

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<p>MACKINAC TRIBE,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>THE HONORABLE SALLY JEWELL, U.S. Secretary of the Interior,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No. 1:14cv00456-KBJ</p>
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PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

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INTRODUCTION

The Mackinac Tribe brought suit under the Indian Reorganization Act to order the Secretary of the Interior to conduct elections under the Indian Reorganization Act (IRA) to adopt a proposed Constitution for the tribe, and to determine whether the Mackinac Tribe is a federally recognized Tribe for the purposes of the IRA. Secretary Jewell has moved for dismissal under FRCP 12(b)(1) [lack of subject matter jurisdiction] and 12(b)(6) [failure to state a claim upon which relief can be granted] arguing that 1) the suit is barred by sovereign immunity, 2) Mackinac is not eligible to request an election, 3) the tribe failed to exhaust administrative remedies 4) the controversy is not ripe, and 5) the matter is non-justiciable. The Court should deny the motion, because 1) Plaintiff has presented a plausible claim alleging plausible violation of the IRA by the Secretary, 2) Congress has specifically authorized suits to enforce the IRA, 3) Mackinac is a tribe within the meaning of the IRA, and 4) exhaustion, ripeness and justiciability concerns are not applicable to the present case and do not justify dismissal.

I. **STANDARD FOR DISMISSAL/ALLEGED FACTS.** When considering any motion to dismiss, this Court “accept[s] all of the factual allegations in [the] complaint as true.” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 164, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), (construing a FRCP 12(b)(1) motion); *Sloan v. U.S. Dep’t of Housing & Urban Dev.*, 236 F.2d 756, 759 (D.C.Cir. 2001)¹ (construing a FRCP 12(b)(6) motion).

a) Subject Matter Jurisdiction (FRCP 12(b)(1). “[P]laintiff[s]’ factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion” than in resolving a 12(b)(6) motion for failure to state a claim. *Grand Lodge of Fraternal Order of Police v.*

¹ *Quoting United States v. Gaubert*, 499 U.S. 315, 327 (1991))

Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C.2001) This court may consider material other than the allegations of the complaint in determining whether it has jurisdiction to hear the case, as long as it accepts the factual allegations in the complaint as true. *See Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005).² The Plaintiff agrees with the Secretary that the Court may only consider undisputed facts evidenced in the record.³ If there are disputed facts, the Court must resolve the factual dispute material to its subject matter jurisdiction. *Herbert v. Nat'l Acad. of Science*, 974 F.2d at 197.⁴ The district court retains “considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,” but it must give the plaintiff “ample opportunity to secure and present evidence relevant to the existence of jurisdiction.” *Prakash v. American University*, 727 F. 2d 1174, 1179-80 (D.C. Cir. 1984). As explained below, the IRA authorizes this suit and confers subject matter jurisdiction on this Court.

b) Failure To State A Claim (FRCP 12(b)(6). The Plaintiff also agrees with the Secretary that a Rule 12(b)(6) motion tests the legal sufficiency of a complaint.⁵ “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 563 (2009)⁶

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.*

2 See also *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 n. 3 (D.C. Cir. 1997); *Herbert v. Nat'l Acad. of Science.*, 974 F.2d 192, 197 (D.C.Cir.1992); *Haase v. Sessions*, 835 F.2d 902, 906 (D.C.Cir.1987); *Hohri v. United States*, 782 F.2d 227, 241 (D.C.Cir.1986).

3 Def. Memo.- Dismiss, at 10 citing *Herbert v. Nat'l Acad. Of Science*, *supra*.

4 See also, *Phoenix Consulting Inc. v. Republic of Angola*, 216 F. 3d 36 (D.C. Cir. 2000)

5 Def. Memo.- Dismiss, at 10 citing *Browning v. Clinton*, 292 F. 3d 235, 242 (D.C. Cir. 2002).

6 Citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)

As with all motions to dismiss, the Court must accept as true all of the factual allegations contained in the Complaint. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); See also *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A court may not grant a motion to dismiss for failure to state a claim “even if it strikes a savvy judge that . . . recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (internal quotation marks and citation omitted). “So long as the pleadings suggest a plausible scenario to show that the pleader is entitled to relief, a court may not dismiss.” *Tooley v. Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009) (quoting *Twombly*, 550 U.S. at 557); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”).

The plausibility standard is not akin to a “probability requirement.” *Id.* The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of its claim. *Twombly*, 550 U.S. at 556. The 12(b)(6) analysis is “context-specific,” so courts should draw upon “judicial experience and common sense” in deciding whether the facts in a complaint describe a plausible violation of law. *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 39 (D.D.C. 2010) (citing *Iqbal*, 129 S.Ct. At 1950). Thus, if the complaint has pled sufficient facts to show the plausibility of the Defendant’s liability, the Court should deny the motion to dismiss.⁷ As discussed below, the pled facts clearly establish that the Secretary had an obligation to order an election under the IRA.

c) Undisputed and Disputed Facts. As noted above, in both *Bell Atl. Corp. v. Twombly*, and *Ashcroft v. Iqbal*, the Court should consider the pled facts as undisputed. In this case, those facts are as follows:

⁷ *Id.*

The Mackinac are a federally recognized Indian Tribe,⁸ who received separate recognition in the Treaty of 1855,⁹ and promised to continue that separate recognition into the future. That recognition has never been terminated.¹⁰ Notwithstanding that history, the Secretary refuses to honor the 1855 treaty. While that statement is conclusory, it is supported by the other alleged facts, which the Secretary does not contest, and which are easily verifiable by the holdings of other Courts (*e.g.*, *U.S. v. Michigan*, 471 F. Supp. 192 (1979)), or other easily ascertainable government sources.

The Chippewa (Ojibwa) and Ottawa (Odawa) Indians are aboriginal and indigenous Algonquin Indian people who occupied areas east of the Mississippi River within the present confines of the northeastern portion of the present United States prior to European contact and settlement within such area.¹¹ Originally the Chippewa and Ottawa Indians of North America were organized along band, village and locality basis, and not within a single tribal Nation.¹² Between the years 1783 to 1855, the United States collectively dealt with the Chippewa and Ottawa Indian bands as a single national entity deemed to be the Ottawa and Chippewa Nation for the convenience of the United States to effectuate land cessions from the Chippewa, Ottawa and other Indians.¹³ For example, in the Treaty of 1836¹⁴ was between the United States and an entity called “the Ottawa and Chippewa Nation of Indians.”¹⁵ Prior to 1855 the United States negotiated and entered into 29 treaties with the Ottawa and Chippewa Nations.¹⁶ In 1815, the

8 Complaint, at para 36

9 Complaint, at para 12; Treaty of July 31, 1855 (11 Stat. 621) - with the “Ottawa and Chippewa”

10 Complaint, at para 36

11 Complaint, at para 5 See *U.S. v. Michigan*, 471 F. Supp., at 220

12 Complaint, at para 6 See *U.S. v. Michigan*, 471 F. Supp., at 247

13 Complaint, at para 7 See *U.S. v. Michigan*, 471 F. Supp., at 264

14 Treaty of March 28, 1836 (7 Stat. 491)

15 Complaint, at para 7 See *U.S. v. Michigan*, 471 F. Supp., at 276

16 Complaint, para 8. There are 29 such treaties. See Treaty of January 21, 1785 (7 Stat. 16) - with the “Wyandot, Delaware, Chippewa and Ottawa Nations.”; Treaty of January 9, 1789 (7 Stat. 28) - with

