

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JULIA CAVAZOS, *et al.*,

Plaintiffs,

v.

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)

**REPLY BRIEF OF
INTERVENOR-DEFENDANT**

I. Introduction

Both parties to the Judgment Funds Act—the Saginaw Chippewa Indian Tribe (“Tribe”) and the Bureau of Indian Affairs (“BIA”)—agree that the Judgment Funds Act did not transfer tribal-membership authority from the Tribe to the BIA. The Plaintiffs’ Opposition Brief again fails to identify where in the Judgment Funds Act the Tribe agreed to relinquish its inherent right to determine membership or the BIA’s acceptance of that responsibility. The Assistant Secretary—Indian Affairs (“Assistant Secretary”) thoroughly

reviewed the Judgment Funds Act and determined no authority exists—inherent or statutory—to review tribal-membership decisions or supplant and compel the Tribe to take specific membership-related action. To find otherwise would blithely cast aside the plain language of the statute, impair tribal sovereignty, invalidate tribal law, and reject BIA deference to interpret legislation it is charged with implementing.

The Tribe brought its motion for one simple reason—the Tribe never bargained away, nor would it, its right to make membership determinations. Not through the Judgment Funds Act, not through its Constitution, and not through tribal law. The Judgment Funds Act neither cedes tribal authority over membership decisions nor does it evince a federal assumption of that role. The Tribe agreed to amend its membership criteria through the 1986 Constitution in return for access to federal land-claims compensation funds. That is a bargain the Tribe made; that is the bargain the Tribe accepts. The Judgment Funds Act, however, does not delegate membership-decision authority to the federal government. Neither the plain language of the Judgment Funds Act, the legislative history, nor the Tribe's history demonstrate the Tribe's intent to abandon its inherent right to make membership decisions.

But the Plaintiffs take the Tribe's initial concession—amended membership criteria—and reach far beyond the plain language to allege far-reaching federal authority over membership-related decisions. *If* the Assistant Secretary did have authority under the Judgment Funds Act (and by extension the Tribe's Constitution), it would be so broad and sweeping as to completely remove the Tribe from every single facet of tribal membership. The Judgment Funds Act does not permit this affront against tribal sovereignty and it was not the bargain the parties struck. The Assistant Secretary-Indian Affairs properly interpreted

the Judgment Funds Act and determined it did not provide *any* authority—mandatory or discretionary—to assume control over tribal membership.

II. By focusing on the tribal-membership constitutional criteria—lineal versus collateral descendancy—the Plaintiffs fail to identify where in the Judgment Funds Act the Tribe delegated tribal-membership-decision authority to the Secretary.

The Plaintiffs do not analyze the actual statutory language. In its 33-page opposition, the Plaintiffs’ narrative leans heavily on “what everyone knew” and “what everyone intended” when Congress passed the Judgment Funds Act. Conversely, the Assistant Secretary’s analysis and decision relies exclusively on the *actual* language of the Judgment Funds Act—the proper starting point when analyzing a statute. But the Plaintiffs appear to have little interest in discussing the statutory language and thus fail to devote much time making a textual argument. This is understandable because Plaintiffs’ real complaint is with the Tribe’s interpretation of its own Constitution, *not* the Secretary’s administration and oversight of the Judgment Fund.

The Plaintiffs’ Opposition Brief removes any doubt that they are using the Judgment Funds Act as a pretense to overturn the legitimate sovereign function of the Tribal government to determine its membership and interpret its Constitution. The heart of Plaintiffs’ claim hinges on a tribal constitutional interpretation—whether collateral descent from the 1883, 1885, and 1891 base rolls is permitted or whether the constitution requires lineal descent. The Plaintiffs avoid the matter of *who* has the authority to make these constitutional determinations (Judgment Funds Act inquiry) by jumping ahead to argue about *what* the constitution requires (Constitution inquiry).

