

NOT YET SCHEDULED FOR ORAL ARGUMENT

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**United States Court of Appeals  
for the District of Columbia Circuit**

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**Case No. 15-5118**

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MACKINAC TRIBE,

*Plaintiff-Appellant,*

v.

SALLY JEWELL, U.S. SECRETARY OF THE INTERIOR,

*Defendant-Appellee.*

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*On Appeal from the United States District Court for the District of Columbia  
Case No. 1:14-CV-0456 (Hon. Ketanji Brown Jackson)*

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**OPENING BRIEF FOR APPELLANT**

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August 28, 2015

## **CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28.1(a)(1), the undersigned counsel for Appellants in the above-captioned matter submits this Certificate of Parties, Rulings, and Related Cases.

### **(A) Parties.**

Plaintiff in the court below and Appellant in this Court is the Mackinac Tribe, which claims to be a federally recognized Indian tribe and historical successor to the Chippewa (Ojibwa) and Ottawa (Odawa) Indians bands signatory to the Treaty of July 31, 1855 (11 Stat. 621) - with the “Ottawa and Chippewa.” Defendant is Sally Jewell, United State Secretary of the Interior. There were no intervenors or amici below.

### **(B) Rulings Under Review.**

Appellants seek review of the District Court’s Order of March 31, 2015 (Docket 18), granting Defendant’s Motion to Dismiss, which was accompanied by a Memorandum Opinion (Docket 19) issued the same day. The Order is reproduced in the Joint Appendix (J.A.) at J.A. A203 and the Memorandum Opinion is reproduced at J.A. A204.

### **(C) Related Cases.**

The case on review has not been previously before this Court or any other court. To the best of counsel’s knowledge, no other related cases currently are pending in this Court or in any other federal court of appeals, nor in any other court in the District of Columbia.

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## **GLOSSARY**

BIA: Bureau of Indian Affairs

IRA: Indian Reorganization Act [ 25 USC § 476]

## **JURISDICTIONAL STATEMENT**

This is an appeal from the District Court's March 31, 2015 Order granting Appellee's motion to dismiss Appellant's complaint for declaratory and mandamus relief. Appellants filed a timely notice of appeal on April 27, 2015. (Docket 20) This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

## **INTRODUCTION**

This case is about a daisy chain of injustice, in which the Secretary seeks to avoid her statutory obligations toward an Indian tribe based upon an illegal termination of that tribe in the past. Specifically, the Secretary of the Interior refuses to conduct an election mandated under the Indian Reorganization Act [25 U.S.C. § 476; 25 C.F.R. Part 81] for the Mackinac because one of her predecessors illegally terminated the tribe. The Courts should not permit a historical injustice toward Indians to justify a present day injustice against those same-said Indians.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- 1) Whether the District Court erred in failing to consider whether the Mackinac Tribe had made a plausible claim?
- 2) Whether the District Court erred in failing to consider the terms of the Indian Reorganization Act and implementing regulations in considering whether the Mackinac Tribe has a plausible claim of right to reorganization under the statute.

## PERTINENT STATUTES

The pertinent statutes are reprinted in an Addendum to this Brief.

## STATEMENT OF THE CASE AND THE FACTS

### I. BACKGROUND

#### A. Historical Treaty-Making With The Mackinac As Part Of The Ottawa and Chippewa Nations.

Early in this Nation's history, the federal government recognized the Mackinac through a long history of treaty-making as a subdivision of the Ottawa and Chippewa Nations. Between the years 1783 to 1855, the United States negotiated and entered into 29 treaties with the Ottawa and Chippewa Nations, which included the Mackinac bands.<sup>2</sup> In these treaties, the Ottawa and Chippewa

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<sup>2</sup> 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 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,

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 located in and around the Mackinac Straits between Big Bay

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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, Winnebao, 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.”.

D’Noc and Drummond Island, variously identified as Mackinac, Michilimackinac, or some variation thereof.<sup>3</sup>

In 1815, the Secretary of War, Defendant’s predecessor,<sup>4</sup> established the Mackinac Indian Agency.<sup>5</sup> The Mackinac Agency was the principle federal office administering the government’s treaty obligations to the Mackinac.<sup>6</sup>

The Treaty of 1836, which completed the Indian land cessions in Michigan, created a five (5) year temporary reservation for the Mackinac bands.<sup>7</sup> As with previous treaties, Mackinac chiefs and bands were specifically identified as signatories to this treaty, *albeit* as the Michilimackinac.<sup>8</sup> As discussed below, the

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3 See 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.”