Secretary of War, Defendant's predecessor, established the Mackinac Indian Agency to implement the treaties with the Chippewa and Ottawa, maintained the agency as the principle

the "Sachems and Warriors of the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac Nations."; Treaty of August 3, 1795 (7 Stat. 49) - with the "Tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias."; Treaty of July 4, 1805 (7 Stat. 87) - with the "sachems, chiefs, and warriors of the Wyandot, Ottawa, Chipawa, Munsee and Delaware, Shawanee, and Pottawatima nations."; Treaty of November 25, 1808 (7 Stat. 112) - with the "Sachems, chiefs, and Warriors of the Chippewa, Ottawa, Pottawatamie, Wyandot, and Shawanoese nations of Indians."; Treaty of September 8, 1815 (7 Stat. 131) - with the "Wyandot, Delaware, Seneca, Shawanoe, Miami, Chippewa, Ottawa, and Potawatimie, Tribes of Indians, residing within the limits of the State of Ohio, and the Territories of Indiana and Michigan."; Treaty of August 24, 1816 (7 Stat. 146) - with the "chiefs and warriors of the united tribes of Ottawas, Chipwawas, and Pottowotomees, residing on the Illionois and Melwakee rivers, and their waters, and on the southwestern parts of Lake Michigan."; Treaty of September 29, 1817 (7 Stat. 160) - with the "sachems, chiefs, and warriors, of the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippewa, tribes of Indians."; Treaty of September 24, 1819 (7 Stat. 203) - with the "Chippewa nation of Indians."; Treaty of June 16, 1820 (7 Stat. 206) - with the "Chippeway tribe of Indians."; Treaty of July 6, 1820 (7 Stat. 207) - with the "Ottawa and Chippewa nations of Indians."; Treaty of August 29, 1821 (7 Stat. 218) - with the "Ottawa, Chippewa, and Pottawatamie, Nations of Indians."; Treaty of August 19, 1825 with the Chippewa, Sioux, Sac and Fox, Menominee, Ipway, Winnebaw, Ottawa and Potawattomie tribes (7 Stat. 272); Treaty of August 5, 1826 (7 Stat. 290) - with the "Chippewa Tribe of Indians."; Treaty of August 11, 1827 (7 Stat. 303) - with the "Chippewa, Menomonie, and Winebago tribes of Indians."; Treaty of August 25, 1828 (7 Stat. 315) - with the "Winnebago tribe and the United Tribes of Potawatamie, Chippewa and Ottawa Indians."; Treaty of July 29, 1829 (7 Stat. 320) - with the "United Nations of Chippewa, Ottawa, and Potawatamie Indians, of the waters of the Illinois, Milwaukee, and Manitououck Rivers."; Treaty of September 26, 1833 (7 Stat. 431) - with the "United Nation of Chippewa, Ottawa and Potawatamie Indians ... being fully represented by the Chiefs and Head-men whose names are hereunto subscribed."; Treaty of March 28, 1836 (7 Stat. 491) - with the "Ottawa and Chippewa nations of Indians, by their chiefs and delegates."; Treaty of May 9, 1836 (7 Stat. 503); U.S. treaty of January 14, 1837 with the Saginaw Band (7 Stat. 528); Treaty of July 29, 1837 (7 Stat. 536) - with the "Chippewa nation of Indians, by their chiefs and headmen."; Treaty of December 20, 1837 with the Saginaw band (7 Stat. 547) - with the "Saganaw tribe of Chippewas."; Treaty of January 23, 1838 with the Saginaw band (7 Stat. 565) - with the "several bands of the Chippewa nation comprehended within the district of Saganaw."; Treaty of February 7, 1839 with the Saginaw band (7 Stat. 578) - with the "Saganaw tribes of Chippewa."; Treaty of October 4, 1842 with the Chippewa of the Mississippi and Lake Superior (7 Stat. 591) - with the "Chippewa Indians of the Mississippi, and Lake Superior, by their chiefs and headmen."; Treaty of August 2, 1847 with the Chippewas of the Mississippi and Lake Superior (7 Stat. 904) - with the "Chippewa Indians of the Mississippi and Lake Superior, by their chiefs and head-men."; Treaty of August 21, 1847 with the Pillager band (7 Stat. 908) - with the "Pillager band of Chippewa Indians, by their chiefs, head-men, and warriors."; Treaty of September 30, 1854 with the Chippewas of the Mississippi and Lake Superior (10 Stat. 1109) - with the "Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men.".

federal office through which relations with the Mackinac operated, and provided services to the Mackinac based upon their status as Indians.¹⁷

In these treaties, the Ottawa and Chippewa Indians of Michigan were represented by participating chiefs from 42 bands of Indians of which 31 bands were Ottawa and 11 bands were Chippewa, including seven (7) bands roughly located in and around the Mackinac Straits between Big Bay D’Noc and Drummond Island, variously identified as Mackinac/ Michilimackinac, or some variation thereof.¹⁸ Of particular relevance, the Treaty of 1836 completed the Indian land cessions in Michigan, and was signed by many of the Mackinac chiefs and included in Article III, reservations for the Mackinac (aka Michilimackinac).¹⁹

Between 1836 and 1855, Chippewa and Ottawa Indians of Michigan asserted various treaty violations and other equitable claims based upon the Treaty of 1836 and prior treaties, which were addressed in the Treaty of 1855.²⁰ During the negotiations of the 1855 treaty, Waw-Be-Geeg, a spokesman for the Michigan Indians stated, “ At the Treaty of (18)36 our Fathers were in partnership with the Ottawa, but now that partnership is finished and we who come from the foot of Lake Superior wish to do business for ourselves.”²¹

In such negotiations, the United States, the Ottawa and the Chippewa agreed to the provisions Article V of the Treaty of 1855, which provided:

17 Complaint, at para 9 See Letter To James Madison from Alexander J. Dallas, June 19, 815 (U.S. Dept. of War)(Letters to the President - U. Of Virginia Press, 2009)

18 Complaint, at para 10 E.g. Treaty of March 28, 1836 (7 Stat. 491) - with the “Ottawa and Chippewa nations of Indians, by their chiefs and delegates.”; Treaty of July 31 1855 (11 Stat. 621) - with the “Ottawa and Chippewa

19 Complaint, at para 11; Treaty of March 28, 1836 (7 Stat. 491) - with the “Ottawa and Chippewa nations of Indians, by their chiefs and delegates.”

20 Complaint, at para 12; Treaty of July 31, 1855 (11 Stat. 621) - with the “Ottawa and Chippewa”

21 Complaint, at para 13; Se Tr. 1855 Negotiations; See also *Michigan Indian Recognition, Hearing before the Subcomm. on Native American Affairs of the Comm. on Natural Resources*, 103rd Cong., 1st Sess. 125 (Sept. 17, 1993) [hereinafter *Michigan Indian Recognition*] (prepared statement of Dr. James M. McClurken)

The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented.²²

The Treaty of 1855, specifically, referenced eight (8) “vicinities” for the residence of the Indians in question and for the “usual place of payment” of annuities under the 1836 and 1855 Treaties. The “Macinac” vicinities were identified as Townships 42 north, ranges 1 and 2 west (near St. Ignace, Michigan) and township 43 north, range 1 west, and township 44 north, range 12 west (near Manistique, Michigan).²³

In 1872, Secretary of the Interior Columbus Delano, a predecessor to the above named Defendant, implemented a policy of “administrative termination” with respect to the Michigan tribes who were signatory to the Treaty of 1855, including the Plaintiff, Mackinac Tribe.²⁴

In 1889, the Defendant’s predecessor closed the Mackinac Agency, and federal services to the Mackinac, based upon their status as Indians, ceased.²⁵ Courts have held that Secretary Delano “illegally acted as if the (Chippewa) Band’s recognition had been terminated.”²⁶

Since that time, the Mackinac have continued to maintain tribal relations.²⁷ In 1910, the Bureau of Indian Affairs conducted an enrollment of the Mackinac tribe, together with other

²² Complaint, at para 14; See Treaty of July 31, 1855 (11 Stat. 621) - with the “Ottawa and Chippewa”

²³ Complaint, at para 15; See Treaty of July 31, 1855 (11 Stat. 621) - with the “Ottawa and Chippewa”

²⁴ Complaint, at para 16; See *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the Western District of Michigan*, 369 F.3d 960, 968 (6th Cir. 2004).

²⁵ Complaint, at para 17; See *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the Western District of Michigan*, 369 F.3d 960, 961-2 (6th Cir. 2004).

²⁶ Complaint, at para 18; *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the Western District of Michigan*, 369 F.3d 960, 968 (6th Cir. 2004).

Michigan Indian tribes, known as the Horace B. Durant Roll, and identifying such Mackinac tribal members as members of such tribe for the purposes of receiving annuities and other services provided to Indian people because of their status as Indian.²⁸ As a result, the individual identities of the Mackinac are easily ascertainable with a high degree of certainty, and their modern-day descendants (including blood quantum) is equally ascertainable with a high degree of certainty.

