IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES K. HUDSON Plaintiff, v. RYAN ZINKE, et al. Defendants.	Civ. No. 1:15-CV-01988 (TSC)

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, Plaintiff, Charles Hudson, ("Plaintiff"), an enrolled member of the Three Affiliated Tribes, of Fort Berthold ("Tribe") challenges Department of the Interior's ("DOI") February 23, 2017 Decision on Remand upholding prior decisions of the Great Plains Regional Director of the Bureau of Indian Affairs ("BIA") and the Interior Board of Indian Appeals ("IBIA") to certify and affirm the results of a Secretarial election conducted for the Tribe in July 2013. Plaintiff alleges that the BIA certified the July 2013 Secretarial election pursuant to its regulations, but with less than the voter quorum required by the Indian Reorganization Act of 1934 ("IRA") and the Tribe's Constitution. In this regard, Plaintiff primarily alleges that the meaning of "those entitled to vote" in the BIA's regulations governing Secretarial elections, which is used to calculate the quorum required for a valid election, is contrary to the meaning of the same term in Section 16 of the IRA and the Tribe's Constitution.

After the IBIA upheld the Regional Director's decision, Plaintiff filed suit in this Court. The case was subsequently stayed to allow BIA to address this question on remand. The Deputy Regional Director for the BIA timely issued a Decision on Remand on February 23, 2017. On March 17, 2017, Plaintiff filed his currently operative Amended Complaint, in which he continues to allege that DOI's regulations are contrary to the IRA and the Tribe's Constitution. Am. Compl. ¶ 66, ECF No. 32. The regulations at issue require eligible voters to register in order to be "entitled to" vote, and define the sufficiency of voter participation in a Secretarial election by the percentage of "entitled voters," i.e., registered voters, who actually voted in the election, rather than by the percentage of all eligible voters. Accordingly, Plaintiff alleges that the BIA's decision to certify the July 2013 Secretarial election and its Decision on Remand upholding the certification were "arbitrary, capricious, and unlawful" in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). *Id.*

In light of the broad authority Congress afforded the Secretary of the Interior ("Secretary") pursuant to the IRA to prescribe rules and regulations governing Secretarial elections, *see* 25 U.S.C. § 476, now codified at 25 U.S.C. § 5123, Plaintiff's arguments are clearly misplaced. BIA's current regulatory interpretation of "those entitled to vote," and the basis for calculating the voter quorum in Secretarial elections, were developed pursuant to the Secretary's broad regulatory authority and as the final product of an initial rule and regulations, as well as amendments to, and revisions of the regulations, which were subject to formal notice-and-comment rulemaking. The Secretary properly applied these regulatory standards and certified the 2013 Secretarial election based on DOI's longstanding interpretation of "those entitled to vote." Accordingly, contrary to Plaintiff's argument, the BIA's regulations are entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Also contrary to Plaintiff's claims, and in light of evidence of the Tribe's understanding and conduct of previous elections, Plaintiff has not shown that the regulatory definitions are contrary to those in the relevant article of the Tribe's Constitution. For these reasons, the Deputy Regional Director's Decision on Remand upholding certification of the July 2013 Secretarial election was not arbitrary, capricious, or unlawful, and should be upheld.

Finally, Plaintiff also argues that the July 2013 Secretarial Election should be vacated based on procedural deficiencies, which he claims disenfranchised off-reservation voters. As the IBIA found in 2015 in Plaintiff's appeal from the Regional Director's decision, and as the Deputy Regional Director affirmed in the Decision on Remand, however, Plaintiff alleges only that it is "likely" that off-reservation voters could have been confused by a discrepancy in the information provided to eligible Tribal voters concerning their eligibility to register for the election, but he has produced no substantiating evidence that there were any eligible voters who

did not vote because they were confused by the information the BIA provided. For this reason, this claim should also be rejected.

II. LEGAL STANDARD

The Court's review of DOI's and BIA's challenged action is governed by the standards set forth in the APA, 5 U.S.C. §§ 701-706. "In actions under the APA, summary judgment is the appropriate mechanism for 'deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Davis v. Pension Benefit. Guar. Corp.*, 864 F. Supp. 2d 148, 156 (D.D.C. 2012), *aff'd in part*, 734 F.3d 1161 (D.C. Cir. 2013) (quoting *United Steel v. Pension Benefit Guar. Corp.*, 839 F. Supp. 2d 232, 246 (D.D.C. 2012), *aff'd*, 707 F.3d 319 (D.C. Cir. 2013)).

The APA provides that final agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nevada v. Dep't of Energy,* 457 F.3d 78, 85 (D.C. Cir. 2006) (quoting 5 U.S.C. § 706(2)(A)). This standard requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). In turn, the reviewing court's '"task is to determine whether the agency's decisionmaking was reasoned, . . . i.e., whether it considered relevant factors and explained the facts and policy concerns on which it relied, and whether those facts have some basis in the record."' *Common Sense Salmon Recovery v. Evans,* 329 F. Supp. 2d 96, 100 (D.D.C. 2004) (quoting *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000)). "Although this inquiry into the facts is to be searching and careful, the 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, Inc. v. Volpe, 401 U.S. 402, 416 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977).). Under this "very narrow" standard, the agency's action is presumed valid and is "accorded great deference." *Oceana, Inc. v. Evans*, No. 04-0811 (ESH), 2005 WL 555416, at *7 (D.D.C. Mar. 9, 2005). *Accord Foo v. Tillerson*, No, 15-CV-2033 (TSC), 2017 WL 1102648, at *2 (D.D.C. Mar. 23, 2017), *appeal docketed*, No. 17-5117 (D.C. Cir. May 26, 2017) ("The court's review is 'highly deferential' and begins with a presumption that the agency's actions are valid.") (citing *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981)).

