IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIA CAVAZOS, *et al*.,

Plaintiffs,

vs.

DEBRA HAALAND, in her official capacity as Secretary of the Interior,

DARRYL LACOUNTE, in his official capacity, exercising the Delegated Authority of the Assistant Secretary for Indian Affairs of the Department of the Interior,

JOHNNA BLACKHAIR, in her official capacity as Director of the Bureau of Indian Affairs,

Federal Defendants,

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,

Intervenor-Defendant.

Civil Action No 1:20 cv-02942 (CKK)

Saginaw Chippewa Indian Tribe of Michigan's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment

The Saginaw Chippewa Indian Tribe of Michigan (the Tribe) files this opposition to Plaintiffs' Motion for Summary Judgment and cross-moves this Court for summary judgment against Plaintiffs on its claim that the Federal Defendants' January 30, 2020 Decision and its findings and conclusions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Under the authority of Rule 56 of the Federal Rules of Civil Procedure and

the accompanying memorandum of points and authorities, the Tribe respectfully requests this Court grant its motion for summary judgment and deny the Plaintiffs' similarly captioned motion. This motion is accompanied by a proposed Order.

Date: April 26, 2021

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Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment and in support of the Saginaw Chippewa Indian Tribe of Michigan's Cross-Motion for Summary Judgment

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I. Introduction

For almost one-hundred years, the Saginaw Chippewa Indian Tribe of Michigan ("Tribe") has battled to regain and exercise control of its membership-decision authority against a backdrop of federal interference. Despite the Tribe's desire otherwise, in the 1930s, the United States dictated the Tribe adopt specific membership criteria in order to organize under the Indian Reorganization Act. Thus, the 1936 Constitution included membership criteria the Tribe did not want but the United States nevertheless imposed for administrative ease. And in 1986, facing extreme financial hardship, Congress passed the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act extracting further tribal membership compromises in order to provide land-claim-award proceeds directly to the Tribe as a government, rather than individual lineally descendants of the historic constituent tribal bands. These two federal actions set in motion tribal-membership disputes the Tribe continues to address to this day.

One of the core fundamental pillars of a tribe's exercise of its self-governance power is the right to determine membership. It is at the very heart of tribal sovereignty. Since adoption of the 1986 Constitution, the Tribe has exercised that power and created a well-developed body of tribal law—both statutory and caselaw—addressing membership issues. The issue now before the Assistant Secretary strikes at the heart of the historically rooted doctrine of tribal sovereignty and a tribe's unequivocal right to determine tribal membership. The Tribe has worked diligently, and within the confines of its Constitution, to rectify membership errors exacerbated by the United States' influence over the 1937 Constitution, the Judgment Funds Act, and the Tribe's 1986 Amended Constitution.

A consequence of the Tribe demanding strict compliance with its Constitution resulted in the Tribe determining that many members enrolled after 1986, including Plaintiffs, did not meet

the constitutional criteria, their membership was erroneous, and they were not valid members of the Tribe. The Plaintiffs subsequently had their membership decisions reviewed by the Tribe's Office of Administrative Hearings, Community Court, and Court of Appeals. Having exhausted their tribal remedies, the Plaintiffs petitioned the United States to intercede in these tribal-membership matters under a claim of authority in the Judgment Funds Act.

Acting on behalf of the Secretary of the Interior, the Assistant Secretary-Indian Affairs ("Assistant Secretary") examined the Judgment Funds Act and determined that it did *not* grant her any authority, mandatory or discretionary, to dictate, direct, or control tribal membership. And even if discretionary authority existed, the Assistant Secretary would not exercise it as it intruded on the Tribe's self-governance powers. The Plaintiffs have asked this Court to find the Assistant Secretary's decision to be contrary to law—effectively returning the Tribe to the days when the United States could dictate who the Tribe recognized as members.

II. Background

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized tribe and is the legal successor of the historic Swan Creek, Black River, and Saginaw Bands ("Bands") of Chippewa Indians. *See* 86 Fed. Reg. 7554, 75566 (Jan. 29, 2021). Between 1795-1864, the Bands signed 16 treaties with the United States, in which they ceded almost all their land. *See* Ziibiwing Center of Anishinabe Culture & Lifeways, *History of the Tribe*, http://www.sagchip.org/ziibiwing/aboutus/history.htm. (last visited Apr. 16, 2021). Primarily under authority of the 1855 and 1864 Treaties, the United States allotted reservation lands to Band individuals. *See* Treaty with the Chippewa of Saginaw, 11 Stat. 633 (1855) and Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 657 (1864). Among the many allotments made between 1871-1891, there are three specific allotments of particular

importance to the Tribe—the three allotment rolls dated November 10, 1883, November 13, 1885, and November 7, 1891. It is these three allotment rolls that formed the basis of tribal membership in 1937.