In 1916, the Mackinac organized a claims committee to present equitable claims on behalf of the Mackinac to the United States.²⁹

On April 4, 1916 the Mackinac claims committee recorded a Power of Attorney at the Mackinac County Records Office naming David Corp for the purposes of pressing Mackinac claims.³⁰

In 1926, Secretary Hubert Work, the Defendant's predecessor, requested and commissioned an investigation and report on the condition and affairs of Indians in the United States, which resulted in the report entitled "The Problem of Indian Administration", also known as the "Meriam Report".³¹ The Meriam Report documented the continued existence of the

27 Complaint, at para 19 ; See Wright, Richard, *The Origin of the Sault Ste Marie Tribe of Chippewa Indians and Bay Mills Indian Community*, at 15 (University of Utah; 1980)

28 Complaint, at para 20; See Correspondence, Field Notes and Census Roll of All Members of Descendants of Members Who Were On the Roll of the Ottawa and Chippewa Tribes of Michigan in 1879, and Living on March 4, 1907 (Durant Roll) No. M-2039 (U.S. National Archives) The Mackinac bands were identified as Bands 11-17 and known as Band 11 (Pine River Band), Band 12 (les Chenaux (The Snows)), Band 13 (Mackinac Island Band- ½ Breeds) Band 14 (Mackinac Island Band-full bloods, Band 15 (Point of St Ignace, Ainse Band), and Band 16 (Point Aux Chenes, Ainse Band), Band 17 (Hubert Lake in the Lower Peninsula)

29 Complaint, at para 21; The officers of the committee were Napoleon Rapin (Chairman), Elmer Corp (Secretary) and Perry Kelly (Treasurer). Members included Louis Bolan, August Hamilin and Joseph Kewandaway, Angelique Paul Hamilin, and Hyacinth, Roselie and Moses Hamilin (Mackinac Tribal Records)

30 Complaint, at para 22

31 Complaint, at para 23; H. Rpt. 110-98, (March 14, 2008); Meriam, *The Problem Of Indian Administration*, (1928)

Mackinac Bands as being the largest identifiable Indian tribe in Michigan with a population of 1,193 in 1926.³²

In 1972, the Indian Claims Commission decisions awarded judgments in Docket Nos. 18–E, 58, and 364 to the Ottawa and Chippewa Indians of Michigan, including the claims of the Mackinac.³³

In November 1979, the Mackinac, through Michael Wright and the Consolidated Bahweting Ojibwa and Mackinac Tribe wrote a letter of intent to the Commissioner of the Bureau of Indian affairs requesting federal reaffirmation of the Mackinac’s Indian’s status as a federally recognized Indian tribe.³⁴

In 1997, the United States Congress enacted the Michigan Indian Land Claims Settlement Act,³⁵ which anticipated distribution of settlement funds to certain members of the Michilmackinac (i.e. the Mackinac).³⁶

In the 1990s, the seven (7) historic bands of the Mackinac are variously organized into different groups, including the Mackinac Bands of Chippewa and Ottawa, the Mackinac Tribe of the Odawa and Ojibwa Indians (aka Bands of Point St. Ignace) and the Mackinac Bands of Ottawa and Chippewa Indians.³⁷

On May 13, 1998, the Mackinac Bands of Chippewa and Ottawa Indians filed a letter of intent to file a petition seeking federal acknowledgment of the Mackinac pursuant to the Office

32 Complaint, at para 24; H. Rpt. 110-98, at p. 56 (March 14, 2008) Meriam, *The Problem Of Indian Administration*, p. 65 (1928)

33 Complaint, at para 25

34 Complaint, at para 26; Wright, R., *The Origin of the Sault Ste Marie Tribe of Chippewa Indians and Bay Mills Indian Community* (PhD. University of Utah, 1980) Chapter 1, P. 15;

35 Complaint, at para 27; See PUBLIC LAW 105–143

36 Complaint, at para 267; Id. §§106(d)

37 Complaint, at para 28

of Federal Acknowledgement process [25 CFR 83] which was assigned designation as “Group 186” within the OFA docket.³⁸

In the addition, all the other above referenced Mackinac organizations have sought or otherwise supported federal reaffirmation of the Mackinac.³⁹

In March and April of 2011 the various Mackinac groups came together and entered into a Compact of Association To Form a Coalition Tribal Government With Limited Powers for the Mackinac People or Bands (hereinafter referenced as “Compact”)⁴⁰

The Compact formed a Coalition Tribal Government for the purposes of seeking reorganization of the Mackinac under the Indian Reorganization Act.⁴¹

Prior to August 8, 2011, the Mackinac Coalition Tribal Government approved a draft Constitution for the Mackinac Tribe.⁴²

The Secretary acknowledges that on August 8, 2011, the Mackinac Coalition Tribal Government submitted a request to the Secretary of the Interior to call and conduct an election to approve the above referenced draft Constitution pursuant to the Indian Reorganization Act [25 USC § 476; 25 CFR Part 81].⁴³ It is uncontested that the Secretary failed to respond to such request.⁴⁴

38 Complaint, at para 29

39 Complaint, at para 30

40 Complaint, at para 31

41 Complaint, at para 32

42 Complaint, at para 33

43 Complaint, at para 34 See. Def. Memo, at 3

44 Complaint, at para 35

II. CONGRESS HAS CONSENTED TO THE SUIT/THE IRA WAIVES FEDERAL SOVEREIGN IMMUNITY

The Secretary asserts the federal government's sovereign immunity and misdirects the Court's attention to irrelevant statutes.⁴⁵ The complaint alleges that the Secretary failed to hold an election under the Indian Reorganization Act (IRA) [25 USC §476] in violation of the IRA. The Secretary seeks to recast the Tribe's complaint as a challenge to the process established in 25 CFR Part 83, and in doing so overlooked an important provision in the Indian Reorganization Act which consents to suits enforcing the IRA.

This action is brought pursuant to 25 USC §476(d)(2), which provides in pertinent part:

If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. **Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.** (emphasis added)

The statute's language could be no plainer. Every Court that has addressed the issue – including this Court – has clearly held that the above language – contained in the 1988 amendments to the IRA⁴⁶ – provides a waiver of federal sovereign immunity. *Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 794 (D.C.C, 1990) [“By enacting this provision, Congress consciously waived the United States’ sovereign immunity and consented to suit.”]⁴⁷

This conclusion is supported by the legislative history of the 1988 amendments. Both the Senate and House Reports state that “[t]he tribe also has the right to challenge any finding made by the Secretary as to the legality of a proposed tribal document in the appropriate Federal

⁴⁵ Def. Memo, at 11-13. Essentially the Secretary argues that 28 USC §§ 1331 (federal question jurisdiction, and 1362 (jurisdiction over suit brought by an Indian tribe) do not waive the federal governments sovereign immunity. While those statutes confer jurisdiction over this action, the plaintiff makes no assertion that those statutes waive the federal government's sovereign immunity, because there is specific consent in the IRA itself. See below.

⁴⁶ Title I, § 101, Nov. 1, 1988, Pub. L. 103-263; 102 Stat. 2938.

⁴⁷ See also, *Wopsock v. Natchees*, 279 Fed. Appx. 679, 686 (10th Cir., 2008); *Allen v. U.S.* 871 F.Supp. 2d 982 (N.D. Ca, 2012)

court.” S.Rep. No. 577, 100th Cong., 2d Sess. 2 (1988); H.R.Rep. No. 453, 100th Cong., 1st Sess. 3 (1987). As explained by the Court in *Allen v. U.S.*, “the reports to the amendment clarify that the Secretary has a mandatory, non-discretionary duty to call a tribally requested election within a time certain after receipt of a tribal request, and that a tribe “has the right to challenge any finding made by the Secretary *as to the legality of a proposed tribal document* in the appropriate Federal court.” *See* S. Rep. 100-577, at 2 (Sept. 30, 1988), 1988 U.S.C.C.A.N. 3908, 3909 (emphasis in original).⁴⁸

There is no serious question that Congress has waived sovereign immunity to allow tribes to bring suit to compel the Secretary to hold an election under the IRA.⁴⁹

III. MACKINAC IS TRIBE AS DEFINED IN THE IRA AND ELIGIBLE FOR REORGANIZATION.

“There has never been a single, all-purpose definition of the terms ‘Indian tribe’ or ‘Indian nation.’⁵⁰ Thus, in determining whether a group of Indians constitute a tribe, the context and purpose of that determination is critical. Equally, as demonstrated below, the term Indian tribe varies as between statutes, and it is important to align statutory definitions with the applicable statute. The Secretary’s argument is that the Mackinac are not a tribe based upon a reading of the wrong statute – i.e. 25 USC § 479a.⁵¹

a) The Secretary Cites To The Wrong Statute To Define Indian Tribe.

48 871 F.Supp. 2d, at 988-989

49 In all of these cases, the Court’s noted the need to confirm the tribal status of the plaintiff, which addressed below.