4 Secretary of War John C. Calhoun originally established the Bureau of Indian Affairs by Letter of March 11, 1824. See Francis Paul Prucha, *Documents of the United States Indian Policy*, 37 (3<sup>rd</sup> Ed., 2000) citing *House Documents*, No. 146, 19<sup>th</sup> Cong., 1<sup>st</sup> Sess. Serial No. 138, p. 6. Responsibility for Indian affairs was transferred to the Secretary of the Interior by the Act of March 3, 1849 (9 Stat. 395). See also 25 U.S.C. § 1.

5 See “Letter To James Madison from Alexander J. Dallas, June 19, 1815” (U.S. Dept. of War) (Letters to the President - U. Of Virginia press, 2009)

6 *Id.*

7 Art. 3, Treaty of March 28, 1836 (7 Stat. 491).

8 See signatories to Treaty of March 28, 1836 (7 Stat. 491) - with the “Ottawa and Chippewa nations of Indians, by their chiefs and delegates.”

intention of the 1836 treaty was to relocate the Ottawa and Chippewa west of the Mississippi.<sup>9</sup>

### **B. The 1855 Treaty And The Restructuring Of US-Mackinac Relations.**

The Treaty of 1855 marked a major change in policy and relations between the Mackinac and the federal government involving 1) establishment of permanent reservations, and 2) recognition of the Mackinac as a separate tribe. The 1855 Treaty was needed because of a change in federal policy abandoning removal of Michigan Indians in favor of permanent settlement in Michigan, and the Indians' claims for past treaty violations.<sup>10</sup>

As to the first issue, the 1855 Treaty reserved two withdrawals for the exclusive use of the Mackinac bands: one near St. Ignace, Michigan,<sup>11</sup> and a

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9 See *U.S. v Michigan*, 471 F. Supp. 192, 242-244 (W.D. Mich., 1979) and discussion *infra*.

10 See Preamble Treaty of July 31, 1855 (11 Stat. 621) with the Ottawa and Chippewa. An extensive discussion of the controversy is found in *People v LeBlanc*, 399 Mich. 31, 248 N. W. 2d 199 (1976) and *U.S. v Michigan*, 471 F. Supp. 192, 242-244 (W.D. Mich., 1979). As summarized in *U.S. v Michigan*, “the 1855 treaty was negotiated to address two principal issues: first, the provision of permanent homes for the Ottawa and Chippewa in Michigan; and second, the settlement and consolidation of monies and services owed to the Indians under previous treaties and in particular the Treaty of March 28, 1836.” 471 F. Supp. at 243.

11 Townships 42 north, ranges 1 and 2 west. See Art. 3, Treaty of July 31, 1855 (11 Stat. 621)

second near Manistique, Michigan.<sup>12</sup> These localities were also to be the “usual place of payment” for the annuities due under the treaty.

More importantly to the present discussion was Article V of the 1855 treaty, which dissolved the Ottawa and Chippewa tribal organization, and substituted direct government-to-government relations with the local groups residing on these reserves. The continued use of general conventions of Indians to deal with issues was not desired by either side. The Indian understanding of the treaty was best demonstrated by Waw-Be-Geeg, a spokesman for the Michigan Indians who, during the negotiations, 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.”<sup>13</sup> Specifically, Article V provided:

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,

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<sup>12</sup> *Id.*, Township 43 north, range 1 west, and township 44 north, range 12 west

<sup>13</sup> See *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) (prepared statement of Dr. James M. McClurken).



and with the same effect in every respect, as if all were represented.<sup>14</sup>

Of course, the Mackinac residing on or near the St. Ignace and Manistique reserves constituted one of these groups which the Article promised government-to-government relations in the future.<sup>15</sup>

### **C. Illegal Administrative Termination of the Mackinac.**

Federal policy once again changed in 1872 with major consequences to the Mackinac. In that year, Secretary of the Interior Columbus Delano, closed the Mackinac Agency, and terminated federal services to the Mackinac and other Michigan tribes.<sup>16</sup> The policy became known as “administrative termination” and courts have held that these actions against the Michigan tribes were illegal.<sup>17</sup> *See, e.g., 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).

Notwithstanding these actions, the federal government continued to treat the Mackinac and other Michigan tribes as Indians under federal jurisdiction. For example, in 1910, the Bureau of Indian Affairs conducted an enrollment of the

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<sup>14</sup>See Treaty of July 31, 1855 (11 Stat. 621) - with the “Ottawa and Chippewa.”