A. The Tribe's 1937 Constitution and tribal membership

The Bands organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5123, and in 1937 adopted a modern-day Constitution. R. at 001845-1846 (Department of the Interior Decision). The Tribe initially wished to organize to include all historic Bands' descendants to draw together its scattered communities. R. at 001200 (Pet'rs' Req. for Action to BIA, Attachment 1). The United States, however, prohibited the Tribe as such and claimed the Tribe could only organize based on reservation residence rather than as a recognized tribe. *Id.* In addition to the residency requirement, the United States required, based solely on its own desire for administrative ease, the Tribe to rely on three historic allotment rolls as base rolls—the underlying foundational documents for tribal-member eligibility. *Id.* at 001310-1312.

Based on the United States' requirements, the Tribe's 1937 Constitution created two mechanisms for gaining tribal membership—(1) be named on the November 10, 1883, November 13, 1885, and November 7, 1891 allotment rolls; or (2) be a future-born child of at least one-quarter degree of Indian blood born to any member who is a resident of the Reservation at the time of the birth of the child. R. at 001846 (DOI Decision). The United States' interference tied tribal membership to just three allotment rolls that only represented roughly 15% of all allotments made, instead of broader allotments schedules. *Id.*; ECF No. 23, ¶ 30 (Tribe's Answer).

So, in 1937, tribal membership was tied to individuals named on the three allotment rolls and their *lineal* descendants, *i.e.*, after-born children, who possessed at least one-quarter degree

Indian blood and whose parents resided on the reservation at the time of their birth. As the Assistant Secretary noted, "[a] substantial number of descendants could not qualify for membership due to either the reservation residency requirement or the fact that they were named on or descended from [earlier allotment rolls]." R. at 001846.

B. The Indian Claims Commission and the U.S. Court of Claims awards in Docket 57 and its subsequent distribution

In 1973, the Indian Claims Commission and the U.S. Court of Claims awarded judgment funds to the Tribe and the Bands in Docket 57. R. at 000529-539 (S. Hrg. 99-263). The 1977 distribution plan distributed the funds from Docket 57 among all lineal descendants from the ancestral tribal entity as it existed in 1819. *Id.* at 000883 (Report on S. 2823 Before the S. Select Comm. on Indian Affairs). A wide range of documents were available to individuals for lineal descendancy purposes to claim Docket 57 payments. However, not all individuals eligible to receive Docket 57 money were eligible for tribal membership under the 1937 Constitution.

This universe of descendancy documents for Docket 57 purposes was much broader than those documents acceptable for tribal membership under the 1937 Constitution. Under the 1937 Constitution, only those individuals named (and their lineal descendants) from the November 10, 1883, November 13, 1885 (two schedules), and November 7, 1891 allotment schedules were entitled to tribal membership. To prove lineal descendancy for Docket 57 purposes, an individual needed to demonstrate a lineal ancestor to a broad range of historic tribal documents, including various censuses, enrollment schedules, and allotment schedules. *See* 25 C.F.R. § 41.3(cc) (1979 ed.). Any lineal descendant from one of the enumerated documents could receive Docket 57 money, regardless of blood quantum, residence, or current relationship with the Tribe.

The Docket 57 moneys were thus distributed among three groups—lineal descendants, tribal members, and the Tribe. Seventy-nine percent of the Docket 57 money was paid out in per capita payments of $4,060 to 3,243 lineal descendants who were *not* members of the Tribe. Seventeen percent was paid out in per capita payments of $3,248.50 to all enrolled members of the Tribe. The remaining four percent of the total ($723,605 taken from tribal members' distributions) was retained for use by the Tribe. R. at 000926 (S. Rpt. 99-119). Thus, the Tribe retained very little of the Docket 57 funds to provide services to tribal members. The Tribe adopted the federal 1977 tribal-member payroll as the new tribal membership roll, commonly known as the 1982 Base Roll.

C. The Indian Claims Commission and the U.S. Court of Claims awards in Dockets 59, 13E, and 13F and its subsequent distribution

By the mid-1980s, the United States was preparing to distribute money from a second round of awards in Dockets 59, 13E, and 13F. The Bureau of Indian Affairs ("BIA") originally proposed following the same formula used for Docket 57 distributions—distribution to all lineal descendants that would again result in a very small percentage available for tribal programs. The Tribe, with little to no resources, proposed that it be awarded the Dockets 59, 13E, and 13F money in its entirety to use for tribal programs. Descendancy groups (those who received Docket 57 money but were not at the time tribal members) opposed this proposal because their individual share would be forfeited to fund tribal programs in which they were ineligible to participate. Even off-reservation tribal members opposed forfeiting their individual share since the Tribe, at the time, appeared to limit services to reservation residents.

The Tribe and BIA worked on compromise legislation that would permit the United States to release Dockets 59, 13E, and 13F funds to the Tribe, provided the Tribe amend its 1937 Constitution to capture a larger percentage of the descendant class currently precluded from

tribal membership because of the residency requirement. On June 30, 1986, President Reagan signed the Saginaw Chippewa Indian Tribe of Michigan Distribution of Judgment Funds Act into law. *See* Pub. L. No. 99-346, 100 Stat. 674 (1986). All the discussions about expanding enrollment were based on the experiences from the Docket 57 payment process—payments that were only made to lineal descendants.