50 COHEN, Handbook of Federal Indian Law, 135 [§3.02(1)] (2005 Ed., LexisNexis)

51 The full section reads,

For the purposes of this title:

(1) The term “Secretary” means the Secretary of the Interior.

(2) The term “Indian tribe” means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term “list” means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

The Secretary's reliance on §479a is wrong because that section does not refer to the IRA. Rather, it defines the term "Indian tribe" as used in "this title", which refers to the Tribal List Act.⁵² In a codified title, the term "this title" most often means the entire title. However, the reference to "title" in the introductory provisions of §479a refers to Title I of Pub. L. 103-454, Nov. 2, 1994; 108 Stat. 4791, of which §479a is a part.⁵³ The reason for this is that P.L. 103-454 dealt with various topics, which were set out in separate titles. The title referenced in §479a is a reference to the title in the statute, not Title 25 of the US Code. In short, the definition of Indian tribe contained in §479a refers to the use of that term for the purposes of the Tribal List Act, not the IRA.⁵⁴

b) The IRA Definition of Tribe.

The IRA defines Indian tribe in a slightly, but significantly, different way. The appropriate definition of tribe for IRA purposes is actually contained in the IRA itself. Specifically, the IRA definition of Indian Tribe is found at 25 USC §479, which reads as follows:

The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.⁵⁵

The obvious, and significant difference between §479 and §479a is that the IRA does not require that an Indian tribe be "acknowledged" by the Secretary as required under the Tribal List Act. To the extent that the Secretary argues that the use of the term "acknowledges" in §479a

52 Technically, called the "Federally Recognized Indian Tribe List Act of 1994." *infra*.

53 See annotated notes in the USCA for this section.

54 The Secretary's error is not unreasonable. As with so much in Indian law, Title 25 of the US Code has anachronistic nuances, one of which is a source of confusion in the present matter. Title 25 has not been enacted into positive law. Certain titles of the US Code are enacted as positive law, in which case, those titles constitute legal evidence of the law in all Federal and State courts. *See* 1 USC § 204. Non-positive law titles are merely *prima facie* evidence of the law. *Royer's, Inc. v. United States*, 265 F. 2d 615 (3rd Cir., 1959) Where there is conflict, the Statutes at Large control. *Id.* Conflicts between the US Code and the Statutes at Large are very rare, however, in this case, the conflict is both confusing and significant.

55 Sec. 19 of the Act of June 18, 1934, ch. 576; 48 Stat. 988,

restricts application of that statute to tribes appearing on the BIA's tribal list, so the omission of such language from §479 would strongly imply that formal federal acknowledgment is not a pre-condition to organization under the IRA.

It is significant that Congress amended §16 of the IRA in the 1988 Amendments to expanded the right to organize under the Act to more tribes. Prior to 1988, tribes were required to "reside" on a reservation in order to have a right to organize under the IRA.⁵⁶ The 1988 Amendment removed this requirement from §16.

It is also significant that the Part 83 process and the Secretary's list was operational at the time Congress enacted the 1988 Amendments, but Congress did not restrict reorganization under the statute to tribes appearing on that list.

The IRA statutory definition of tribe is clearly more expansive than the definition of tribe under the Tribal List Act in other ways. For example, miscellaneous and otherwise unassociated Indians having a common bond of residence on the same reservation may seek to organize under the IRA, but they are not eligible to seek recognition under Part 83 because common residence on a reservation is not a sufficient basis for acknowledgement under Part 83, and is not even a criteria consider in the acknowledgment process.⁵⁷

Finally, if reading of these two statutes creates an ambiguity, that ambiguity must be resolved in favor of the Plaintiff because a basic canon of Indian law is that statutes are to be liberally construed in favor of the Indians, and all ambiguities are to be resolved in favor of the Indians.⁵⁸

⁵⁶ The provision originally read: "Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare Sec. 16 of the Act of June 18, 1934, ch. 576; 48 Stat. 988,

⁵⁷ Compare 25 CFR Part 83.7

⁵⁸ *McClanahan v. Ariz. State Tax Comm.*, 411 U.S. 164, 176 (1973); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-768 (1985) ; *County of Yakima v. Confederated Tribes*, 502 U.S. 251, 269 (1992)

c) The IRA Regulations Definition of Tribe.

The BIA regulations clarify that a tribe need not be on the Federal Register list to be considered a tribe for organization under the IRA. The IRA implementing regulations are found at 25 CFR Part 81. The applicable regulation defines “tribe” to mean

Any Indian entity that has not voted to exclude itself from the Indian Reorganization Act and is included, **or is eligible to be included**, among those tribes, bands, pueblos, groups, communities, or Alaska Native entities listed in the Federal Register pursuant to § 83.6(b) of this chapter as recognized and receiving services from the Bureau of Indian Affairs; and (2) any group of Indians whose members each have at least one-half degree of Indian blood for whom a reservation is established and who each reside on that reservation. **Such tribes may consist of any consolidation of one or more tribes or parts of tribes.** (emphasis added)⁵⁹

There is no question that the “or is eligible” language in the implementing regulations means that tribes not listed on the tribal list are tribes for the purpose of reorganizing under the IRA if they would be eligible to be included on the list. This is clearly a lower standard than a requirement that the tribe actually be on the Secretary’s list. The regulation does not say that the applicant tribe must be on the list or go through the acknowledgment process set forth in 25 CFR Part 83. Indeed, as discussed in greater detail below, nearly all the tribes on the list did not go through the Part 83 process, particularly the tribes initially listed, as well as tribes in Alaska and California, the latter two groups of which comprise a majority of federally recognized tribes.

As in the IRA statutory definition, the IRA implementing regulations provide for a broader definition of eligibility to reorganize than for recognition under Part 83. As with the statute, the IRA implementation regulation allow reorganization of Indians who merely have a common bond of residency on the same reservation.⁶⁰ As noted above, common residence on a reservation is not a sufficient basis for recognition under Part 83. Additionally, IRA

⁵⁹ 25 CFR Part 81.1(w)

⁶⁰ 25 CFR 81.1(w)

implementing regulations permit “parts of tribes” to reorganize under the IRA,⁶¹ but Part 83 regulations specifically preclude recognition of “splinter groups.”⁶²

The obvious legal conclusion is that federally recognized tribes under Part 83 is a subset of a more inclusive definition of Indian tribe under the IRA implementation regulations.

d) The Use Of The Common Law Definition of Tribe in Implementing The IRA.

The regulation language makes perfect sense in light of the history of the IRA. As described below, for the last 80 years, the BIA has determined the tribal status of an applicant Indian tribe on a case-by-case basis using the federal common law definition of tribe.

Implementation of the Indian Reorganization Act required the Secretary to make determinations as to which groups were eligible for the benefits of the Act. As other Courts have acknowledged, over the last eighty (80) years, the Secretary assesses each group of Indian people seeking recognition on a case-by-case basis to determine whether they constituted an “Indian tribe” within the meaning of the IRA.⁶³ In deciding whether a group constituted a “tribe” under the IRA, the Secretary used various factors, including whether the group has had treaty relations with the United States, has been determined to be a tribe by an Act of Congress or executive order, has been treated as having collective rights in tribal lands or funds, been treated as a tribe or band by other Indian tribes, and has exercised political authority over its members through a tribal council or other governmental forms.⁶⁴ These standards were clearly derived from the common law definition of Indian tribe adopted by the US Supreme Court in *Montoya v. U.S.*, 180 U.S. 261 (1901). That definition was understood to mean “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a

61 25 CFR Part 81.1(w) See emphasized text accompanying footnote 59 supra.

62 See 25 CFR Part 83.3(d)

63 *Allen v. U.S.*, 871 F. Supp. 2d, at 989-990, citing *Golden Hill Paugusset Tribe v. Weiker*, 39 F. 3d, at 57

64 COHEN, supra, at 149 citing Memo Sol. Int. Feb. 8, 1937 (Mole Lake Band of Chippewas).

particular though sometimes ill-defined territory.”⁶⁵ This definition of “Indian tribe” was generally used in interpreting the definition of Indian tribe used by Congress in other legislation: principally the Indian Depredation act and the Indian Non-Intercourse Act.⁶⁶

While the IRA definition of “Indian tribe” is somewhat circular – *i.e.*, an Indian tribe means an Indian tribe – the long history of the common usage and interpretation as to the statutory definition of Indian tribe can only lead to the conclusion that in enacting the IRA and using the term “Indian tribe,” Congress intended that the term should be defined in the manner the Courts had long accepted.