<sup>15</sup>See Art. 1 Treaty of July 31, 1855 (11 Stat. 621) 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.

<sup>16</sup>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).

<sup>17</sup>See discussion in Section III, *infra*.

Mackinac tribe, together with other 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.<sup>18</sup>

During this period, the Mackinac continued to maintain tribal relations.<sup>19</sup> In 1916, the Mackinac organized a claims committee to present equitable claims on behalf of the Mackinac to the United States.<sup>20</sup> On April 4, 1916 the Mackinac claims committee recorded a Power of Attorney at the Mackinac County Records Office naming David Corp as agent for the purposes of pressing Mackinac claims.<sup>21</sup>

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<sup>18</sup>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) The immediate purpose of the roll was to distribute claims settlement funds due the Mackinac and other Michigan Indians on account of claims under the 1836 treaty. See 33 Stat. 1081 (1905), and 35 Stat. 70 (1908).

<sup>19</sup>See Wright, Richard, *The Origin of the Sault Ste Marie Tribe of Chippewa Indians and Bay Mills Indian Community*, at p. 15 (University of Utah Press, 1980)

<sup>20</sup>*Id.* 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)

<sup>21</sup>*Id.*

In 1926, Secretary Hurbert 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".<sup>22</sup> The Meriam Report documented the continued existence of the Mackinac Bands as being the largest identifiable Indian tribe in Michigan with a population of 1,193 in 1926.<sup>23</sup>

During this time, the Mackinac continued to press claims for treaty violations, and in 1948 brought claims for violations of the 1836 treaty before the Indian Claims Commission, which resulted in a judgment in 1972.<sup>24</sup>

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.<sup>25</sup>

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22 H. Rpt. 110-98, (March 14, 2008); Meriam, *The Problem Of Indian Administration* (1928).

23 *Id.*, at p. 56 (March 14, 2008); Meriam, *The Problem Of Indian Administration*, p. 65 (1928).

24 See S. Hrg 105-413, at p. 27-28 (November 3, 1997) (Comments by Rep. Kildee); See also ICC Docket Nos. 18-E, 58, and 364; See also Appellant's Complaint, J.A. A6, at ¶ 25

25 Wright, Richard, *The Origin of the Sault Ste Marie Tribe of Chippewa Indians and Bay Mills Indian Community*, at p. 15 (University of Utah Press; 1980)

In the 1990's, the seven (7) historic Mackinac bands organized into various 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 for the purpose of obtaining reaffirmation of their tribal status.<sup>26</sup>

In 1997, the United States Congress enacted the Michigan Indian Land Claims Settlement Act,<sup>27</sup> which anticipated distribution of settlement funds to certain members of the Michilmackinac (i.e., the Mackinac).<sup>28</sup>

On May 13, 1998, one of the Mackinac groups – 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 of Federal Acknowledgment process [25 C.F.R. 83] which was assigned designation as “Group 186” within the Office of Federal Acknowledgment docket.<sup>29</sup> The other Mackinac groups have also sought or otherwise supported federal reaffirmation of the Mackinac.<sup>30</sup>

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<sup>26</sup>See Complaint J.A. A6 at ¶ 28

<sup>27</sup>See Complaint J.A. A6 at ¶ 27; See P.L. 105–143 (Michigan Indian Land Claims Settlement Act).

<sup>28</sup>*Id.* §106(d); See Complaint J.A. A6 at ¶ 26-27.

<sup>29</sup>See Complaint J.A. A6 at ¶ 29

<sup>30</sup>See Complaint J.A. A6 at ¶ 30

#### **D. The Tribe's Request To The Secretary**

In March and April of 2011 these 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”)<sup>31</sup> in order to seek reorganization of the Mackinac under the Indian Reorganization Act.<sup>32</sup> The Coalition Tribal Government approved a draft Constitution for the Mackinac Tribe and, on August 8, 2011, submitted it to the Secretary with a request to conduct an election pursuant to the Indian Reorganization Act (IRA) [25 USC § 476; 25 C.F.R. Part 81],<sup>33</sup> which requires the Secretary to call and hold an election to adopt a tribal constitution upon request of a tribe.<sup>34</sup>

The Secretary failed to respond, and this lawsuit followed.