The Tribe provided a draft Constitution (that was later adopted) as part of the Judgment Funds Act and it was incorporated by reference. Under the 1986 Constitution, tribal membership now would include four classes of individuals:

- All persons whose names appeared on any of the following rolls: November 10, 1883; November 13, 1885; November 7, 1891; or December 10, 1982.[1]
- All children of at least one-quarter blood born to any member of the Saginaw Chippewa Indian Tribe of Michigan.[2]
- All descendants of person whose names appear on any of four rolls enumerated above who are at least one-quarter degree Indian blood born prior to or within one year of November 5, 1986 provided that descendants apply within an 18-month period.
- Through adoption into the Tribe.

R. at 000096-000106 (1986 Constitution).

D. The Judgment Funds Act

The Judgment Funds Act created the Judgment Funds ("Funds") that contained the principal from the Dockets 59, 13E, and 13F award. The Funds were held in trust by the Tribal Council for the benefit of the tribe and would be administered in accordance with the Act. The Act prohibited distribution of any principal through per capita payment and prohibited the use of Funds monies for purposes other than investment or economic development projects or

[1] This provision includes the 1937 Constitution requirements and adds the newly created 1982 Base Roll.

[2] This provision changed from the 1937 Constitution in that it removed the reservation residency requirement but added a one-quarter-degree blood-quantum requirement.

programs. The Tribe agreed to revise its Constitution and membership criteria to capture a larger portion of the descendancy group as members. The Tribe included the draft Constitution, and it became incorporated, by reference, into the Act.

The Judgment Funds Act also included a provision that the Tribe would not discriminate in providing services among reservation residents and off-reservation tribal members. Moreover, the Judgment Funds Act prohibited discrimination against tribal members who obtained membership as descendants under the 1986 Constitution.

E. The Tribe's 1986 Constitution and membership criteria

The 1986 Constitution, while opening tribal membership to many people, did not guarantee membership to all individuals that would have received Dockets 59, 13E, and 13F money. The class of individuals who would receive Docket money was not coextensive with the Tribe's membership criteria. Despite the Plaintiffs' solemn desire to make the two classes of individuals coextensive, sheer determination cannot transform their desire into actuality. The Plaintiffs repeatedly claim that the Judgment Funds Act required the Tribe to make *all* descendants eligible for tribal membership—but that is simply not the case.

Only those members who met the constitutional criteria would be eligible for tribal membership. Again, it is critical to appreciate the difference between the federal requirements for descendancy payments and the tribal requirements for membership. They are not the same. After adoption of the Judgment Funds Act, some individuals who would have received Dockets 59, 13E, and 13F money under a Docket-57-distribution model were eligible for membership and some were not eligible.

The Tribe *did not* represent to Congress that it would open membership to all individuals eligible for Dockets 59, 13E, and 13F money as descendants; it would do so only to those

individuals who met the constitutional criteria. As demonstrated below, the 1986 Constitution did not permit all individuals eligible for Dockets 59, 13E, and 13F money to become members.[3]

	Descendancy payment eligibility (Dockets 59, 13E, and 13F)	Tribal membership under the 1986 Constitution
Descent	• Lineal descent	• Lineal descent[4]
Acceptable rolls	• 1868 census of the Kansas Swan Creek and Black River Chippewas • 1900 enrollment schedule of the United Band of Chippewa and Munsees of Kansas, appearing thereon as a Chippewa • allotment schedules of the Saginaw, Swan Creek, and Black River Bands of Chippewa Indians dated February 6, 1871, June 3, 1871, April 1, 1872 (two schedules), November 10, 1883, November 13, 1885 (two schedules), and November 7, 1891 • March 22, 1939, revised membership roll of the Saginaw Chippewa Indian Tribe of Michigan • records as a person of Chippewa Indian descent who received a tract of land pursuant to article 3 of the treaty of September 24, 1819; or • any other record or document acceptable to the Secretary.	• November 10, 1883 allotment schedule • November 13, 1885 allotment schedules (two schedules) • November 7, 1891 allotment schedule • December 10, 1982 Base Roll
Blood quantum	• None	• One-quarter degree

The Assistant Secretary subsequently determined that "the BIA . . . understood at the time that the Tribe's proposed constitutional amendments would not extend membership

[3] 25 C.F.R. § 41.3(cc) (1979 ed.).

[4] The Plaintiffs spend a significant portion of their motion for summary judgment discussing collateral versus lineal descendancy and its meaning under the 1986 Constitution. But before even beginning that inquiry, the Plaintiffs must first demonstrate that the Judgment Funds Act grants the Assistant Secretary authority to make such an examination.

eligibility to the entire Descendant Group, but nonetheless endorsed the bill." R. at 001859 (Decision).