The history of federal acknowledgement and the IRA strongly support this conclusion. The IRA was part of the New Deal era of legislation, which sought to reorganize everything from the banks to the federal government itself. Leading up the enactment of the IRA, the Meriam Report found widespread poverty in Indian communities, and linked those conditions to mismanagement and administrative abuse throughout Indian country.⁶⁷ The IRA purposed to reorganize Indian tribes into modern governments and corporations.⁶⁸

In contrast, the BIA adopted Part 83 and began publishing a list of recognized tribes in 1978.⁶⁹ Since that time, however, the BIA has approved the reorganization of tribes that did not appear on the Secretary’s list prior to the reorganization. Alaska is a case in point.

Prior to 1993, no Alaskan Native tribes appeared on the Secretaries list of federally recognized tribes.⁷⁰ Nevertheless, between 1978 and 1993, the Secretary approved three Alaskan

65 Id., at 266

66 COHEN, *supra*, at 146

67 COHEN, *supra*, at 253 [§ 4.04(3)(a)(i)] See Meriam, *The Problem Of Indian Administration* (1928)

68 Id.

69 43 Fed. Reg. 39,361 (1978); See COHEN, *supra*, at 155

70 As discussed in detail below, Alaska Native tribes first appeared on the Secretary’s list of federally recognized tribes in 1993. See 54 Fed. Reg. 54,364 (Oct. 21, 1993)

tribes' organization under the Indian Reorganization Act: i.e. the Native Village of Eagle (Approved by the Secretary on June 13, 1989); the Native Village of Circle (Approved by the Secretary on October 4, 1991); and the Native Village of Seldovia (Approved by the Secretary on May 8, 1992).⁷¹ In another case, the Secretary conducted an IRA election for the Native Village of Port Graham in 1992, however the tribe rejected the proposed constitution.⁷² At the time, none of these tribes were on the list of federally acknowledged tribes, even though the OFA regulations and the federal list had been in effect since 1978.⁷³ This did not happen by accident. Rather, as subsequently explained by the Interior Solicitor, this happened because the definition of tribe for IRA purposes is based upon the historical federal common law definition of tribe.

In 1988, the IRA was amended, and there was substantial interest among Alaska Native villages in organizing under the IRA.⁷⁴ In 1993, the Secretary requested that the Interior Solicitor provide legal guidance respecting implementation of the IRA.⁷⁵ As part of that opinion, the Solicitor considered whether Alaska Native tribes were eligible as tribes for the purposes of organizing under the IRA, and for other purposes. Importantly, the Solicitor looked primarily at the history of Alaska Natives and the treatment by Congress.⁷⁶

In his analysis, the Solicitor noted that "there is no commonly accepted definition of the term "Indian tribe", either by statute or from other generally accepted sources."⁷⁷ However, the Solicitor noted the holding in *Montoya v. U.S.*, and the common law definition of tribe adopted

71 Sansonetti, T., GOVERNMENTAL JURISDICTION OF ALASKA NATIVE VILLAGES OVER LAND AND NON-MEMBERS, Op. Sol. Int. M-36975, at 2 n 4 [1993 WL 13801710 (I.B.L.A.)] (Jan. 11, 1993) (hereinafter referred to as the "Sansonetti Opinion."

72 Sansonetti Opinion, at 2 n 5

73 In 1978 the Secretary promulgated regulations providing for the publication of a list of federally recognized tribes and establishing administrative procedures by which tribes would be able to establish their legal status as tribes. See 43 Fed. Rg 39,361 (1978). See also COHEN, supra, at 155 n 126

74 Sansonetti Opinion, at 1-2

75 Sansonetti Opinion, at 2

76 Sansonetti Opinion, passim

77 Sansonetti Opinion, at 28

in that decision.⁷⁸ The Solicitor found an extensive history of Congress dealing with Alaska Natives as tribes, and determined that “we cannot say that Alaska Native villages are not tribes for purposes of federal law. . . . Which specific Alaska Native villages are tribes is a factual determination beyond the scope of this opinion.”⁷⁹ Of particular interest relative to the case at bar, the Solicitor went on to discuss the fact that Courts in Washington and Maine determined that treaty tribes administratively terminated in the past continued to be tribes.⁸⁰ The Solicitor noted that these court decisions “clarified that neither change, adaptation nor a degree of assimilation, which the courts viewed as inevitable, destroyed the tribal status or meant the abandonment of the tribal community.”⁸¹ The Solicitor took note in passing that the Secretary had developed regulations in the 1970s to clarify tribal status (i.e. 25 CFR Part 83),⁸² but he did not opine that only tribes recognized under Part 83 could organize under the IRA. Rather, the Solicitor returned to the IRA definition of Indian tribe, which is not dependent upon a Part 83 determination of tribal status, or appearance of the Tribal List.⁸³

Importantly, the Solicitor noted in implementing the IRA, the Department distilled five criteria to determine whether a group constituted a “tribe” or “band.”⁸⁴ The factors are:

- a. That the group has had treaty relations with the United States.

78 Sansonetti Opinion, at 28

79 Sansonetti Opinion, at 28

80 Sansonetti Opinion, at 29-30

81 Sansonetti Opinion, at 30 citing *U.S. v. Washington*, 641 F.2d 1368, 1373-74 (9th Cir., 1981).

This particular passage is critical to a full understanding of the problems with the OFA process. As the Solicitor noted, the United States has not relied on ethnological unity in determining what is a “tribe”. *Id.*, at 29. Rather the Federal government has principally concerned itself with the tribe in a political sense. *Id.*, quoting Felix Cohen. As the more updated Cohen notes, “Under the influence of the Indian Reorganization Act, the Bureau of Indian Affairs had focused on the existence of treaties, acts of Congress, or executive orders, as well as the internal political experience and external treatment of native groups. The post-1978 recognition process, in contrast took a largely socio-anthropological approach”. COHEN, *supra*, at 155 citing Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Policy Rev. 271 (2001)

82 Sansonetti Opinion, at 30

83 Sansonetti Opinion, at 31

84 Sansonetti Opinion, at 31

- b. That the group has been denominated a tribe by act of Congress or Executive order.
- c. That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
- d. That the group has been treated as a tribe or band by other Indian tribes.
- e. That the group has exercised political authority over its members, through a tribal council or other governmental forms.⁸⁵

It is these factors that the Solicitor used in determining whether an Alaska Native groups were “tribes” eligible for organization under the IRA. The Solicitor placed particular emphasis upon whether the group had been denominated a tribe by executive order or act of congress.⁸⁶ In his analysis, the Solicitor acknowledged that “Many tribes were initially recognized by the United States through the treaty process.”⁸⁷

Following the Sansonetti opinion, the Secretary added all Alaska Native villages listed in ANCSA to the list of federally recognized tribes, without requiring any of them to go through the Part 83 process for acknowledgment.⁸⁸ In other words, the Secretary was relying upon the common law definition of tribe.

e) The Mackinac Are A Tribe Under The IRA.

Accepting the specific facts alleged in the complaint as true, and applying the IRA definition of tribe, there is little question that the Mackinac have more than a plausible claim that they are eligible for reorganization under the IRA. As noted in the *Sansonetti* Opinion, a primary question is whether the tribe was recognized through the treaty process or in legislation. As pointed out above, prior to 1855, it is largely incontestable that the United States negotiated and

85 Sansonetti Opinion, at 31 n 143

86 Sansonetti Opinion, at 34-5

87 Sansonetti Opinion, at 31

88 54 Fed. Reg. 54,364 (Oct. 21, 1993) As discussed below, this action was critically linked and followed the 9th Circuit’s decision that Alaska Native villages listed in ANCSA were Indian tribes contained in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, (9th Cir., 1988) rev’d on other grounds, 501 U.S. (1991).

entered into more than 25 treaties with the Ottawa and Chippewa Nations,⁸⁹ and that the Mackinac head chiefs were signatory to those treaties.⁹⁰ The 1855 treaty, however, dissolved this larger tribe and pledged to deal directly with the groups located in the eight (8) “vicinities,” one of which was the Mackinac (Macinac) located near St. Ignace and Manistique, Michigan.⁹¹ In other words, the 1855 Treaty expressly promised the “Macinac” (Mackinac) that the government would deal with them as a group into the future. The treaty has not been abrogated or legally terminated. Normally, treaties do not expressly promise to recognize the tribe into the future. The 1855 treaty does.