III. STATEMENT OF FACTS, AND PROCEDURAL HISTORY

In April 2013, the Regional Director authorized the Superintendent of the BIA's Fort Berthold Agency to call and conduct a Secretarial election to vote on two proposed amendments to the Tribe's Constitution.[1] Prior to the election, the Agency Superintendent mailed a notice of the election and an Election Packet to all Tribal members with known addresses. The packet included copies of the proposed amendments, a voter registration form, and a brochure entitled "Notice and Rules of Election." The voter registration form required anyone seeking to vote to certify that he or she was an adult member of the Tribe. AR 131. The brochure set forth the date, time, and polling sites for the election and it defined "Eligible Voters" as "all tribal members of the Three Affiliated Tribes who are at least 18 years of age on the day of the election *and who are registered with the Secretarial Election Board* . . . ." AR 137 (emphasis added).

[1] The first of the amendments proposed amending the Constitution by increasing the number of tribal representatives on the Tribe's Business Council and changing the quorum required for Council action. *See* AR 132. The second of the amendments proposed to amend the Constitution to prohibit felons from serving on the Business Council. AR 134.

The Secretarial election was held on July 30, 2013. One thousand, two hundred forty-nine (1,249) Tribal members registered to vote in the election and five hundred ten (510) members cast ballots. *See* AR 145, 146. The following day the Election Board, chaired by the BIA and including two representatives of the Tribe's governing body, certified both of the proposed amendments as having been duly adopted "in an election *in which at least 30 percent of the . . . members entitled to vote*, cast their ballot in accordance with 25 C.F.R. Part 81." AR 145, 146 (emphasis added).

Plaintiff was among the Tribal members who registered and voted in the July 2013 Secretarial election. AR 143. On August 5, 2013, Plaintiff appealed to the Regional Director and challenged the certification of the election on several grounds. He asserted, first, that the election should be declared null because it "[failed] to meet [the] electoral requirement pursuant to the Three Affiliated Tribes' Constitution." *See* AR 143. In explaining this challenge, Plaintiff stated that "[c]ensus data of the Three Affiliated Tribes enrollment office reported June 14, 2013 show[ed] [the Tribe had] 9,270 members over 18 years of age and therefore eligible to vote," AR 143, but that the Board's certification of the election results showed that the votes cast respectively for each of the two amendments represented "a mere 5.5% participation level, clearly falling short of the Constitutional requirement." *Id.* Plaintiff provided no further explanation or evidence supporting his claim that Article X of the Tribe's Constitution requires that all adult tribal members, as opposed to only those who registered to vote, must be considered "eligible" to vote for purposes of calculating the thirty percent quorum.

By letter dated September 13, 2013, the Regional Director rejected Plaintiff's challenge. AR 126-27. The Regional Director explained that, because a Secretarial election "is a federal election, not a tribal election," in conducting the election, the BIA "follow[s] the regulations for

Secretarial Elections found in . . . 25 C.F.R. Part 81, which were developed pursuant to § 16" of the Indian Reorganization Act. AR 126. The Regional Director then rejected Plaintiff's challenge as untimely, but he also stated that even if it had been timely filed, Plaintiff had failed to provide any substantiating evidence supporting his challenge. AR 127.

Plaintiff appealed to the IBIA and again argued that the thirty-percent voter participation quorum as required by the Tribe's Constitution was not satisfied in the 2013 Secretarial election. AR 96. On September 15, 2015, however, the IBIA affirmed the Regional Director's decision and denied Plaintiff's challenge. AR 2-10. In rejecting Plaintiff's arguments alleging failure to satisfy the thirty-percent quorum, the IBIA stated that, although it agreed with Plaintiff that "Article X of the Tribes' Constitution establishes the voting requirements for constitutional amendments, [it] disagree[ed] with [his] interpretation of that provision." AR 9. Specifically, the IBIA further explained that

> Appellant fails to distinguish between 'eligible voters' and 'voters entitled to vote' as the latter term is used in the Tribes' Constitution, and concludes that at least 30% of tribal members 18 years of age at the time of the election, regardless of their registration status, must vote to meet the Article X voter participation threshold requirement. Appellant does not provide any support for this proposition, which supposes that the Tribes' Constitution adopted the formulation used in [25 C.F.R.] § 81.7, the parallel Federal regulation governing voter participation in amending tribal constitutions, but assigned a different meaning to the specific term used to calculate whether the voter participation threshold had been met. This seems particularly unlikely where, as here, the election at issue is 'an election called . . . by the Secretary of the Interior' for the purpose of amending the Tribes' Constitution.