F. Tribal disenrollments

Over the past several years, the Tribe has disenrolled a number of individuals for failing to prove lineal descent as required by the Constitution. The Tribal Court of Appeals found, after examining the Tribe's own governing documents, that although the Constitution does not use the term lineal descendancy, the Constitution necessarily requires lineal descent. Because these individuals did not lineally descend from the historic base rolls, the Court of Appeals found they were improperly granted membership. The Tribe took such steps to ensure that its membership rolls accurately reflected those individuals who met the Constitutional criteria and instituted disenrollment proceedings.

The Plaintiffs were provided notice and hearing before the Tribe's Office of Administrative Hearings, an administrative judicial body singly charged with legal review of membership decisions. After these administrative proceedings, the Plaintiffs appealed their disenrollment to the Community Court and finally to the Court of Appeals. At all stages, the Plaintiffs were provided an opportunity for briefing and oral argument before the judicial tribunals. Having exhausted their tribal remedies, the Plaintiffs attempt to create a fictional hook, based on the Judgment Funds Act, to plead for federal intervention in an intra-tribal matter. To expand the Secretary's generalized authority over the Judgment Funds to a clear delegation from either the Tribe or Congress to the Secretary over membership determinations stretches credulity.

G. *The January 2020 Decision of the Assistant Secretary-Indian Affairs*

After their disenrollment, the Plaintiffs sought intervention of the Department to assume membership determinations under the putative authority of the Judgment Funds Act. The Plaintiffs requested the BIA order the Tribe to stop all pending disenrollment proceedings, restore the Plaintiffs' membership, and other additional relief. R. at 001853 (Decision). Eventually, the request came before the Assistant Secretary-Indian Affairs who had to determine whether the Judgment Funds Act granted her any authority to make membership decisions for the Tribe.

The Assistant Secretary determined that the Act did not require the enrollment of all descendants. *Id.* at 001859. On at least two occasions, Congress was put on notice that not all Descendant Group members would become eligible for membership. *Id.* Moreover, the BIA "not only recognized, but accepted, the fact that a substantial number of Descendant group members would be excluded from membership under the Tribe's Amended Constitution." *Id.*

The Assistant Secretary determined that the plain language and congressional intent of the Act did not mandate the membership of the Plaintiffs. "Since there is no enrollment requirement ... to enforce, and the Act limits the Secretary's enforcement authority to 'the requirements of the Act,' the Act's enforcement provisions do not independently authorize me to take any action ...." *Id.* But even if there was some authority, it would be merely discretionary, and the Department would not interfere in tribal-member decisions nor exercise any authority in a way that intruded in tribal self-governance. *Id.* at 001856.

III. Standard of review

The Plaintiffs bring their claim under the Administrative Procedures Act, 5 U.S.C. § 706. "'[W]hen a party seeks review ... under the APA, ... the district judge sits as an appellate

tribunal.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 12 (D.D.C. 2020) (quoting *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA." *Conservation Law Foundation v. Pritzker*, 37 F. Supp. 3d 254, 261 (D.D.C. 2014).

Section 706(2)(A) of the APA 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 the law." This standard encompasses a presumption in favor of 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 Preserve 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). 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. "[T]he arbitrary-and-capricious standard is 'highly deferential' and 'presumes agency action to be valid[.]'" *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.,* 724 F.3d 243, 245 (D.C. Cir. 2013) (quoting *Am. Wildlands v. Kempthorne,* 530 F.3d 991, 997 (D.C. Cir. 2008)); *Envtl. Def. Fund, Inc. v. Costle,* 657 F.2d 275, 283 (D.C. Cir. 1981) (same).

IV. Argument

Under the 1986 Constitution and accompanying tribal caselaw, the Plaintiffs do not meet the constitutional-membership criteria and are ineligible for membership. At issue here is whether the Secretary may intervene in a modern-day, tribal-membership dispute based on purported general and limited authority to assume management of the Tribe's Investment Fund

created by the Judgment Funds Act. This matter involves the intersection of the Tribe's 1986 Constitution, its membership criteria, the purpose of the Judgment Funds Act, and the Tribe's interpretation of its own membership criteria.

The real-world consequence of Secretarial intervention would require liberally interpreting the Judgment Funds Act in favor of the Plaintiffs rather than the Tribe, overturning established tribal law, substituting a federal interpretation of the 1986 Constitution over that of the Tribe, dictating to the Tribe who is or is not a tribal member, mandating membership, and essentially, assuming federal oversight of tribal membership more than thirty years after the ratification of the 1986 Constitution.

In the intervening 30+ years, the Tribe has spent significant time and resources dealing with membership issues. As a result, the Tribe has a comprehensive Enrollment Ordinance and substantial tribal caselaw addressing membership-related claims, including constitutional interpretation. The Tribe has established an independent administrative hearings office devoted solely to membership claims—both application cases and disenrollments. Unfounded and unwarranted intervention in tribal-membership issues would violate the Tribe's sovereign right to determine its membership and would severely undermine the time and resources the Tribe has invested in addressing membership issues. After examining the plain language of the Judgment Funds Act, the Assistant-Secretary determined that it did not grant her any authority to make tribal-membership decisions. The Tribe agrees.