The issue of legislative recognition of the Mackianc is more complex. Congress has recognized the Mackinac as being eligible for tribal recognition in §106(d)(1) of the Michigan Indian Land Claims Settlement Act (MILCSA).⁹² MILCSA was intended to provide for a fair and equitable division of funds appropriated by Congress to satisfy judgments rendered by the Indian Claims Commission arising out of the 1836 and 1855 Treaties.⁹³ It took approximately 25

89 *Supra.*

90 *e.g.*, Treaty of March 28, 1836 (7 Stat. 491)

91 Complaint, at para 15; See Art. V, Treaty of July 31 1855 (11 Stat. 621) - with the “Ottawa and Chippewa” The full text of the section is set out above.

92 §106(d)(1) of 105 Pub. L. No. 143; 111 Stat. 2652

93 In hearings on MILCSA, Rep. Dale Kildee, US Rep. from Michigan, provided the following explanation:

Over 150 years ago, in 1836, the Chippewa and Ottawa Indian Tribes signed a treaty in which the Michigan Indian Nations agreed to cede over 12 million acres of land in Michigan to the Federal Government in exchange for a series of annuities to be paid to the tribes. This land encompassed most of the upper Lower Peninsula in Michigan, and the eastern part of the Upper Peninsula. In 1855, the tribes signed another treaty that freed the U.S. Government from paying any further annuities to the tribes, and moved the Indians onto reservations to facilitate more European settlements. The final compensation considered paid to the tribes was approximately \$0.15 an acre. In 1948, the tribes filed suit with the Indian Claims Commission to examine the fairness of the two treaties signed by the Michigan tribes, and after a thorough and very exhaustive review, the Indian Claims Commission called the \$0.15 an acre payment an unconscionable consideration and determined that the tribes should have been given 90 cents an acre for their land. On December 29, 1971, the tribes were awarded over \$10 million by the Congress to settle this land claim. These moneys were placed in a trust fund that has been administered by the BIA for the last 26 years. Today, the fund is worth over \$74 million. Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 27

years to obtain a judgment, but it took another 25 years in order to develop a distribution of the judgment fund.⁹⁴ The reason for this latter delay is that the BIA had illegally administratively terminated all but one of the Chippewa tribes,⁹⁵ which rendered distribution of the judgment fund difficult.

As noted above, the 1855 Treaty divided the Michigan Ottawa and Chippewa Nation into eight (8) tribes defined by their vicinities of residence. At the time the Indian Claims Commission cases were brought, only one remained; i.e. Bay Mills Indian Community.⁹⁶ Bay Mills brought the claims commission action,⁹⁷ but the action was brought on behalf of all the signatory tribes to the 1836 and 1855 Treaties. But when the judgment was rendered, the other seven tribes defined by the 1855 treaty had not been restored, which made the distribution to all the beneficiaries of the judgment fund difficult.⁹⁸ By 1993, however, four additional tribes had been restored,⁹⁹ meaning a majority of Chippewa Tribes had been restored. Two other tribes were actively seeking federal recognition.¹⁰⁰ At that point, the Mackinac filed a letter of intent to seek recognition, but were unable to go any further in the process.¹⁰¹ In order to deal with the unrecognized tribes in an equitable manner, Congress provided for individual payments to

94 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 31

95 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 37; See also *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for the Western District of Michigan*, 369 F.3d 960, 961 (6th Cir. 2004)

96 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 30 and 37

97 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 30

98 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 37

99 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 37. The tribes restored at this point were Sault Ste Marie, Grand River Band of Chippewa and Ottawa, Little Traverse Band, and Little River Band. The Sault Ste Marie of Chippewa Indians were accorded federal recognition by memorandum of the United States federal government Commissioner of Indian Affairs on September 7, 1972 and reorganized under the IRA. See H.Rpt 110-794, 110th Cong., 2d Sess. (July 29, 2008). The Grand Traverse Band of Ottawa and Chippewa Indians was acknowledged by the Assistant Secretary of Indian Affairs on May 27, 1980. *Id.* The Little Traverse Bay Bands of Odawa Indian and the Little River Band of Ottawa Indians each had its Federal status reaffirmed by an Act of Congress on September 21, 1994. *Id.*

100 Sen. Hrg 105-413, 105 Cong., 1st Sess (Nov. 3, 1997), at 37-38

101 Complaint, para. 25

certain individual members of the unrecognized tribes, including the Michilmackinac (i.e. the Mackinac).¹⁰² These funds would be held for eight years to allow for recognition to occur for those unrecognized tribes, including the Michilmackinac (i.e. the Mackinac).¹⁰³ The Mackinac had not obtained reaffirmation prior to 2005 and could not participate in the judgment fund awarded by the United States for the loss of their land. However, the fact remains that Congress recognized at least the eligibility of the Mackinac to seek reaffirmation of their tribal status in the MILCSA.

In *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, (9th Cir. 1988) the Court considered the tribal status of Circle Village, which had been made eligible for benefits under the Alaska Native Claims Settlement Act, but had not been recognized by the Secretary of the Interior through the Part 83 process. The Court held that recognition by Congress in the land claims settlement legislation was sufficient.¹⁰⁴ In discussing this specific point, the Court explained that:

It is true that section 1362¹⁰⁵ speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. If Congress has recognized the tribe, a fortiori the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior. Consequently, Circle Village, as well as Noatak, qualifies under section 1362 (as a tribe).¹⁰⁶

The simple fact is that Mackinac is a tribe for the purposes of the IRA because it meets the critical aspects of the common law definition of an Indian tribe. It was recognized as part of the 1855 treaty, process. What is more important, the government promised in the 1855 treaty to continue relations directly with the Mackinac and the seven (7) other tribes named in the treaty, which is the meaning of recognition. Moreover, in MILCSA, Congress rendered the Mackinac

102 §106(d)(1) of 105 Pub. L. No. 143; 111 Stat. 2652

103 §106(d)(1) of 105 Pub. L. No. 143; 111 Stat. 2652

104 896 F.2d, at 1161

105 28 USC 1362

106 896 F.2d, at 1161

eligible for benefits, even though the Mackinac did not complete the process and receive the judgment funds. The fact that Congress made provision for their recognition in land claims settlement litigation is sufficient evidence of federal recognition, particularly in conjunction with the treaty promise in the future to engage in relations with the Mackinac directly and not through another tribe. The fact that Congress enacted legislation believing that the Mackinac were eligible for recognition, makes the Mackinac eligible for reorganization under the BIA regulations implementing the IRA.

Finally, the legislative history of the IRA itself clearly supports the idea that the Mackinac are eligible for reorganization under the Act. There is no question that the Merriam Report¹⁰⁷ was part of the legislative history of the IRA.¹⁰⁸ In considering the application of the IRA to the Mackinac, it should not be overlooked that the Mackinac were specifically identified in the Merriam Report as a tribe. The Mackinac appear to have been one of the largest identifiable Indian groups in Michigan comprising approximately 1/7th of the total recognized Indian population of Michigan leading up to the passage of the IRA.¹⁰⁹ The legislative history contained in the Merriam Report is very clear that the Mackinac were one of the groups intended to benefit from the Indian Reorganization Act that was subsequently enacted.

f) Summary.

The Secretary made a clear error in believing that 25 USC §479a defines Indian tribe for the purposes of the IRA; the proper definition is found at 25 USC §479. This later definition relies upon the federal common law definition of Indian tribe rooted in *Montoya v. U.S.*, which is confirmed by the implementing BIA regulations that only require a tribe to be eligible for federal recognition, and not be formally recognized. The only conclusion from the statute and the

107 Meriam, *The Problem Of Indian Administration*, p. 65 (1928)

108 COHEN, *supra*, at 84-87

109 Compare *Id.* at 62 and 65

regulations is that failure to go through the Part 83 process does not preclude a tribe from reorganizing under the IRA. This interpretation is consistent with both past BIA practice, policy and law as interpreted by the Secretary. Finally, the Mackinac have plead sufficient facts to present a plausible case in favor of its right to reorganize under the statute.

IV. THE TRIBES' REQUEST WAS DEEMED APPROVED UNDER THE IRA RENDERING EXHAUSTION, JUSTICIABILITY AND RIPENESS MOOT.

The Secretary presents several arguments respecting exhaustion, justiciability and ripeness. In so doing, the Secretary fails to cite a single legal authority respecting the implementation of the IRA; none of the cited cases deal with tribes seeking to organize under the IRA. In so doing, the Secretary overlooks a critical provision of the IRA and undisputed facts which clearly demonstrate that the Mackinac have a plausible claim which should not be dismissed.