Id. (internal citations omitted). The IBIA found that Plaintiff had not submitted any evidence or legal argument in support of his contentions, and it was therefore "unwilling to infer in the Tribes' Constitution a different legal meaning of the term 'entitled to vote' than that established by Federal regulation." *Id.*

Following the IBIA's decision, in November 2015, Plaintiff filed his complaint in this case. ECF No. 1. Pursuant to a Joint Briefing Schedule agreed upon by the parties and ordered by the Court, ECF No. 12, in April 2016, Plaintiff filed a Motion for Summary Judgment. ECF No. 14. In response, Defendants filed a Motion requesting a voluntary remand to allow them to address substantial and legitimate concerns about the agency's certification decision. Defs.' Mot. for Voluntary Remand, 14, ECF No.18. Following full briefing and oral argument, the Court granted Defendant's Motion for Voluntary Remand without vacatur, and ordered Defendants to provide a Decision on Remand to the Court within sixty days. ECF No. 28. The BIA timely issued its Decision on Remand and lodged the decision with the Court on February 24, 2017. ECF No. 30. On March 17, 2017, Plaintiff filed his currently operative Amended Complaint, ECF No. 32, in which he challenges the Decision on Remand as arbitrary, capricious, and unlawful in violation of the APA. Am. Compl. ¶ 66.[2]

IV. ARGUMENT

A. The BIA's Regulatory Interpretation of "Entitled to Vote" is Consistent with the IRA and is Entitled to Deference.

In Count II of the Amended Complaint, Plaintiff alleges that, in deciding to certify the July 2013 Secretarial election based on a quorum of 30% of registered voters, the BIA violated the IRA and acted outside of its statutory authority. Am. Compl. ¶¶ 66, 67. In support of his motion for summary judgment, Plaintiff argues more specifically that BIA regulations in 25

[2] Plaintiff also continues to challenge the Regional Director's decision to certify the July 2013 election. *See* Am. Compl. ¶ 69; Requested Relief ¶ C. That decision is now moot, however, by virtue of the Decision on Remand, which is the only operative decision for purpose of Plaintiff's challenges to the agency's actions. Accordingly, to the extent Plaintiff asserts claims based on the prior agency decision, such claims should be dismissed.

C.F.R. Part 81, particularly including 25 C.F.R. § 81.11, contradict the IRA "by misinterpreting the tribal quorum in 25 U.S.C. § 478a." Pl.'s Mem. of P. & A. in Supp. Mot. for Summ. J. 21-22 ("Pl's Mem."), ECF No. 35-1. Plaintiff's arguments misapprehend the IRA's provisions with regard to tribes' rights to self-governance, however, and they ignore the broad authority Congress delegated to the Department of the Interior to regulate Secretarial elections pursuant to the statute.[3]

B. The IRA Does Not Define the Term "Entitled to Vote".

A Secretarial election is a Federal election held within a tribe pursuant to regulations prescribed by the Secretary of the Interior ("Secretary") as authorized by Section 16 of the Indian Reorganization Act of 1934. Under Section 16, Indian tribes have "the right to organize for [their] common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto . . . ." 25 U.S.C. § 476(a). Section 16 of the IRA as enacted in 1934 did not establish a quorum of eligible or entitled voters required to amend a tribe's constitution or bylaws through a Secretarial election. Rather, the statute provided that

> Any Indian tribe . . . shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective *when ratified by a majority vote of the adult members of the tribe* . . . at a special election authorized and called for by the Secretary of the Interior under such rules and regulations as he may prescribe.

IRA, § 16, as enacted June 18, 1934, 48 Stat. 984, 987 (emphasis added).

[3] *See Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999) (discussing breadth of Secretary's powers pursuant to IRA to conduct and hold elections); *Chosa v. Midwest Reg'l Dir.*, 46 IBIA 316, 321 (2008) (Regulations governing Secretarial elections were prescribed pursuant to Secretary of the Interior's "substantive and procedural responsibility under federal law . . . [and] authority delegated by Congress.").

In 1935, Congress enacted 49 Stat. 378, in part, "[t]o define the election procedure under the IRA." *Id.* In the 1935 statute Congress provided

> That, in any election heretofore or hereafter held under the [IRA] (48 Stat. 984), on the question of . . . adopting a constitution and bylaws or amendments thereto . . . the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such . . . adoption . . . *Provided, however,* that in each instance, the total vote cast shall not be less than 30% of those entitled to vote.

Id. Thus, the 1935 statute further defined the original terms of Section 16 of the IRA by providing that adoption of a constitution and bylaws (or amendments thereto) required not a majority vote of all members of a tribe, but "the vote of a majority *of those actually voting,*" *Id.* (emphasis added). The 1935 amendment also established that a 30% quorum of "those entitled to vote" is required for adopting or amending tribal constitutions. In establishing the quorum, however, Congress did not define "those entitled to vote," which is the operative term for purposes of determining how and whether the quorum requirement is satisfied in any particular election.

Section 16 of the IRA, now codified at 25 U.S.C. § 5127, continues to provide that "the vote of a majority of those actually voting shall be necessary and sufficient to effectuate" the adoption of a tribe's constitution and bylaw or amendments thereto, "*Provided, however*, that in each instance the total vote cast shall not be less than 30 percentum of those entitled to vote." *Id.* Neither in the original statute nor in any subsequent amendment has Congress ever provided a definition of "those entitled to vote." *Id.*

C. In Prescribing Regulations Governing Secretarial Elections, BIA Properly Exercised its Broad Authority Pursuant to the IRA.

"Secretarial elections, although held for tribal governance purposes, nevertheless are Federal elections[,] [and] . . . are conducted in accordance with Federal law." *Chosa*, 46 IBIA at 321 (citing 25 U.S.C. § 476; 25 C.F.R. Part 81) (other citations omitted); *Rosales v. Sacramento*

Area Dir., 34 IBIA 50, 54 (1996) (citing *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); 25 C.F.R. § 81.1(s)). *See also Thomas*, 189 F.3d at 667 ("It bears emphasizing that Secretarial elections, such as the one at issue here, are federal—not tribal—elections." citing 25 C.F.R. § 81.1(s)).[4] Specifically, "Secretarial elections are federal elections governed by 25 C.F.R. Part 81," *Rosales*, 34 IBIA at 50, and conducting such elections is the "substantive and procedural responsibility of the Secretary of the Interior." *Chosa*, 46 IBIA at 321 (citing *Thomas*, 189 F.3d at 667).