A. The Secretary properly determined that the Judgment Funds Act did not mandate the enrollment of all descendants nor any specific individuals; the Judgment Funds Act has no effect on tribal enrollment.

The Assistant Secretary first examined whether the Judgment Funds Act controlled the Plaintiffs' membership inquiry—she found it did not. "The Act and as-enacted Amended Constitution are separate and distinct and should not be conflated to create an ongoing membership requirement not found in the Act's plain language." R. at 001857 (Decision). First, the Judgment Funds Act does not mandate enrollment, direct enrollment, or set forth enrollment criteria. The Judgment Funds Act has nothing whatsoever to do with tribal enrollment. The Judgment Funds Act merely authorized the direct payment of judgment funds to the Tribe and the subsequent management of those funds. The Judgment Funds Act did not shift membership authority from the Tribe to the federal government. In fact, federal legislation usurping a tribe's exercise of its right to determine tribal membership is repugnant to both federal and tribal principles.

The Tribe did agree, however, to amend its constitution to broaden its membership criteria. This was part of the compromise leading to the passage of the Judgment Funds Act. And the Tribe did so and has been enforcing the tribal-membership provisions since. The *1986 Constitution* governs tribal enrollment, not the Judgment Funds Act. Although they are inter-related, the Assistant Secretary carefully limited her review to the requirements of the Judgment Funds Act.

B. After examining the Judgment Funds Act, the Assistant Secretary appropriately determined that it does not grant any authority—whether mandatory or discretionary—to the Secretary to determine membership in the Saginaw Chippewa Indian Tribe of Michigan.

In considering the contours of the Judgment Funds Act, the Assistant Secretary asked essentially two inter-related questions: whether the Judgment Funds Act grants her authority—

either mandatory or discretionary—to protect individuals from disenrollment or to order re-enrollment of individuals. R. at 001650 (Scheduling Order to Parties). At its very core, the Plaintiffs have asked that the Assistant Secretary to direct the Tribe to: (1) cease disenrollment proceedings; and (2) re-enroll the Plaintiffs as tribal members. Both actions would severely impinge on tribal self-governance and have no basis under federal law. The Plaintiffs claim that because their individual docket money went to the Tribe and became part of the Judgment Funds, the Assistant-Secretary's general, limited authority over the Funds somehow equals specific authority to make tribal-membership decisions.

The Assistant Secretary examined Section 5(b)'s enforcement provision of the Act to determine what, if any, authority it granted to direct tribal-enrollment decisions. The Assistant Secretary noted that the Act "strongly suggests" that Congress did not anticipate the Act would apply to membership disputes and instead, "reflect[ed] a congressional safeguard that would allow the Department to intervene in the event that the Tribe mismanaged the actual Investment Fund." R. at 001858 (Decision). The Assistant Secretary also recognized the Act's plain enforcement language—for mismanagement or discrimination—did not "explicitly discuss[] tribal membership in either provision ..." *Id.*

Moreover, the Assistant Secretary noted that a broad interpretation of general enforcement authority in the Judgment Funds Act would result in "intrusive authority over the Tribe's internal governing affairs, and there is no indication that Congress intended this outcome ...." R. at 001857. Such a reading "defer[s] to tribal processes and authority rather than mandate any particular action." *Id.* The Plaintiffs' reading would "effectively require the Secretary to enforce *all* the constitutional amendments ratified in 1986." *Id.* The Assistant

Secretary declined to adopt such a broad approach to avoid a construction that would produce odd or absurd results. *Id.*

1. The right to determine membership is reserved solely to the tribe and cannot be the subject of federal legislation.

"For nearly two centuries now, [federal law has] recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family & Cattle Co*., 554 U.S. 316, 327 (2008) (citations omitted) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). "[T]ribes are subject to plenary control by Congress," but they also remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see also United States v. Lara*, 541 U.S. 193, 200 (2004). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030, (2014) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

"As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, to determine tribal membership, and to regulate domestic relations among members." *Plains Commerce Bank*, 554 U.S. at 327 (citations omitted). "An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress." *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007); *see also Muscogee Creek Indian Freedmen Band, Inc. v. Bernhardt*, 385 F. Supp. 3d 16, 21 (D.D.C. 2019) (noting that "[a] tribe's authority to determine its own membership is an important component of tribal self-governance and independent sovereignty" and that the "composition of a tribe's membership is fundamental to its self-governance and sovereignty"). "A tribe's right to define its own membership for tribal purposes

has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

Because of this fundamental right of self-governance, the Plaintiffs should not be permitted to make an "end run" around tribal self-governance by nominally naming a federal law. The Assistant Secretary determined that "the Act [did] not extend to tribal membership or provide any basis for intervening in what is a purely tribal matter between the [Plaintiffs] and the Tribe." R. at 001855. The Assistant Secretary recognized the Plaintiffs' "attempt to cast the matter as something other than an enrollment dispute" because they were ultimately asking her to "step in and tell the Tribe who should or should not be enrolled." *Id.*

2. The Judgment Funds Act does not transfer membership authority to the Assistant Secretary.

The Assistant Secretary thoroughly examined the Judgment Funds Act to determine if it provided any authority—mandatory or discretionary—to manage the Tribe's membership. The Assistant Secretary determined that although tribal membership was an aspect of the Judgment Funds Act, the Act itself did not bestow any authority, either explicitly or implicitly, to manage tribal enrollment.