The IRA, as originally enacted, provided that "Any Indian tribe or tribes, residing on the same reservation, shall have the right to organize for its common welfare."¹¹⁰ However, as originally enacted, the statute lacked any procedural directions, deadlines, or substantive standards for Secretarial review.¹¹¹ As a result, it was not unusual for the BIA to be unresponsive to requests from tribes to hold IRA elections.¹¹² In one reported case involving three tribes seeking reorganization, the Court found that the Secretary had a mandatory duty under the IRA to call an election for tribal ratification of a draft constitution upon request from an eligible tribe.¹¹³

110 § 16 of Act of June 18, 1934; 48 Stat. 987.

111 COHEN, *supra*, at 254

112 See generally, *Coyote Valley Band of Pomo Indians, v. U.S.*, 639 F. Supp. 165 (E.D. Cal., 1986)

113 *Coyote Valley Band of Pomo Indians, v. U.S.*, 639 F. Supp. 165, 170 (E.D. Cal., 1986)

In 1988, Congress amended the IRA to clarify that “Any Indian tribe shall have the right to organize for its common welfare and may adopt an appropriate constitution and bylaws.”¹¹⁴ In addition to removing the prior requirements that a requesting tribe needed a reservation, the amendments also established a strict process for the submission, review and approval of tribal requests to hold IRA elections. The relevant statutory provision now reads:

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings.

- (1) The Secretary shall call and hold an election as required by subsection (a) of this section—
 - (A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws,
- (2) During the time periods established by paragraph (1), the Secretary shall—
 - (A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and
 - (B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.
- (3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.¹¹⁵

These amendments to the IRA placed mandatory non-discretionary duties and timelines upon the Secretary to perform certain acts upon the receipt of a tribal request to hold an election under the IRA. Upon receipt of a request, the Secretary must hold an election to adopt a constitution within 180 days.¹¹⁶ Thirty (30) days prior to the election, the Secretary must notify

114 25 USC § 476(a)

115 25 USC § 476(c) (provisions related to amendment and repeal of tribal constitutions omitted).

116 25 USC § 476(c)(1)(A)

the tribe whether the proposed constitution is contrary to applicable law.¹¹⁷ Another subsection of the 1988 Amendments provides that tribes may bring an action to enforce the provisions of this section in Federal Court.¹¹⁸

In light of this statutory scheme and the critical uncontested facts pled by the Mackinac, there can be little question that the Secretary violated the provisions of § 476. As noted above, the Secretary acknowledges that the tribe requested the Secretary to call and conduct an election to approve a constitution under the IRA on August 8, 2011.¹¹⁹ Clearly, more than 180 days have passed, and it is undisputed that the Secretary did not 1) conduct any review regarding whether the Constitution violated any provision of applicable law, 2) notify the tribe of such deficiencies thirty-day's prior to the conduct of the election to adopt the constitution, nor 3) conduct the election within 180 days. In fact, under the facts plead and substantially admitted by the Secretary, the Secretary did nothing. The Secretary didn't even make a formal decision that the tribe was ineligible to reorganize under the statute, nor informally respond to the tribe. The Secretary did nothing.

Given the history of mistreatment of the Mackinac over the last 125 years,¹²⁰ the suggestion that the tribe is somehow at fault for the Secretary's total and absolute abandonment

117 25 USC § 476(c)(3)

118 It is anticipated that the Secretary may argue on reply that the enforcement provision only applies to subsection (d) of § 476. Of course, the plain language of the enforcement provision applies to the entire section and is not restricted to enforcement of subsection (d).

119 Def. Memo, at 3; See Complaint, para 34.

120 As outlined above, within four years of promising to deal with the seven tribes directly, the federal government closed the Mackinac agency in 1889 and administratively terminated the Mackinac, as well as the other seven tribes recognized under the 1855 treaty. There is little question that the administrative termination of the tribes was illegal. See *Grand Traverse Band v. Office of U.S. Attorney*, 369 F.3d 960, 964 (6th Cir., 2004) See also *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902-903 (D. Mass., 1977), aff'd in 592 F. 2d 575 (administrative termination of tribe in the absence of Congressional action does not terminate federally recognized status of Indian tribe) See also *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F.Supp 649, 663 n 15 (D. Maine, 1975) Of course, within short order the reservations set up for the Mackinac and six other signatories to the 1855 treaty were lost, setting up 50 year legal battle for compensation of such losses. Of course, at the end of this

of her duties under the IRA is near unconscionable. Nevertheless, the Secretary now argues that this Court should ignore the pleas of the Mackinac as the Secretary has done herself, because the Mackinac claims 1) are not ripe, 2) the tribe has not exhausted its administrative remedies, 3) the BIA has primacy over the issue, and 4) the issue is non-justiciable. The arguments are not correct.

a) Exhaustion And Ripeness.

The gravamen of the Secretary's ripeness and exhaustion arguments is that the Mackinac are attempting to side-step the Part 83 administrative process for recognition, and that the tribe must go through that process as a precondition to reorganization under the IRA. In making this argument, the Secretary has cited no statutory or case law authority, and she has cited to the wrong statutory definition of "tribe." As discussed above, there is no requirement that a tribe need go through a Part 83 recognition process prior to applying for reorganization under the IRA.

Thus, the more correct questions relating to ripeness and exhaustion is what administrative remedies are available to a tribe seeking an election under the IRA when that request is correct statutory definition of "tribe" under the IRA is different. This was specifically addressed in *Coyote Valley Band of Pomo Indians v. U.S.*¹²¹

The APA requires exhaustion of administrative remedies prior to judicial review. 5 U.S.C. § 704; *Lloyd C. Lockrem, Inc. v. United States*, 1609 F. 2d 940, 942 (9th Cir.1979). In their briefs, defendants initially argued that plaintiffs had failed to obtain a final agency decision and to exhaust administrative remedies and that they were therefore foreclosed from seeking judicial review under the APA by 5 U.S.C. § 704 and the

litigation, the Mackinac remain uncompensated for the losses that the Indian Claims Commission found "unconscionable". Now, 159 years after the United States government promised in a sacred treaty to continue relations with the Mackinac, we are in this court seeking to hold the United States to its treaty promises. In 1879, Helen Hunt Jackson wrote *A Century of Dishonor*, chronicling the treatment of Indian people up to that time. See Jackson, *A Century of Dishonor*, (1879) The Meriam Report merely chronicled the failure of the following 50 years of assimilation policy, and specifically noted the plight of the Mackinac. See *Meriam Report, supra*. For the Mackinac, the last 159 years has been an exercise in non-plausible deniability respecting the violation of that 1855 treaty by the federal government.

121 639 F. Supp. 165 (E.D. Ca, 1986)

doctrine of ripeness. Defendants also contended that without the APA's specific waiver, plaintiffs' claims were barred by the doctrine of sovereign immunity. Plaintiffs responded that the Secretary's refusal to authorize elections upon tribal request constituted final agency action because no administrative remedy existed once plaintiffs refused to implement the recommended changes in their draft constitutions. *See, e.g., United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1253 (9th Cir.1982) ("Exhaustion of administrative remedies is not required where the remedies are inadequate, inefficacious, or futile...."). *See also Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499-500 (9th Cir.1980), *citing Frontier Airlines v. Civil Aeronautics Board*, 621 F.2d 369, 371 (10th Cir.1980) ("The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpretation.")¹²²

These same considerations apply to the present case.

Of course, *Coyote Valley* arose before the 1988 Amendments, when the IRA which did not statutory non-discretionary standards and timelines. The 1988 Amendments imposed mandatory and non-discretionary standards and deadlines, and authorized the federal courts to enforce those deadlines. Exhaustion and ripeness are not grounds to dismiss this case.

b) Primacy.