#### **E. The Procedural Background**

The Tribe filed its Complaint to compel the Secretary to perform her duties under the IRA on March 20, 2014. [See Complaint at J.A. A6] No answer was filed by the Secretary. Rather, on May 27, 2014, the Secretary filed a motion to dismiss arguing 1) sovereign immunity of the federal government and 2) that the

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<sup>31</sup>See Complaint J.A. A6 at ¶ 31

<sup>32</sup>See Complaint J.A. A6 at ¶ 32

<sup>33</sup>See Complaint J.A. A6 at ¶ 33 and 34

<sup>34</sup>See Cohen, *Handbook Of Federal Indian Law*, § 4.04[3][a][i]

Mackinac were not a federally recognized tribe and ineligible for reorganization under the IRA. [J.A. A14] The motion was opposed by the tribe [J.A. A55], and the Secretary filed a reply. [J.A. A100] Upon completion of the briefing, but prior to oral argument, the Secretary proposed changes to the IRA implementing regulations [25 C.F.R. Part 81] to “clarify” the definition of a tribe under the regulations to include only tribes appearing on the list of federally recognized tribes published under 25 C.F.R. Part 82. [J.A. A140]

After oral argument, the Court issued its decision granting summary judgment in favor of the Secretary [J.A. A203] and issued a Memorandum Opinion explaining the ruling. [J.A. A204] On the first issue, the Court held that the federal government’s sovereign immunity did not bar the Tribe’s lawsuit. [J.A. A205]<sup>35</sup> As to the second issue, the Court ruled “that Plaintiff must exhaust its administrative remedies by undergoing the administrative process for formal recognition before it may file a lawsuit seeking the benefits of the IRA.” [J.A. A205]. The Court never ruled upon the factual contention that the Mackinac were a federally recognized tribe as alleged in the complaint, but held,

The administrative path to receiving the recognition and reorganization assistance that Plaintiff Mackinac Tribe seeks is clear: the Interior

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<sup>35</sup>The Court reasoned that the APA contained the waiver of sovereign immunity, which disagrees with Judge Harris of the DC District Court’s holding in *See Kickapoo Tribe of Oklahoma v Lujan*, 728 F. Supp. 791, 794 (D.D.C 1990) (holding that the IRA itself contains a waiver of immunity). *See* 25 U.S.C. § 476(d)(2)

Department requires Indian tribes to apply for these benefits pursuant to the Part 83 process. See 25 C.F.R. Part 83, *Procedures for Establishing That An American Indian Group Exists As An Indian Tribe*; See also 25 C.F.R. Part 81, *Tribal Reorganization Under A Federal Statute*. [J.A. A239]

As discussed in detail below, the Court committed legal error because there is no requirement in statute nor implementing regulations that requires a tribe to exhaust recognition procedures under 25 C.F.R. Part 83 prior to seeking reorganization under the IRA. Moreover, the failure of the Secretary to recognize the tribe for IRA purposes is premised upon a prior administrative termination of Michigan tribes that was held to be illegal.

### **SUMMARY OF THE ARGUMENT**

The District Court erred in dismissing the Mackinac Tribe's Complaint for Mandamus Relief because the statute and regulations do not mandate that a tribe exhaust administrative processes under 25 C.F.R. Part 83 before seeking reorganization under the IRA. A tribe's eligibility for IRA benefits is made without consideration as to whether the tribe has successfully negotiated the Part 83 acknowledgment process.

The federal government's previous illegal purported administrative termination of the Mackinac tribe is not a valid basis to continue the violation of the Secretary's duties under the IRA. The Secretary's must end the historical violation of the Tribe's treaty, rescind the illegal administrative termination, and perform her duty to list all recognized tribes mandated by the List Act.

Finally, the District Court erred because 25 C.F.R. Part 83 is not the exclusive process by which a tribe may reaffirm federal recognition of its status. The District Court's decision rested on the implicit assumption that 25 C.F.R. Part 83 is the only process available to a tribe – an assumption which is wrong and belied by both legislation and the long history of judicial determination of tribal status.