While reviewing the Judgment Funds Act—a federal statute— "traditional tools" of "statutory construction" are instructive. "The traditional tools include examination of the statute's text, legislative history, and structure…as well as its purpose." *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (internal citations omitted). "Interpretation of a statute must begin with the statute's language." *e.g., Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 300-01 (1989); *see also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) ("The most traditional tool, of course, is to read the text.") The first stop is examining the plain meaning of a statute's language, which is

conclusive unless literally applying the statute's text demonstrably contradicts Congress's intent. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). "[Wh]en deciding whether the language is plain, [courts] must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).. By applying traditional tools of statutory construction, it becomes abundantly clear that the Judgment Act does not confer membership-decision authority to the Secretary.

It is beyond dispute that tribal-membership decisions, as envisioned by the Judgment Funds Act, are reserved to the Tribe. The right of determining tribal membership rests with the Tribe absent a delegation to the United States; the Assistant Secretary cannot simply assume oversight authority she does not have. But even a casual review of the Judgment Funds Act reveals no delegation of membership-decision authority from the Tribe to the Assistant Secretary. And although resolving the question of tribal membership was essential in getting the Judgment Funds Act passed, it was then, and remains now, a *tribal* process. The Tribe never ceded its inherent authority over tribal membership to the federal government. To usurp that authority now under a casual reference to the Judgment Funds Act would have been contrary to federal law, tribal law, and the policy of tribal self-governance.

Nowhere in the Judgment Funds Act did the Tribe shift its tribal-enrollment authority to the federal government. At no time during the administrative process did the Plaintiffs point to any such transfer. The Plaintiffs' Motion for Summary Judgment is extraordinarily light in its discussion of the actual language of the Judgment Funds Act. Instead, the Plaintiffs rely on misstatements and emotional pleas in their request for the Assistant Secretary to act. Based on a plain reading of the Judgment Funds Act, the Assistant Secretary has no authority—mandatory

or discretionary—to oversee tribal membership. Because there is no ambiguity on the face of the Judgment Funds Act, it is unnecessary to examine the legislative history. The Judgment Funds Act does not create any secretarial authority to assume tribal-membership-decision authority.

As noted above, the Judgment Funds were established for the benefit of the Tribe and must be administered in accordance with the Act. The Act prohibited distribution of any principal through per capita payment and prohibited the use of Funds money for purposes other than investment or economic development projects of programs. After the transfer of the Judgment Funds to the Tribe, no approval from the Secretary was needed for any payment or distribution from the principal or income of the Investment Fund. Moreover, and most importantly, the "Secretary shall have no trust responsibility for the investment, supervision, administration, or expenditure of the principal or income of the Investment Fund." Judgment Funds Act, Sec. 5(b)(1). Nothing in the Act permits the Assistant Secretary to interfere with tribal-membership decisions and agency authority should not be lightly presumed. *Cf. Santa Clara Pueblo*, 436 U.S. at 72 n.32 (Courts long have recognized that the right to define its membership is central to a tribe's "existence as an independent political community." Therefore, "the [federal] judiciary should not rush to create causes of action that would intrude on these delicate matters."). It is clear that the Judgment Funds Act does not mandate secretarial action to intercede in tribal-membership issues. Moreover, there is not even discretionary authority to manage tribal membership. The reason for this is clear—the Judgment Funds Act does not implicate tribal-membership decisions and cannot be used as a springboard to demand federal action when it is unwarranted.

C. Even if the Judgment Funds Act delegated discretionary authority to the Assistant Secretary for membership decisions, the Assistant Secretary acknowledged any action would be an unnecessary intrusion of tribal self-governance.

And although the Judgment Funds Act *does not* grant secretarial authority over membership decisions, the Plaintiffs argued the Secretary *may* "take such action as the Secretary may determine to be necessary and appropriate to enforce the requirements of the [Judgment Funds Act.]" The Judgment Funds Act required the Tribe to amend its Constitution to broaden membership criteria to include a larger group of descendants. The Tribe did so. Interceding in this intra-tribal matter is *not* a step to enforce the requirements of the Judgment Funds Act; it is a grave overstep into the application and interpretation of the Tribe's Constitution—something not anticipated by the Judgment Funds Act.