The Tribal Court of Appeals determined the Constitution does not permit collateral descendancy from the 1883, 1885, 1891, and 1982 base rolls, lineal descent is required. The Plaintiffs were disenrolled because they did not have a lineal ancestor on a constitutional base roll. This is strictly an interpretation of the Tribe's Constitution, not the Judgment Funds Act. And to remove any doubt the Plaintiffs' focus lies with the constitutional interpretation about collateral versus lineal descendancy, the following are instances where the Plaintiffs focus on "descendant" as used in the Constitution rather than what statutory language exists to take the authority to interpret the Constitution away from the Tribe and place it in the hands of the BIA.

The Tribe lists a small sampling of the Plaintiffs' focus on the constitutional issue of descendancy and *not* the real issue regarding Secretarial authority to make membership or constitutional decisions. These points aren't particularly helpful or even true, as the plain language of neither the Judgment Funds Act nor Tribal Constitution discuss collateral descendancy:

- "[T]he compromise bill that came out of the JFA negotiations guaranteed that collateral descendants of the constitutional base rolls of one-quarter Indian blood could still benefit . . . by joining the Tribe." (EFC 36, p.3).
- "[W]hy did the Tribe enroll hundreds of collateral descendants during open enrollment . . . ? *Id.*
- "Why didn't the Tribe disenroll the collateral descendants the day after open enrollment ended?" *Id.*
- "Why, during open enrollment, did BIA take the position that the 1986 Constitution permitted enrolment of collateral descendants of one-quarter Indian blood . . . ?" *Id.*
- "Plaintiffs . . . are of at least one-quarter Indian blood and can trace their ancestry collaterally to an individual listed on a constitutional base roll" *Id.* p. 4.

Beyond the first four pages, the Plaintiffs make over 30 additional mentions throughout its brief about collateral descendancy. But not *one* of these instances examines

where in the Judgment Funds Act Congress or the Tribe designated the Secretary as the arbiter of tribal-constitutional construction. Who gets to make the decision whether the Constitution's use of "descendant" includes collateral descendency? The Plaintiffs are unable to point to any Judgment Funds Act language that grants the Assistant Secretary authority to interpret the Tribe's Constitution. The analysis begins and ends with the actual language of the Judgment Funds Act.

The Judgment Funds Act must include a clear and unequivocal indication, on its face, that the Tribe intended to delegate tribal-membership authority to the Secretary. The Plaintiffs have not pointed to such delegation because it simply does not exist.

III. Any surrender of the Tribe's inherent authority to determine membership must be done by clear and unequivocal language.

Tribal sovereignty immunity and tribal membership are vital elements in ensuring Tribal self-preservation and self-governance. But unlike a sovereign-immunity analysis, there exists little guidance or standard to examine whether a Tribe, through a federal statute, has ceded its inherent authority to determine membership. Arguably, a sovereign's authority to determine its own membership is a more important aspect of self-governance than sovereign-immunity. A standard at least as exacting as the sovereign-immunity-waiver standard should apply in this instance.

In the sovereign-immunity context, the waiver or cession of this important self-governance right "cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-9 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)); accord *Dellmouth v. Muth*, 491 U.S. 223, 227-28 (1989) (Congress may abrogate the States' constitutionally secured immunity from suit only by making its intention

unmistakably clear in the language of the statute.) Because exercising tribal-membership authority is even more critical and important as sovereign immunity, at least this exacting standard should apply—a Tribe must delegate its membership authority by clear, express, and unequivocal terms. A review of the Judgment Funds Act reveals no such delegation, let alone one that is explicit and identifiable.

In *Aguayo v. Jewell*, the Ninth Circuit examined the Pala Band’s constitution and enrollment ordinance to determine what, if any, authority the Assistant Secretary-Indian Affairs had to approve enrollment or disenrollment decisions. 827 F.3d 1213, 1218 (9th Cir. 2016). The Pala Band’s 1960 Articles of Association and 1961 membership ordinance stated that the tribal executive committee made membership recommendations, but the Bureau of Indian Affairs was expressly granted ultimate authority over whether an applicant was enrolled. *Id.* In that instance, explicit and direct delegation in the articles and ordinance conferred authority to the Secretary to make final tribal-enrollment decisions.