In the IRA, Congress afforded the Secretary of the Interior express authority to prescribe rules and regulations for the conduct of Secretarial elections. *See* 25 U.S.C. § 476, now codified at § 5123. In 1935, a year after the IRA was enacted, the Department of the Interior first prescribed certain rules "for the holding of Secretarial elections pursuant to section 16 of the IRA." AR 192, 55 Decisions of the Dep't of the Interior 355, 356 (Oct. 18, 1935). The purpose of those rules was to resolved "questions of construction" raised by the IRA, including the meaning of the term "entitled to vote" in the 1935 amendment. *Id.* at 356. At that time, the Department of the Interior defined "those entitled to vote" as including "any member of the tribe or tribes . . . regardless of whether he is a resident of the reservation at the time of the election." *Id.*

1. The 1964 regulations

The regulations governing Secretarial elections were first added to the Code of Federal Regulations in 1964. *See* Tribes Organized Under Section 16 of Indian Reorganization Act, 29

[4] Except as otherwise indicated, the citations to the BIA's regulations in this memorandum refer to the 1981 revised regulations, which were in effect at the time of the events at issue in this case; however, the regulations were later revised in October 2015. *See* 80 Fed. Reg. 63,094 (Oct. 19, 2015).

Fed. Reg. 14,359 (Oct. 17, 1964) (to be codified at 25 C.F.R. Part 52). DOI stated that the purpose of the proposed regulations, to be codified at 25 C.F.R. Part 52, was "to provide uniformity and order in holding elections on tribal constitutions and bylaws and constitutional amendments." Tribes Organized Under Section 16 of Indian Reorganization Act Notice of Proposed Rule Making, 28 Fed. Reg. 6545 (June 26, 1963) (to be codified at 25 C.F.R. Part 52); 29 Fed. Reg. at 14,359. The 1964 regulations were duly promulgated through DOI's Notice of Proposed Rulemaking, 28 Fed. Reg. 6546 (June 26, 1963), and were subject to notice-and-comment rulemaking procedures and ultimately adopted with certain changes based on comments received. *See* 29 Fed. Reg. at 14,359. The final regulations adopted in 1964 continued to define voters "entitled to vote" as "any adult member regardless of residence," *id.*, as codified at 25 C.F.R. § 52.6, (a)(1), (c). The 1964 regulations did not include a voter registration requirement. The 1964 regulations did not include a voter registration requirement.

2. The 1967 amendments

In February 1967, the Department of the Interior published notice of a proposal to amend the 1964 regulations. Proposed Rules of Registration for Voting on Constitutions and Bylaws, 32 Fed.32 Fed. Reg. 3061 (Feb. 18, 1967) (to be codified at 25 C.F.R. Part 52). In the notice, DOI expressly stated that the purpose of the proposed amendments was

> to provide for the registration of Indians eligible to participate in elections called by the Secretary of the Interior to adopt or to amend constitutions and bylaws pursuant to the [IRA] *in order to facilitate compliance with the statutory requirement that no less than 30 percent of those entitled to vote must participate to validate such elections.*

Id.; see also Final Rule of Registration for Voting on Constitutions and Bylaws, 32 Fed. Reg. 11,777 (Aug. 16, 1967) (to be codified at 25 C.F.R. Part 52) (emphasis added). To facilitate this purpose, Part 52 regulations were amended to provide that, "[f]or organized tribes voting in

elections for amendments of the constitution and bylaws, only eligible voters who have duly registered are entitled to vote . . ." 32 Fed. Reg. at 11,778, as codified at 25 C.F.R. § 52.6(c).

The 1967 amendments also added Section 52.10a, which established procedures for voter registration in Tribal elections. *Id.*, as codified at 25 C.F.R. § 52.10a. In addition, Section 52.11 of the regulations was amended to require Election Boards to compile lists of "*registered* voters, arranged by voting districts, if any, of the members of the tribe who are or will have attained" voting age by the date of the Secretarial election. *Id.*, as codified at 25 C.F.R. § 52.11 (emphasis added). The 1967 amendments were duly promulgated through a Notice of Proposed Rulemaking, 32 Fed. Reg. at 3061, and were subject to notice and comment rulemaking procedures and ultimately adopted "after consideration of all such matter as was presented by integrated persons." 32 Fed. Reg. at 11,777.

3. The 1981 regulations.

In 1979, the Department of the Interior published notice of a proposed revision of the Part 52 regulations. Proposed Revision of Existing Rule for Tribes Organized Under Section 16 of the Indian Reorganization Act, 44 Fed. Reg. 40,345 (July 10, 1979) (to be codified at 25 C.F.R. Part 52). In the notice of the proposed revision, DOI stated that the purposes of the revision were, inter alia, to "correct demonstrated weaknesses and clarify what has proven confusing language in existing regulations." *Id*; *see also* Tribes Organized Under Section 16 of the Indian Reorganization Act & Other Organized Tribes; Procedures for Reorganizing, Amending, or Revoking Constitutions & for Ratifying Charters of Incorporation, 46 Fed. Reg. 1668 (Jan. 7, 1981) (Final Rule). In accordance with this purpose, the Part 52 regulations were revised with respect to three provisions concerning the voter registration requirement. First, DOI added a subsection to 25 C.F.R. § 52.6 through which it clarified that

> [f]or a reorganized tribe to amend its constitution and bylaws, only members who have duly registered to vote shall be entitled to vote, provided that registration is open to the same class of voters that was entitled to vote in the Secretarial election that effected its reorganization, unless the amendment article of the current constitution provides otherwise.