The Secretary's discretionary authority is neither sweeping nor unqualified. Any oversight authority contained in the Act is restricted to the management of the Funds. And although tribal membership is tangentially related to the Judgment Funds, *i.e.,* only tribal members may participate, the Act does not confer Secretarial authority over tribal-membership considerations.

The Assistant Secretary determined that "the Department generally refrains from intruding into tribal membership decisions" especially when "the tribe has already utilized its own forums for resolving the dispute." R. at 001855. In such cases, "'the Department must respect the tribe's right to self-government and thus, has no authority to interfere.'" *Id.* at 001885-1886 (citing *Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 553 (10th Cir. 1978). Such an inquiry would have the Assistant Secretary determine that the Tribe's own determination that these individuals did not meet the constitutional membership

criteria (a tribal matter) was tantamount to mismanagement of the Judgment Funds (a federal matter)—a stretch to be sure.

D. The Tribe's disenrollment process provides all individuals with full due process and equal protection of the law.

The Tribe has a comprehensive membership ordinance that governs membership questions—both applications and disenrollments. As set forth below, the Tribe's membership-review process provides significant due process to individuals whose membership may be challenged.

1. The Tribal disenrollment process provides ample due process and equal protection to individuals subject to disenrollment.

The Tribal Certifier (the entity that makes final membership decisions) may direct the Enrollment Director to conduct a review of an individual's enrollment file to determine whether there is a "reasonable basis for reopening a final enrollment decision." R. at 000193 (Ordinance 14-Tribal Enrollment). If a reasonable basis exists, the Enrollment Director will issue a written Notice of Membership Eligibility Review ("MER") describing with particularity the grounds for review. *Id.* The member may challenge those grounds by submitting written arguments and supporting evidence to the Enrollment Department within 30 days. *Id.*

After 30 days, the Enrollment Department reviews any material submitted and issues a written decision. R. at 000194. If the Enrollment Department determines there is still a reasonable basis for reopening a final enrollment decision, the Enrollment Department will issue a Notice of Commencement of Disenrollment Proceedings ("CDP"). *Id.* The CDP will describe with particularity the enrollment eligibility issues that will be considered in the proceeding and the evidence that will be required to resolve these issues in favor of the member. *Id.* The

member now has a 60-day opportunity to provide written argument and supporting evidence to the Enrollment Department.

At the end of the CDP-notice period, the Enrollment Department will transfer the file (together with all documents and submissions from the members) to the Office of Administrative Hearings ("OAH") for review. R. at 000195. The member must then make a written request for a hearing before the OAH. *Id.* The OAH is an independent administrative hearings agency charged with hearing appeals from decisions of the Tribe's Enrollment Department. R. at000196. Both hearings officers are law-trained and have served in that capacity for many years—the Senior Hearing Office has been with the OAH since its creation in 2003 and the other Hearings Officer has been with the OAH for eight years. The OAH has handled hundreds of membership-related cases—both applications and disenrollments.

Members may be represented by counsel and almost all individuals are represented by attorneys. At the OAH, the parties are required to disclose all documentary and other evidence (including rebuttal evidence) to the other party. R. at 000202. The parties may also serve interrogatories and requests for admission on each other.[5] The OAH encourages the parties to provide expert genealogical reports if possible. If either party files a motion for summary disposition, the OAH will conduct a full hearing, on the record, to determine if a material factual dispute exists. If the OAH grants a motion for summary disposition, it will issue a written opinion and make a recommendation to the Certifier. If there is no motion for summary disposition, the OAH will conduct a full evidentiary hearing and issue a written report and recommendation to the Certifier.

[5] These discovery provisions were added to Ordinance 14 in 2014 and are found at Sec. 13 (f)(1.10.3 and 1.10.4). The versions of Ordinance 14 contained in the record predate 2014.

If the OAH recommends disenrollment and the Certifier agrees, the individual may appeal their disenrollment to the Tribe's Community Court. R. at 000207. Before the Community Court, the parties fully brief the matter—opening brief, response brief, and reply brief—and submit those to the Court for consideration. The Community Court also conducts oral arguments on the appeals and issues a written decision based on the record.

Finally, an individual may appeal to the Tribe's Court of Appeals for final review. Again, the parties fully brief the matter—opening brief, response brief, and reply brief—and submit those to the Court for consideration. The Court of Appeals may conduct oral arguments on the appeals and has done so in nearly every enrollment case presented for its review. The Court of Appeals also issues written decisions based on the record.[6] At this point, the individual has exhausted judicial review. As set forth above, the combined agency, administrative hearing body, and judicial review provide an abundance of due process to individuals involved in disenrollment proceedings. The Plaintiff's request for federal intervention in these enrollment matters would likely upend the Tribe's well-established body of law developed over the course of the last thirty plus years, including numerous tribal-court opinions. Such intervention would eviscerate the Tribe's most sacred and sovereign right to determine its own membership.