The Pala Band subsequently amended its Constitution and adopted a new enrollment ordinance that vested ultimate authority over enrollment decisions to the tribal executive committee and relegated the Bureau of Indian Affairs to an advisory role. The Ninth Circuit ultimately decided that under the new constitution and enrollment ordinance, there was no federal authority to act but discussed the clear authority the Band had earlier delegated under the original 1960s documents. That the Pala Band’s delegation was revocable underscores that the authority ultimately rests with the tribe.

That same exacting standard of explicit delegation should apply here to determine if the Tribe intended, through the Judgment Funds Act, to delegate its right to determine membership to the federal government. Nowhere in the Judgment Funds Act has the Tribe

shifted the Tribe’s enrollment authority to the federal government. Based on a plain reading of the Judgment Funds Act, the Assistant Secretary has no authority—mandatory or discretionary—to oversee tribal membership.

The Tribe agreed to amend its Constitution and its membership criteria as incorporated into the Judgment Funds Act, nothing more. The Tribe did not grant the federal government the right to review, interpret, or approve the implementation or interpretation of the tribal Constitution and its membership criteria. In the intervening 35 years, neither the Tribe nor the federal government have operated under an assumption that the Tribe had dealt away its membership-determination authority.

IV. The Judgment Funds Act’s plain language does not even hint at a role for the BIA over tribal-membership issues, let alone plainly grant it authority.

As a corollary to requiring a clear and unequivocal delegation from the Tribe of its tribal-membership authority, the Judgment Funds Act lacks *any* language discussing the federal government’s assumption of a membership-review role. At the outset, the “language at issue” is examined to determine whether it “has a plain and unambiguous meaning with regard to the particular dispute in [this] case.” *United States v. Villanueva–Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If such an unambiguous meaning is apparent, the “inquiry ends and [the court must] apply the statute’s plain language.” *Id.*; see also *United States v. Cordova*, 806 F.3d 1085, 1099 (D.C. Cir. 2015) (“In determining the ‘plainness or ambiguity of statutory language’ we refer to ‘the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’”) (quoting *United States v. Wilson*, 290 F.3d 347, 353 (D.C. Cir. 2002)).

Unsurprisingly, the Judgment Funds Act grants the Secretary limited authority in matters regarding the judgment funds, not tribal membership. And while the Tribe made tribal-membership concessions by broadening its membership criteria, nothing in the Judgment Funds Act exists which grants the Secretary any authority over tribal membership, the Constitution, or tribal affairs beyond the actual management of the judgment funds.

V. Conclusion

Tribal membership, membership criteria, and the Tribe's 1986 Constitution are integral components of the Judgment Funds Act. To be sure, they are inextricably intertwined. The Judgment Funds Act clearly sets out the parameters of federal oversight and ties it almost exclusively to the actual management objective of the Judgment Fund—financial-mismanagement oversight. But to extend this limited authority to tribal-membership decisions is a bridge too far.

As an inherent right of self-governance, the Tribe jealously guards its tribal-membership authority. To steal that authority away from the Tribe with anything less than a clear and unequivocal tribal surrender in the Judgment Funds Act is unconscionable. The parties did not negotiate a transfer—the Tribe did not cede its authority and the BIA did not assume the mantle. And the Judgment Funds Act reflects that understanding; it is devoid of any language regarding tribal-membership decisions. These decisions—these essential pillars of a tribe's exercise of its inherent sovereign power—should remain where they have always existed, with the Tribe.

The Assistant Secretary's decision finding no authority to assume tribal-membership decisions is neither arbitrary, capricious, an abuse of discretion, or contrary to law. The

Tribe respectfully requests the Court grant its motion for summary judgment and deny the Plaintiffs' motion for summary judgment.

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