ottawa and Pottawatomies in Michigan's Lower Peninsula were eligible to organize under the IRA. SUPP-AR000640-645. On the one hand, the Federal government considered the Potawatomis to be under Federal jurisdiction, see SUPP-AR000643 ("'Potawatomis of Southern Michigan (near Athens, Dowagiac, Hartford, etc.)' were 'under Tomah Jurisdiction [the Regional Indian Office]'"), but Federal officials also made statements that the Michigan Indians has lost their wardship status. SUPP-AR000641. Furthermore, although the IRA was designed to strengthen tribal self-governance, "on a practical economic level the federal government was unable to respond fully to the economic plight of Indian people." SUPP-AR 000638, citing Felix S. Cohen, Handbook of Federal Indian Law § 1.05. Because many of the tribes in Michigan's Lower Peninsula lacked reservations, Interior would need to acquire land for these groups, but Congress failed to provide the funding necessary to implement the Act. Id.

A 1939 survey of Indian groups in the State of Michigan undertaken by John H. Holst, Supervisor of Indian Schools, reported that the Indians in Michigan maintained no tribal organizations. SUPP-AR000645. The Gun Lake Band is among the Pottwatomies that Holst

identified in his report. Id. Holst opined that because their land had been allotted previously, their wardship status was eliminated and he recommended no further extension of IRA benefits in Michigan. SUPP-AR000646.[17] Consistent with Holst's report, the Assistant to the Commissioner of Indian Affairs prepared a memorandum recommending *withdrawal* of Bureau of Indian Affairs activities in Lower Michigan. Notably, the need to withdraw services would be unnecessary if those services had already been terminated. Indeed, the Tomah Superintendent, Peru Farver, stated that:

> The issue will be kept alive for many years in view of the fact that most of the groups in the upper peninsula [of Michigan] have been recognized and we are likewise contributing to the Chippewas in Lower Michigan. In other words, the Ottawas and Potawatomis are the only tribes in Michigan which have been denied assistance under the Indian Reorganization Act. There are some 35 Ottawas and Potawatomie children receiving Boarding Home Care and public School Assistance as this time and so far as I know none have been denied enrollment in Government boarding schools on the basis of belonging to these tribes.

SUPP-AR000646. Nevertheless in 1940, Commissioner of Indian Affairs, John Collier, adopted the recommendations of the Holst report and the IRA was not implemented in Lower Michigan, due to lack of funding. SUPP-AR000648. Congress would later repudiate this decision to ignore the tribes' history and needs and not organize the Lower Michigan under the IRA due to a lack of funding. SUPP-AR000639. Indeed, Congress found that in spite of the government's denial of their rights to organize under the IRA, these tribes maintained continuous dealings with the Federal Government since its early history. SUPP-AR000639; see also 25 U.S.C. § 1300j

[17] In deciding that the Gun Lake Band was "under federal jurisdiction" for purposes of the IRA, the Department considered a voluminous number of administrative decisions and communications regarding Indian tribes residing in the Lower Michigan peninsula, including the Gun Lake Band. SUPP-AR000620-22. Although statements from many government officials in the 1930s show that the government largely disavowed its responsibilities to these groups, these beliefs were mistaken. In any event, as discussed infra at p. 34, only Congress has the authority to terminate the Gun Lake Band's government-to-government relationship with the United States.

(Pokagon Band of Potawatomi Indians) and 25 U.S.C. § 1300k (Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians).

Based on all of the foregoing evidence, the Secretary reasonably determined that the historical record demonstrates that the Gun Lake Band retained that jurisdictional relationship up to and including 1934, thereby fulfilling the second part of DOI's "under Federal jurisdiction" inquiry. Id. DOI also concluded that there is no evidence that the United States congressionally terminated the Gun Lake Band's jurisdictional status or that the Tribe otherwise lost that status at any point from 1795 through present. Id. Because only Congress can lawfully terminate the relationship with, and thus its obligations to, the Gun Lake and, United States v. Celestine, 215 U.S. 278, 290 (1909), the Department's actions or inaction concerning the Band are not tantamount to a lawful termination. Because of DOI's expertise on these issues, these conclusions are entitled to deference. See Cal. Valley Miwok Tribe, 515 F.3d 1262, 1266 (deferring to the agency "because of the 'interstitial nature of the legal question' and the 'related expertise of the Agency'").