[6] Before the Saginaw Chippewa Court of Appeals, the Plaintiffs (among other similarly disenrolled individuals), argued that the Tribe's promises of enrollment under the Judgment Funds Act violated tribal law and created a tribal-law cause of action. While the analysis of the Judgment Funds Act by the Saginaw Court involves a tribal-law claim, that Court's rationale is instructive. For much the same reasons considered by the Assistant Secretary, the Saginaw Court determined that the Judgment Funds Act neither promised the Plaintiffs membership nor the lineal descendants listed on the Secretary's Docket 57 roll. Moreover, the Saginaw Court determined the Judgment Funds Act, its legislative history, and the 1986 Constitution expressly contradict such a finding. *Fowler v. Saginaw Chippewa Indian Tribe of Michigan*, Case No.: 17-CA-0021 (Nov. 12, 2020), pp. 12-24, attached as Ex. A.

2. The Plaintiffs received full due-process rights and were found to not meet the constitutional enrollment criteria.

The proper inquiry regarding tribal membership is whether the Plaintiffs meet the Tribe's constitutional membership criteria. The Plaintiffs allege two main points: (1) that the Tribe promised to enroll "all descendants" who meet one-quarter Indian blood; and (2) that descendancy was not limited to direct, lineal descent. As noted above, the controlling document is the Tribe's 1986 Constitution. The Constitution does not make eligible "all descendants," only those who descend from four enumerated base rolls.

The second claim the Plaintiffs make is that the 1986 Constitution permitted collateral descendancy to the four enumerated base rolls, *i.e.*, having a great-great-aunt on a base roll. But the Plaintiffs have provided no support for this proposition. The 1937 Constitution required an individual either be named on the base roll *or* be the child born to a member. The child-born-to-a-member standard is a form of lineal descendancy, and the Tribe used this standard until the adoption of its 1986 Constitution. Moreover, the Docket 57 distribution plan required *lineal* descendancy to participate in Docket 57 payments. The 1986 Constitution was amended to include a larger percentage of those lineal descendants who would receive Dockets 59, 13E, and 13F money. Although the 1986 Constitution does not specifically state lineal descendancy, all previous enrollment standards and constitutional-amendment discussions were couched in terms of lineal descent.

The Tribe's Court of Appeals, in interpreting the 1986 Constitution determined "the Tribe has amply documented that Section 1(c) was conceived and understood as applying to lineal descendants only, including the standards utilized by the BIA prior to self-governance; Chief Arnold Sowmick's 1984 statement to Congress; and the original membership application form which expressly requires documentation of lineal descent . . .." R. at 001795, 001800. The

Court of Appeals concluded by finding "that Article III, Section 1(c) of the Saginaw Chippewa Tribal Constitution Section 1(c) authorizes only the enrollment of lineal descendants of persons named in the base rolls enumerated under Section 1(a) and does not permit the enrollment of person on the basis that they are collaterally related to persons named in the enumerated base rolls." *Id.*

The Tribe and the Court of Appeals, in interpreting the Tribal Constitution, determined that the Constitution only envisioned lineal descendancy for enrollment purposes, not collateral descendancy, as the Plaintiffs alleged. The Assistant Secretary's acknowledged her intervention would upset established tribal law and replace the Tribe's interpretation of its own governing documents with that of an outsider. There could be no greater trampling of tribal self-governance than to seize control over the Tribe's membership rights.

V. Conclusion

The Plaintiffs have asked the Court to find the Assistant Secretary's finding that the Judgment Funds Act does not provide any authority to direct Saginaw tribal membership to be erroneous. But the Assistant Secretary did not accept the Plaintiffs' request to intercede in an internal tribal-membership dispute under the guise of authority in the Judgment Funds Act. The Judgment Funds Act did not mandate the enrollment or continued membership of the Plaintiffs. Moreover, its general enforcement authority did not apply to membership matters or other issues related to the 1986 Amended Constitution.

Under the Tribe's interpretation of its own governing documents, the Plaintiffs were not eligible as tribal members because they failed to meet the constitutional criteria. Because tribal-membership matters are generally beyond federal reach, the Plaintiffs attempt to use the Judgment Funds Act as a mandatory delegation of tribal-membership matters to the Secretary—

thus creating a federal hook for outside intervention. But the Plaintiffs failed because the Judgment Funds Act contains no specific and explicit authority—mandatory or discretionary—for the Secretary to intervene in tribal-membership disputes.

The Assistant Secretary rightly determined that she did not have any authority under the Judgment Funds Act to assume tribal-membership authority. And even if the Judgment Funds Act could be read so broadly as to include discretionary authority, the Assistant Secretary would not intervene because it would constitute a gross intrusion into tribal self-governance. The Assistant Secretary's decision is neither arbitrary, capricious, an abuse of discretion, or contrary to law. The Tribe respectfully requests the Court find the Plaintiffs' appeal without merit, deny the Plaintiffs' Motion for Summary Judgment, and grant the Tribe's Motion for Summary Judgment.

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