46 Fed. Reg. at 1671, codified at 25 C.F.R. § 81.6(d).[5] Second, the regulations as revised in 1981 clarified that proposed constitutional amendments

> shall be considered adopted . . . if a majority of those actually voting are in favor of adoption . . . [but that] [t]he total vote cast, must be at least 30 percent of those entitled to vote, *unless, with regard to amendments, the constitution provides otherwise.*

Id. at 1672, codified at 25 C.F.R. § 81.7 (emphasis added). Finally, in a revised section, now entitled "Registration," the regulations expressly provided that

> Only registered voters will be entitled to vote, and all determinations of the sufficiency of the number of ballots cast will be based upon the number of registered voters.

Id., codified at § 81.11(a). The regulations were also amended to define "registration" as "*the act whereby persons, who are eligible to vote, become entitled or qualified to cast ballots* by having their names placed on the list of persons who will be permitted to vote." *Id.*, codified at 25 C.F.R. § 81.1(o) (emphasis added).

Like the original 1964 regulations and the 1967 amendments, the 1981 revisions were promulgated through a Notice of Proposed Rulemaking, 44 Fed. Reg. at 40,345, and were subject to notice-and-comment rulemaking procedures as the result of which, "[m]any constructive suggestions to clarify the intent of the regulations were incorporated into the final rule. 46 Fed. Reg. 1,668 (Jan. 7, 1981). Notably, with regard to registration, the Final Rule

[5] The Part 52 regulations were subsequently redesignated as 25 C.F.R. Part 81. Redesignation Table for Chapter I Title 25—Indians, 47 Fed. Reg. 13,327 (Mar. 30, 1982).

specifically stated that "some Alaskan comment[s]"[6] had been received suggesting that the voter registration requirement "should be dropped as unduly burdensome." DOI responded to these comments stating that

> Similar concern was expressed by parties in the contiguous forty-eight states when the need for registration was initially introduced into the regulations in 1967. *The practice has proven its value and is now widely accepted*. We believe that the Alaska Natives and Bureau of Indian Affairs staff will with time also realize the advantages of registration.

46 Fed. Reg. at 1668 (emphasis added).

D. The Secretary's Longstanding Interpretation of "Entitled to Vote" and the Thirty-Percent Quorum as Being Limited to Registered Voters is Permissible and Entitled to Deference.

In *Chosa v. Midwest Regional Director*, the Interior Board of Indian Appeals recognized that the voter registration requirement Plaintiff challenges has been part of the regulations governing Secretarial elections since October 1967, i.e., for now nearly fifty years. *See Chosa*, 46 IBIA at 321. Throughout that time, the regulations have consistently provided that "[o]nly registered voters will be *entitled to vote*, and all determinations of the sufficiency of the number of ballots cast will be based upon the number of registered voters." *Id.* (quoting 25 C.F.R. § 81.11); *see also Rosales*, 34 IBIA at 54 (quoting 25 C.F.R. § 81.6(d) "There are no exceptions to the registration requirement.")).

Deference under *Chevron* is appropriate "'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541 (2012) (quoting *United States v. Mead Corp.*, 533 U.S. 218,

[6] Another purpose of the 1981 revisions was "to extend to tribes in Oklahoma and to Alaska Native entities published procedures for recognizing under Federal Statute previously available only to reservation based tribes under the [IRA]." 44 Fed. Reg. at 40,345.

226-27 (2001)). Here, Congress gave the Secretary of the Interior broad authority to prescribe rules and regulations for the conduct of Secretarial elections. *See* 25 U.S.C. § 476. Subsequently, in enacting the 1935 amendment to the IRA, Congress added the requirement that, in order for a Secretarial election to be certified and a constitutional amendment adopted, at least thirty percent of those "entitled to vote" must have voted in the election. In establishing the thirty percent quorum, Congress did not define "those entitled to vote," however, and this introduced an ambiguity into the statute, which the Department of the Interior had implicit authority to define pursuant to 25 U.S.C. § 476. "Where . . . Congress enacts an ambiguous provision within a statute entrusted to the agency's expertise; it has 'implicitly delegated to the agency the power to fill those gaps.'" *Trans Union, L.L.C. v. FTC*, 295 F.3d 42, 50 (D.C. Cir. 2002) (quoting *Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1016 (D.C. Cir. 1999)) (internal quotation and citation omitted)). *See also Women Involved in Farm Econ. v. U.S. Dep't Agric.*, 876 F.2d 994, 1000–01 (D.C.Cir.1989) (noting "the presumptive delegation to agencies of authority to define ambiguous or imprecise terms we apply under the Chevron doctrine"). Pursuant to this authority, DOI initially promulgated rules "for the holding of Secretarial elections pursuant to section 16 of the IRA." AR 192, 55 Decisions of the Dep't of the Interior at 356, in order to resolve "questions of construction" raised by the IRA, including the meaning of the term "entitled to vote" in the 1935 amendment. *Id*.

As the Supreme Court has held,

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking . . .

Mead Corp., 533 U.S. at 226-27. Here, in 1935, the Department of the Interior initially defined

"entitled to vote" as including "any member of the tribe or tribes . . . ," but in 1967, it revised that definition as part of its efforts to

> provide for the registration of Indians eligible to participate in elections called by the Secretary of the Interior to adopt or to amend constitutions and bylaws pursuant to the [IRA] [and] . . . *to facilitate compliance with the statutory requirement that no less than 30 percent of those entitled to vote must participate to validate such elections*.

32 Fed. Reg. 3061; 32 Fed. Reg. at 11,777 (emphasis added). The 1967 amendments, as well as subsequent revisions to the regulations in 1981, were prescribed pursuant to the Secretary's authority under the IRA. The amendments and revisions were adopted through notice-and-comment rulemaking "to facilitate compliance with statutory requirements."[7]

The history of the Department of the Interior's implementing regulations thus makes clear that the definition of "those entitled to vote" and the thirty percent quorum required for Secretarial elections to amend tribal constitutions as established in the regulations at 25 C.F.R. Part 81 satisfy step one of the analysis required for *Chevron* deference, *See Chevron,* 467 U.S. at 842−44 (requiring courts analyzing agencies' implementation of their statutory authorities to determine, first, whether Congress has "directly spoken to the precise question at issue," or instead has delegated "authority to the agency to elucidate a specific provision of the statute by regulation."). Accordingly, here, the Court should afford such deference to DOI's regulations at issue, subject only to its determination, pursuant to step two of the *Chevron* analysis, that DOI's "interpretation is permissible or reasonable, [while] giving controlling weight to the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Armstrong*

[7] Notice-and-comment rulemaking on the 1964 regulations, the 1967 amendments, and the 1981 revisions to the regulations all obviously took place far outside the six-year statute of limitations applicable to challenges to agency action under the APA. Accordingly, to the extent Plaintiff attempts to raise a facial challenge to the regulatory definitions in the BIA's regulations, any such challenge is time-barred and should be dismissed.

v. Archuleta, 77 F. Supp. 3d 9, 19 (D.D.C. 2014) (citing *Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 754 (D.C. Cir. 2007))

If the statute is "silent or ambiguous with respect to the specific issue," courts proceed to step two of the *Chevron* analysis, and the question "is whether the agency's answer is based on a permissible construction of the statute." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013)); *Save Jobs USA v. U.S. Dep't. of Homeland Sec.*, 210 F. Supp. 3d 1, 12 (2016) ("When Congress is not entirely clear, the court proceeds to *Chevron* step two, which asks whether [the agency] acted under a 'reasonable interpretation' of the statutes.") (citing *Chevron*, 467 U.S. at 844.) "Under *Chevron*, [the court] is bound to uphold agency interpretations as long as they are reasonable—'regardless whether there may be other reasonable, or even more reasonable, views.'" *Allied Local & Reg'l Mfrs. Caucus v. EPA*, 215 F.3d 61, 71 (D.C. Cir. 2000) (quoting *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)). In particular, "'a long standing interpretation given a statute by the agency charged with administering it should be deferred to unless it is unreasonable.'" *Billings v. United States*, 322 F.3d 1328, 1333 (Fed. Cir. 2003) (quoting *Jones v. Dep't of Transp.*, 295 F.3d 1298, 1307 (Fed. Cir. 2002)). *See also Menkes v. U.S. Dep't. of Homeland Sec.,* 637 F.3d 319, 332 (D.C. Cir. 2011) (internal quotations omitted) (finding it "highly significant" that Coast Guard's interpretation of challenged statute was "one of long standing," and affording deference even though Coast Guard had "reached its interpretation through means less formal than 'notice and comment rulemaking,").

DOI's definition of "those entitled to vote" and the thirty percent quorum requirement as including only registered voters is a reasonable interpretation of Section 16 of the IRA. Under the *Chevron* test, DOI has the authority to regulate Secretarial elections. The Supreme Court has noted that "[t]he intent and purpose of the [IRA] was to rehabilitate the Indian's economic life

and to give him a chance to develop the initiative destroyed by a century of oppression." *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (per curiam) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (internal quotations omitted). This purpose accords with the IRA's stated purpose of "conserv[ing] and develop[ing] Indian lands and resources; . . . extend[ing] to Indians the right to form business and other organizations; . . . establish[ing] a credit system for Indians; [and] grant[ing] certain rights of home rule to Indians . . . ." Pub. L. No. 383, 48 Stat. 984, 984 (1934). *See also Muscogee* (*Creek*) *Nation v. Hodel*, 851 F.2d 1439, 1442 (D.C. Cir. 1988) (IRA "provided for self-government pursuant to constitutions and permitted the tribes to organize for economic purposes[.]"). Indeed, as the Supreme Court held in *Morton v. Mancari*, the IRA's overriding purpose . . . *was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.*" 417 U.S. 535, 542 (1974) (emphasis added).