Assuming that the Secretary has some administrative primacy over the matter, dismissal is not appropriate in these circumstances. In *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2d Cir., 1994), a non-recognized, non-treaty¹²³ tribe brought a Non-Intercourse Act land claim. The State sought dismissal arguing that the tribe had failed to exhaust administrative proceedings under Part 83. The Court rejected this argument, "tribal status for purposes of obtaining federal benefits (i.e. the purpose of Part 83) is not necessarily the same as tribal status under the Nonintercourse Act."¹²⁴ The Court noted that the *Montoya/Candelaria*¹²⁵ (federal common law)

122 639 F. Supp., at 168 n. 5

123 See 69 Fed. Reg. 118, 34,388-34,393, Final Determination Against Federal Acknowledgement of the Golden Hill Paugussett Tribe, (June 21, 2004)

124 39 F.3d, at 57

definition of tribe and the BIA criteria under Part 83 set out “two standards (that) overlap though their application might not always yield identical results.”¹²⁶ As a result, the Court reversed the District Court’s dismissal of the case.¹²⁷

Upon remand, the Circuit Court instructed the District Court to exercise judicial deference to allow the BIA to first consider the tribes claims to tribal status. The Appeals Court directed the District Court to stay the matter for 180 days to allow the BIA to make a decision. Upon the BIA decision or the running of the stay, the Tribe might return to the Court to have the Court make a decision on the merits, realizing that the *Montoya/Candelaria* and Part 83 processes used different standards.¹²⁸

Of course, *Golden Hill Paugussett Tribe* is easily distinguished from the present matter. In this case, the BIA has already had 180 days to make a decision, which has already run. In this regard, the tribe has clearly provided the BIA opportunity that a stay would provide, with no action by the BIA. Equally, in *Golden Hill Paugussett Tribe*, there was no Congressionally mandated timeline for BIA action that had expired by the time the tribe brought suit. Under the IRA, the Secretary had 180 days to review, comment and notify the tribe of its opinion respecting whether the proposal was inconsistent with applicable law. And finally, *Golden Hill Paugussett Tribe* involved a non-treaty tribe and there was no claim that the United States government had committed itself in a treaty to directly dealing with the tribe going into the future from 1855. Moreover, in *Golden Hill Paugussett Tribe* there was no claim that the tribe had been previously recognized by treaty, nor that BIA had illegally administratively terminated

125 Reference is to *U.S. v. Candelaria*, 271 U.S. 432 (1926) (concluding that Congress had intended to cover all tribal Indians, including the Pueblo Indians, when it used the words “any tribe of Indians” in the Non-Intercourse Act.)

126 39 F.3d, at 59

127 39 F.3d, at 60

128 39 F.3d, at 61

a tribe in violation of the tribe's treaty. The case is clearly distinguishable, and the BIA has clearly had time to exercise primary decision-making in the matter, and has elected to not do so.

In summary, *Golden Hill Paugussett Tribe* stands for the proposition that the Court should not dismiss the matter based upon exhaustion, ripeness or primacy. *Golden Hill Paugussett Tribe* permits the Court to defer to the Part 83 process recognizing the substantive difference between in process and standards applied under Part 83 and the IRA. However, where 1) the government is claimed to have illegally terminated the Mackinac, 2) the BIA has already had 180 days to consider the matter and took no action, and 3) in light of the IRA's statutory timelines for BIA decision making, further deference to the BIA process would only serve to delay and deny the Mackinac the justice that has been denied to the tribe over the last 159 years.¹²⁹

c) The Issue Is Justiciable.

As noted above, Congress has clearly made the failure to conduct an election under the IRA after a tribal request a justiciable matter by operation of § 476, which provides that the IRA mandates may be enforced in the appropriate federal court.¹³⁰ Additionally, as described above and by the Court in *Golden Hill Paugussett Tribe*, there is a long history of judicial determinations of Tribal status following the *Montoya* line of cases. As of January 2014, the Secretary recognizes 566 tribes.¹³¹ Nearly half of the tribes on the Secretary's list were recognized by Court decision after the Secretary promulgated Part 83 and without going through the Part 83 process.

¹²⁹ Of course, there is a more practical reasons for the Court to not stay this matter. It is not clear that this case will go to trial within 180 days, given the discovery needed. There is no reason the BIA could not reconsider its approach to this matter as the case proceeds in normal course.

¹³⁰ 25 USC § 476(d)(2)

¹³¹ 79 Fed. Reg. 4,748 (January 29, 2014)

There are 229 tribes in Alaska. Before the Secretary added Alaska Natives tribes to his list in 1995,¹³² the 9th Circuit ruled in 1988 that villages listed in the Alaska Native Claims Settlement Act, or otherwise organized under the terms of the Indian Reorganization Act were Indian tribes. In *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, (9th Cir., 1988) rev'd on other grounds, 501 U.S. (1991). The net effect of this litigation was to extend recognition to the 229 tribes in Alaska, which the Sansonetti Opinion implemented.

In California the federal recognition of seventeen (17) tribes, illegally terminated under the California Rancheria Act,¹³³ was restored under a stipulated settlement in the so-called “Hardwick” litigation.¹³⁴ Later in 1994, two additional tribes in California were added to the Secretary’s list as “technical corrections.” See *Muwekama Ohlone Tribe v. Kempthorne*, 5452 F. Supp. 2D 105, 110-111 (D.D.C, 2006).

Thus, 248 out of 566 tribes on the Secretary’s list of tribes were added by judicial decision. The idea that tribal status is non-justiciable is simply not the case.

More interesting, the Secretaries current argument respecting the justiciability of recognition issues ignores the entire line of cases flowing from *Montoya* discussed above. As the Sansonetti Opinion notes, the Part 83 process was implemented because Court were adjudicating tribal recognition.¹³⁵ The simple fact is that in following *Montoya*, for the last 113 years, Courts

132 60 Fed. Reg. 9,250 (February 16, 1995) Prior to that date, Alaska Native enties had been included on the list on a “preliminary basis” in 1982, and added ANCSA village and regional corporations to the list in 1988. Explained at Id., at 9,250. The 1995 list removed the corporations from the list.

133 P.L. 85-671; 72 Stat. 619

134 *Tille Hardwick et al. v. United States*, No. C-79-1710 SW (N.D.Cal.1979); explained at *U.S. v. Livingston*, 2020 WL 3463887 (E.D. Cal., 2010) at 2 (unpublished)

135 Sansonetti Op., at 29-30

have determined whether a group of Indian constituted a tribe for the purpose of various federal enactments.¹³⁶

The Secretary's justiciability argument mischaracterizes the law, which may be best demonstrated in her reliance on *U.S. v. Sandoval*, 231 U.S. 28 (1913).¹³⁷ In that case, the Court indicated that it would follow the Congressional and Executive decisions extending recognition to Indian tribes in accord with *Montoya*. Noticeably, the Court in *Sandoval* did not rule that tribal status was non-justiciable. The Secretary selectively quotes from *Sandoval*. The full quote from *Sandoval* reads,

Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to that extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not the courts.¹³⁸

This passage makes three particularly relevant points. First, the holding clearly reserves to the Courts the power to determine when Congress has acts arbitrarily should Congress define a non-Indian group of people to be Indian. Second, while the Courts do not necessarily determine whether a people constitute a tribe in the absence of Congressional action, the Courts may determine whether Congress has actually extended recognition through a course of dealing articulated in the *Montoya*, which includes recognition by treaty. And third, the power to regulate relations with the tribes resides in Congress.¹³⁹ Notably, the Court in *Sandoval* did not say that

¹³⁶ See COHEN, *supra*, at 146-148.; See also *Native Village of Noatak v. Hoffman*, 896 F.2d 1157, (9th Cir., 1988) rev'd on other grounds, 501 U.S. (1991).

¹³⁷ Cited at Def. Memo, at 14

¹³⁸ 231 U.S. at 46

¹³⁹ As explained in *U.S. v. Lara*, 541 U.S. 193, 202 (2004), the Indian Commerce Clause, which vests authority over commerce with Indian tribes with Congress. US CONST. Art. I, §8 cl. 3, ("The Congress shall have power To regulate commerce ... with the Indian tribes.") Additionally, while Indian tribes are not expressly mentioned in the Treaty clause, this clause provides that the President may negotiate treaties, subject to the advise and consent of the Senate. US CONST. Art. II, §2 cl. 2,

the Executive branch of the federal government had plenary power over Indian affairs. Indeed, since the earliest days of the Republic, the Courts have held that Congress has plenary authority over Indian affairs.¹⁴⁰

CONCLUSION.

The Court should deny the Secretary's motion to dismiss because 1) when the facts alleged in the complaint are considered to be true, Plaintiff has presented the complaint alleges a plausible violation of the IRA by the Secretary, 2) Congress has specifically authorized suits to enforce the IRA, 3) Mackinac is a tribe within the meaning of the IRA, and 4) exhaustion, ripeness and justiciability concerns are not applicable to the present case and do not justify dismissal.

REQUEST FOR ORAL HEARING

Plaintiff requests an oral hearing on all issues presented in the Motion and Opposition.

140 *U.S. v. Lara*, 541 U.S. at, 202

Dated: June 30, 2014

Respectfully submitted,

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