E. PLAINTIFF'S ASSERTIONS THAT THE GUN LAKE BAND IS INELIGIBLE FOR THE BENEFITS OF THE IRA ARE BASED ON AN INCORRECT READING OF THE STATUTE AND CARCIERI

1. THE IRA DOES NOT REQUIRE A TRIBE TO BE FEDERALLY RECOGNIZED IN 1934 TO BE ELIGIBLE FOR ITS BENEFITS

Plaintiff argues that federal recognition is necessary for a tribe to be "under Federal jurisdiction" under a narrow, strict reading of the term "under Federal jurisdiction." Pl. Br. at 10-16. However, because the term "now" in the IRA does not modify the term "recognized Indian tribe," there is no requirement that a tribe prove that it was viewed by the federal government as a "recognized" tribe in 1934. While the Carcieri majority did not address the term, "any recognized Indian tribe," that precedes the term "under Federal jurisdiction" in the

IRA definition of "Indian," Justice Breyer addressed the relationship between these two terms in his concurrence; he explained that the word "now" modifies "under federal jurisdiction," but does not modify "recognized," and concluded that the IRA therefore "imposes no time limit on recognition." Id. at 397-98. Because the term "now" does not modify the term "recognized Indian tribe," there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, as Justice Breyer noted, "a tribe may have been 'under federal jurisdiction'" in 1934 even though the Federal Government did not" realize it "at the time." Id. (explaining that the Stillaguamish Tribe, as a signatory to an 1855 Treaty had fishing rights even though recognition status was not confirmed until 1976). Plaintiff's assumption that the term "recognized Indian tribe" also carries with it a temporal component dating back to 1934, such that the tribe must have been federally acknowledged (in today's terms) in 1934, is therefore incorrect and contrary to the language of the statute.

Following Justice Breyer's interpretation of the phrase "recognized," the Secretary concluded that, in the first definition of "Indian" in the IRA, the word "now" modifies the phrase "under Federal jurisdiction," and not the phrase "recognized Indian tribe." If Congress had intended a different interpretation, it would have done so by referencing a particular date or time frame. Pursuant to this interpretation, the Secretary properly determined that she had authority to acquire land in trust for the Gun Lake Band based on the acknowledgment of the Band in 1998 and the determination that the Band was under Federal jurisdiction in 1934. For the same reasons that the Secretary's interpretation of the phrase "under Federal jurisdiction" is entitled to deference, the Secretary's determination that there is no temporal limitation on recognition in the definition of Indian in the IRA is also entitled to Chevron deference.

Plaintiff next incorrectly asserts that in Carcieri, the Court impliedly held that tribe must

be recognized in 1934 in ruling that the Narragansett Indian Tribe was ineligible for the IRA's benefits based on its later recognition. Pl. Br. at 11. However, the Court never addressed this issue because it concluded that the parties in effect had conceded that the Narragansett Indian Tribe was under state, not federal, jurisdiction in 1934. Id. at 395-96. Plaintiff then cites statements made at oral argument by the United States as supporting the view that it is assumed or implied in the Carcieri decision that Federal recognition was required to be under Federal jurisdiction. Pl. Br. at 11. However, as Justice Breyer's concurrence indicates, this is not the case and although that statement was made at oral argument, the issue was neither decided by the Court nor briefed by the United States.

Plaintiff would also like this Court to assume that because the majority opinion never adopted Justice Breyer's concurrence, it expressly rejected his interpretation. Pl. Br. at 12. However, the better reading is that the majority opinion addresses the very narrow issue before the Court – whether "now" in the phrase "now under Federal jurisdiction" meant 1934 – while Justice Breyer's concurrence explains that the plain language reading of the word "now" is not as restrictive as it first appears because the phrase "recognized tribe" has no temporal limitation and the agency's practices support this interpretation. Carcieri, 555 U.S. at 397-99. As Plaintiff recognizes, Pl. Br. at 10, Justice Thomas simply does not address the issue and it would be inappropriate for this Court to imply anything from the majority's silence on this issue.