At various times since 1935, when the IRA was amended, voter turnout for Secretarial elections has been sufficiently low that, if "entitled to vote" were defined and the 30% quorum requirement first established through that amendment interpreted to require 30% of all members of a Tribe eligible to vote, the Secretary might rarely, if ever, have been able to certify an election. *See* AR 208 (finding that none of seven Secretarial elections for the Three Affiliated Tribes certified after 1967 would have satisfied the thirty-percent quorum "if 'entitled' voters include[d] all voting age eligible voters) (citing Attachment A, AR 213). This would hardly have furthered the purposes of the IRA,[8] and accordingly, in 1967, DOI first amended the

[8] Plaintiff argues that DOI's regulatory definitions of "those entitled to vote" and the 30% quorum requirement are contrary to majoritarian values. Pl.'s Mem. 24, 28. Although such values are also a part of the IRA's purpose, in accordance with the Supreme Court's pronouncement in *Morton v. Mancari,* these values must be weighed in light of other purposes,

regulations to "facilitate compliance with the statutory requirement," and allow it to certify constitutional amendments as having been adopted by the majority of those actually voting in Secretarial elections, provided that the number of those actually voting was at least thirty percent of those who were "entitled to vote" by virtue of having registered. DOI's long-standing regulatory interpretation of the statute, which has been the subject of notice and comment rulemakings, thus is both permissible and reasonable as a means of furthering the IRA's overriding purpose. Accordingly, it is entitled to *Chevron* deference

E. The Tribal Constitution is Not in Conflict with the 25 C.F.R. Part 81 Regulations.

Plaintiff also contends that BIA's regulatory definition of "those entitled to vote" conflicts with the meaning of the identical term in the Amendment Article (Article X) of the Tribe's Constitution. Plaintiff points out that BIA's regulations at 25 C.F.R. § 81.2 provide that Secretarial elections will be conducted in accordance with the regulations "unless the amendment article of the tribe's governing document provides otherwise and is not contrary to Federal voting qualifications or substantive provisions, in which case the provisions of those documents shall rule, where applicable."

Article X of the Tribe's Constitution provides as follows:

> This Constitution and Bylaws may be amended by a majority vote of the qualified voters of the tribes voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.

AR 220. Article X uses the same term – "entitled to vote" – that is used in the 25 C.F.R. Part 81 regulations. The fact that the Constitution uses language identical to the current regulations does

specifically including furthering tribal sovereignty and self-governance.

not prove that the Tribe intends the term to have the same meaning, however, because the Tribe's Constitution was adopted in 1936, *see* AR 219, long before the 1967 amendments to the BIA's regulations, and at a time when the operative BIA rule defined "those entitled to vote" within the meaning of the 1935 amendment to the IRA as including "any member of the tribe or tribes . . . regardless of whether he is a resident of the reservation at the time of the election." AR 192, 55 Decisions of the Dep't of the Interior at 356. Neither the IRA nor the Tribe's Constitution define the term "entitled to vote," and it is undoubtedly true that prior to 1967, both the BIA and the Tribe understood the phrase "those entitled to vote" to mean the adult members of the Tribe, without any registration requirement.[9] In 1967, the BIA, through notice-and-comment rulemaking, established a different definition of "those entitled to vote." The crux of this litigation is whether the phrase "entitled to vote" in Article X of the Tribe's Constitution continued to refer to adult tribal members, whether or not registered to vote, or, following the1967 amendments to the BIA's regulations, referred to adult members who registered to vote.

The controlling principle applicable to this question is that "under the doctrines of tribal sovereignty and self-determination, a tribe has the right initially to interpret its own governing documents in resolving internal disputes, and the Department must give deference to a tribe's reasonable interpretation of its own laws." *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150 (D.D.C. 1999) (quoting *United Keetoowah Band of Cherokee Indians in Okla. v. Muskogee Area Dir.*, 22 IBIA 75, 80 (1992)). *See also Aguayo v. Jewell*, No. 13-CV-1435-BAS KSC, 2014 WL 6473111, at *1 (S.D. Cal. Nov. 18, 2014), *aff'd*, 827 F.3d 1213 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 832 (2017). Plaintiff asks this court to vacate the Secretary's construction of the

[9] Some tribes have residency requirements, or other restrictions, such that not all adult members are entitled to vote. But such restrictions are unrelated to the registration requirement in the Part 81 regulations.

ambiguous term "entitled to vote" in the Tribe's Constitution, but he provides no evidence whatever that, since 1967, the Tribe has ever construed the term in the way Plaintiff suggests. By contrast, DOI's decision on remand was based on evidence showing that, since the Part 81 regulations were amended in 1967 to define "those entitled to vote" as those tribal members who registered to vote, the Tribe has, without exception, construed Tribal law to be consistent with the federal regulations. In seven Secretarial elections conducted since 1967, including the July 2013 election challenged by Plaintiff, the Tribe has concurred in the Secretary's certification based on the participation of thirty percent of registered voters. *See* AR 373–86 (Aug. 13, 1974 election); AR 361- 72 (Nov. 19, 1975 election); AR 351-57 (Mar. 11, 1985 election); AR 358-360; 333-50 (June 25, 1986 election); AR 324-32 (May 6, 2008 election); AR 316-23 (Nov. 2, 2010 election); AR 310-15 (July 13, 2013 election. The Tribe's consistent endorsement of the regulatory definition of "those entitled to vote" shows conclusively that the Tribe's "reasonable interpretation of its own laws" is that "entitled to vote" in Article X means the same thing as "entitled to vote" as used in the 25 C.F.R. Part 81 regulations.

In sum, the fact that the Tribe's Constitution uses language parallel to the language in the 25 C.F.R. Part 81 regulations, and the absence of any definition of "entitled to vote" in the Constitution, may render that term ambiguous. In such a circumstance, the Federal Government should accept a tribe's reasonable interpretation of ambiguities within tribal law. *Ransom*, 69 F. Supp. 2d at 150-51. Here, however, Plaintiff has produced no evidence supporting his claims that the term "entitled to vote" as used in the Tribe's Constitution, although identical to the term in the BIA's regulations, is intended to bear a different meaning, and to the contrary, the Tribe's consistent concurrence in the federal regulations' definition over nearly fifty years provides

substantiating evidence that the Tribe has interpreted its Constitution as consistent with the federal regulatory definition.