Plaintiff next misconstrues the Federal Acknowledgment regulations in an attempt to support his interpretation. Pl. Br. at 13. Citing 25 C.F.R. § 83.2, Plaintiffs argues that the purpose of Federal recognition is to grant tribes the advantages that come with being under Federal jurisdiction, and therefore, the two are synonymous. However, the reality is that there was no formal process or method for recognizing a tribe until the establishment of the Federal

Acknowledgment Process in 1978. Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978). Prior to that date, the process of recognition or acknowledgment was done on an ad hoc basis by the Department or Congress. Plaintiff fails to explain how a regulatory statement made decades later would provide the basis for determining which tribes were under Federal jurisdiction in 1934 or why there is no reference to Section 479 of the IRA in the promulgation of the regulations if the two are indeed the same. The historical uncertainty surrounding recognition or acknowledgment and the lack of a formal process is precisely why Justice Breyer recognized that there could be no time limit on recognition when there was no formal process for recognition until 1978.

Although the text of the IRA contains no temporal limitation on recognition, Plaintiff attempts to prove that the Gun Lake Band was not recognized in 1934 by misconstruing Section 83.8 of the Federal Acknowledgment regulations. Plaintiff states that the date of previous unambiguous acknowledgment established by the Gun Lake Band pursuant to that Section is the date of the Band's most recent Federal acknowledgment. Pl. Br. at 14. The date of previous unambiguous Federal acknowledgment is meant to ease the documentary burden of the petitioner, not to establish a definitive date of a tribe's last federal acknowledgment. 25 C.F.R. § 83.8. If a tribe can establish a date of previous unambiguous Federal acknowledgment, then the tribe only needs to provide documentation from that date forward of its continued existence. Id. Inherent in that determination is the understanding that this previous acknowledgment was unambiguous, but not that any subsequent interactions between the tribe and the Federal government were non-existent. At best, any subsequent interactions would be considered ambiguous. Plaintiff also cites to an affidavit filed by George Skibine during the course of this litigation that refers to the Gun Lake Band as once terminated, Pl. Br. at 16, but as discussed

previously, an unlawful administrative termination of services does not terminate the jurisdictional status of the Gun Lake Band. Only Congress possesses the authority to terminate that relationship and Congress did not.

2. PLAINTIFF MISCONSTRUES BREYER'S REFERENCE TO A LIST OF TRIBES COVERED BY THE ACT

In his concurrence in Carcieri Justice Breyer references a list of 258 tribes compiled by the Department of the Interior following the IRA's enactment; listing tribes covered by the Act. Carcieri, 555 U.S. at 398. In referencing this list, Justice Breyer cites to the Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae*, which in turn cites to a law review article for the existence of this list. However, the Department is unable to verify that such a list exists. Plaintiff, relying on Justice Breyer's statement, incorrectly asserts that this list of tribes constitutes the entire universe of tribes that were "under Federal jurisdiction" in 1934. Pl. Br. at 17. As an initial matter, Section 19 of the IRA defines Indian three ways: members of recognized tribes now under federal jurisdiction, all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and all other persons of one-half or more Indian blood. 25 U.S.C. § 479. Any list produced would necessarily include Indians that fit under the other two definitions, and not just those "under Federal jurisdiction."

Furthermore, the list that the Ninth Circuit referred to in Big Lagoon Rancheria v. California, 741 F.3d 1032, 1044 (9th Cir. 2014), en banc granted 758 F.3d 1073 (9th Cir. 2014), is not the same list that Justice Breyer referenced. Immediately after passage of the IRA, pursuant to Section 18 of the Act, the Department was required to conduct a vote for every reservation to opt out of the IRA. 25 U.S.C. § 478. These votes were conducted by reservation, not by tribe, and once the voting was completed the results of most elections are reflected in the

Haas Report. It was this Report that was referenced in the Big Lagoon case. Theodore Haas, Ten Years of Tribal Government Under IRA (1947) ("Haas Report"). The Haas Report listed reservations where the Indian residents voted to accept or reject the IRA, id. at 13 (table A), tribes that reorganized under the IRA, id. at 21 (table B), tribes that accepted the IRA with pre-IRA constitutions, id. at 31 (table C), and tribes not under the IRA with constitutions, id. at 33 (table D).