F. Plaintiff Has Not Shown that the Information BIA Provided to Voters Concerning the July 2013 Election Confused Any Eligible Voter or Prevented Any Tribal Member from Voting in the Election.

Finally, as he did in his original Complaint, Plaintiff continues to allege that the Election Packet that was mailed to all eligible voters in the Tribe with known mailing addresses in advance of the July 2013 Secretarial election contained conflicting information that had the effect of disenfranchising voters permanently living off the reservation. *See* Am. Compl. ¶¶ 26, 27. Specifically, Plaintiff alleges that the Election Brochure, which was included in the packet, set forth only two of the possible criteria that a voter could satisfy to be allowed to vote by Absentee Ballot, i.e., "temporary absence from the reservation[,] [or] illness or physical disability[,]" *see* AR 137, while the Absentee Ballot Request Form, which appeared in the packet immediately after the Election Brochure, offered a third possible criteria for receiving an Absentee Ballot, i.e. being a "non-resident voter" not living on the reservation. *See* AR 139. Plaintiff apparently contends that it is "likely" that there may have been eligible, non-resident voters who read only as far as the Election Brochure, determined that there were only two possible circumstances that would qualify them to vote absentee in the July 2013 Secretarial election, and therefore did not go on to fill out the Absentee Ballot Form and seek to vote by absentee ballot based on their non-resident status. *See* Pl.'s Mem. 12.

First, although it is true that the Election Brochure, which appears before the Absentee Ballot Form in the Election Packet, does not set forth permanent, off-reservation residency as a criteria for voting by absentee ballot, as a factual matter, the agency's Cover Notice, AR 129-30, which appears first in the Election Packet, expressly informed anyone wanting to vote absentee

that the reasons a voter may be allowed to vote absentee were shown on the "pink" Absentee Ballot form, and that the form must be returned if an eligible voter was unable to vote on the date of the election. AR 129. Accordingly, it is not as likely as Plaintiff seems to believe that a non-resident voter would have been confused by the information provided in the Election Packet, or, at a minimum, it is clear that the BIA took affirmative steps in its Cover Letter to prevent any such confusion.

More importantly, Plaintiff merely alleges that "[i]t is likely" that some eligible voters living off-reservation did not vote because they believed themselves ineligible to do so based on the discrepancy between the information provided in the Election Brochure and that in the Absentee Ballot Form. Am. Compl. ¶ 27. As the IBIA found on Plaintiff's appeal, and as the Deputy Regional Director affirmed in the Decision on Remand, however, Plaintiff has presented no substantiating evidence either on appeal or concerning the Decision on Remand that any eligible, non-resident voter was actually confused by, or failed to vote in the July 2013 Secretarial election because of the discrepancy. *See* Decision on Remand, AR 209 (citation omitted). Indeed, Plaintiff, who is himself a tribal member living off-reservation, did not, and cannot, show that he was confused by the discrepancy because he registered for, and voted by absentee ballot in the July 2013 Secretarial election. *See* AR 143. Plaintiff thus has not shown that the discrepancy between the information provided in the Election Brochure and that set forth in the Absentee Ballot form resulted in any voter disenfranchisement as he claims. Accordingly this claim should be dismissed.

V. CONCLUSION

In sum, BIA's regulatory interpretation of "those entitled to vote," and the basis for calculating the voter quorum in Secretarial elections were developed pursuant to the broad

regulatory authority afforded the Secretary under the IRA, and through original regulations, and subsequent amendments and revisions, all of which were subject to formal notice-and-comment rulemaking. The Secretary properly applied the regulations and certified the July 2013 Secretarial election based on DOI's long-standing interpretation of "those entitled to vote." Therefore, the 25 C.F.R. Part 81 regulations governing Secretarial elections are entitled to *Chevron* deference and the Secretary's certification of the election was lawful pursuant to the regulations. Moreover, in light of evidence of the Tribe's understanding and conduct of previous elections, Plaintiff has not shown that the regulatory definitions are contrary to those in the relevant article of the Tribe's Constitution. Finally, Plaintiff also has produced no evidence in support of his claims that the information the BIA provided to eligible voters in advance of the July 2013 Secretarial election confused, or ultimately resulted in the disenfranchisement of any eligible voters living off-reservation.

For the foregoing reasons, Defendants request that Plaintiff's Motion for Summary Judgment be denied, and that Defendants' Motion for Summary Judgment be granted.

Dated: June 14, 2017

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ *Barbara M.R. Marvin*
BARBARA M.R. MARVIN
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20004
Telephone: (202) 305-0240
Fax: (202) 305-0506
E-mail: barbara.marvin@usdoj.gov

Of Counsel:

Tony Sullins,
Field Solicitor
Office of the Field Solicitor
5600 American Boulevard West, Suite 270
Bloomington, MN 55437
Telephone: (612) 713-7100
tony.sullins@sol.doi.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2017, I electronically filed the foregoing Defendants' Memorandum in Support of Defendants' Cross-Motion For Summary Judgment and Opposition To Plaintiff's Motion For Summary Judgment with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

/s/ Barbara M.R. Marvin
Barbara Marvin