Table A of the Haas Report lists most of the tribes that voted to accept or reject the IRA. Table A has been cited for the mistaken proposition that tribes that voted on the IRA were the only ones recognized as eligible to organize under the IRA's provisions, the same mistake that the Big Lagoon panel made. That decision has since been withdrawn and a new decision is pending after rehearing en banc. 758 F.3d 1073. Furthermore, Table B lists the tribes that have IRA constitutions and charters. If only those that voted were eligible to organize, every tribe in Table B should be listed in Table A, but that is not the case. Groups that fit within the definition of Indian in Section 19 were still eligible to organize under the IRA, despite not being eligible to vote to accept or reject the Act. Haas Report. If Plaintiff's assertion were true, it would not be possible for a tribe that did not vote to accept or reject the IRA to organize under its provisions.[18] Therefore, that tribe would not appear in Table B. Because the voting was conducted by reservation and not by tribe, the lists of reservations that voted to accept or reject the IRA's provisions are not definitive and certainly does not represent the entire universe of tribes that were under Federal jurisdiction.[19]

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[18] Nor is there any suggestion that a tribe had to have land to be subject to Section 465 of the IRA. Such a reading would in effect penalize those tribes that lost all their land to allotment.

[19] Furthermore, some tribes that were permitted to vote on the IRA's application were years later denied the opportunity to reorganize their tribal government under the IRA due to an erroneous determination by DOI, as in the case of the Nooksack Tribe. Haas Report; M-35013

3. THE GUN LAKE BAND SATISFIES THE INDICIA OF BEING UNDER FEDERAL JURISDICTION

Plaintiff next argues that the Gun Lake Band fails to meet any of the criteria set forth as possible indicia of being under Federal jurisdiction that Justice Breyer references in his concurrence. Pl. Br. at 18-19. As Justice Breyer notes, "[e]ach of the administrative decisions [involving later recognition] just discussed involved post–1934 recognition on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre–1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office." Carcieri v. Salazar, 555 U.S. at 399-400. As discussed above, these are precisely the indicia that the Secretary found the Gun Lake Band to meet, including several treaties for which the Federal government was required (but failed) to provide payments to the Band, a congressional act expressly providing for the Gun Lake Band and the other Pottawatomis to sue the Federal government for its failure to provide the treaty payments, and Federal governments inclusion of Band members on various censuses and rolls of Indians. SUPP-AR000632-37.

Finally, Plaintiff argues that the Gun Lake Band was required to have land in order to be under Federal jurisdiction in 1934. The only definition of Indian in Section 19 of the IRA that references land is the second definition. 25 U.S.C. § 479. And this was clearly not the case as the Department purchased lands for some landless groups at the time the IRA was implemented, see, e.g. Wisconsin v. Stockbridge-Munsee Community, 366 F. Supp. 2d 698, 732-33 (2004),

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(Organization of the Nooksack Indians Under the Indian Reorganization Act) (Dec. 9, 1947). This opinion was later superseded by Solicitor's Opinion M-36833 (Aug. 13, 1971), which confirmed the status of the Nooksack Tribe for IRA purposes. See Cohen's Handbook of Fed. Indian Law, § 3.02[6][d], at 148 n. 108 (Nell Jessup Newton ed., 2012).

and as Congress later explained, any assumption that land was necessary in order to be eligible for IRA benefits was mistaken. AR-SUPP000639, n.146.

The Secretary employed the agency's specialized expertise in Indian affairs and the authority delegated to her through the IRA to determine that the Gun Lake Band factually met the requirements of her legal interpretation of the phrase "under Federal jurisdiction." Plaintiff misconstrues the Carcieri decision and the text of the IRA. Neither Carcieri nor the IRA requires a tribe to be recognized in 1934 and the Secretary's interpretation of the ambiguous phrase "under Federal jurisdiction" is entitled to Chevron deference and is correct as a matter of law. For all the foregoing reasons, the Court should deny Plaintiff's motion for summary judgment and grant in favor of the United States on the sole claim in his complaint.

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's complaint pursuant to the Gun Lake Trust Reaffirmation Act or deny Plaintiff's motion for summary judgment and rule in favor of the United States on the sole claim before the Court.

Dated: December 4, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2014, I electronically filed the foregoing document with the clerk of court by using the CM-ECF system which will send notice of the electronic filings to all counsel of record:

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