## **ARGUMENT**

### **I. DE NOVO STANDARD OF REVIEW**

Where the District Court considers “matters outside the pleading” upon a motion to dismiss for failure of the complaint to state a claim upon which relief can be granted, the motion will be treated as one for summary judgment and disposed of as provided by Fed. R. Civ. P. 56. *Colbert v. Potter*, 471 F.3d 158, 164 (D.C. Cir. 2006): “All parties shall be given a reasonable opportunity to present all material made pertinent by such a motion. *Id.* In this case, the facts, as stated above, are not in dispute. The question before this Court is one of pure law, and this Court reviews the District Court's grant of summary judgment *de novo*. *Id.*

### **II. THERE IS NO REQUIREMENT IN STATUTE, REGULATION NOR CASE LAW THAT REQUIRES A TRIBE TO EXHAUST RECOGNITION PROCEDURES UNDER 25 C.F.R. PART 83 PRIOR TO SEEKING REORGANIZATION UNDER THE IRA.**

The District Court's opinion fails to identify any provision of the IRA, its implementing regulations, nor case law dealing with the IRA which provides that a



tribe must exhaust recognition procedures under 25 C.F.R. Part 83. This is because there is no such authority for such a contention.

**A. The IRA Statute and Amendments [25 U.S.C. § 476].**

Section 16 of the Indian Reorganization Act of June 18, 1934 (IRA), explicitly acknowledged that “**Any Indian tribe** shall have a right to organize for its common welfare, and may adopt an appropriate constitution.” 25 U.S.C. § 476(a) (emphasis added); *See also* Cohen, *Handbook Of Federal Indian Law* at § 4.04[3][a] (Ed. 2005); *See Kickapoo Tribe of Oklahoma v. Lujan*, 728 F. Supp. 791, 793-794 (D.D.C 1990). The statute instructs the Secretary of the Interior to call and conduct federal elections among tribal members for this purpose. 25 U.S.C. § 476(c).

In 1988, Congress enacted major amendments to the IRA<sup>36</sup> in response to the decision in *Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165 (E.D. Cal. 1986), which held that “the Secretary had a mandatory non-discretionary duty to call elections to ratify IRA documents within a reasonable time after a request from an eligible tribe.” *See* S. Rep. No 577, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 2, p. 2 (1988). The decision did not set out time limits, and Congress responded by adopting strict timelines – e.g., one hundred eighty (180) days after receipt of a tribal request for an election. 25 U.S.C. § 476(c)(1)(A). During this

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<sup>36</sup> See P.L. 100-581 (1988 Amendments to the IRA).

period, the Secretary is to review the final draft of the draft constitution, determine if any provision is “contrary to applicable laws,” and advise the tribe in writing within thirty days prior the calling of the election as to whether she has found any provision of the proposal to be contrary to applicable laws. 25 U.S.C. § 476(c)(3). The amendments also provided for federal court enforcement of the IRA,<sup>37</sup> and defined “applicable laws” and “appropriate tribal request.”<sup>38</sup>

Of particular relevance, the 1988 Amendments removed prior restrictions on tribes eligible for reorganization under the IRA by “delet(ing) reference to residence on a reservation and eliminat(ing) reservation status or ownership of a tribal land base as a condition precedent to organization under this Act.” *See S. Rep. No 577, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 2, p. 2 (1988)* The legislative history goes on

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37The amendments provide, “Actions to enforce the provisions of this section may be brought in the appropriate federal district court.” 25 U.S.C. § 476(d)(2) This latter provision has been viewed as a waiver of sovereign immunity in the D.C. District Court. *Kickapoo Tribe of Oklahoma*, 728 F. Supp. at 794.

38These definitions are not included in the codified section of U.S.C. P.L. 100-581, Title I, § 102 provides that: “For the purpose of this Act, the term –

“(1) ‘applicable laws’ means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts;

“(2) ‘appropriate tribal request’ means receipt in the Area Office of the Bureau of Indian Affairs having administrative jurisdiction over the requesting tribe, of a duly enacted tribal resolution requesting a Secretarial election as well as a copy of the proposed tribal constitution and bylaws, amendment, or revocation action”

to confirm that Congress intended that the term “tribe” in this section meant the definition of tribe in Section 19 of the IRA [25 U.S.C. § 479]. *Id.* The section reads,

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.<sup>39</sup>

(emphasis added)

More recently, the Supreme Court provided clarification of the IRA’s Section 19 definition in *Carcieri v. Salazar*, 555 U.S. 379 (2009). The Court interpreted this section to apply to those tribes that were under federal jurisdiction in June 1934 without regard to any subsequent action under 25 C.F.R. Part 83. *Id.*, at 382-83. That case involved a tribe that appeared on the Secretary’s list of federally recognized tribes – the Narragansett – but had not been under federal jurisdiction in 1934. The Court held that such a tribe was not a “tribe” for IRA purposes. Thus, *Carcieri* interpreted Sec. 19 of the IRA to employ a “look-back” test, to determine whether the tribe at issue was “under federal jurisdiction” in 1934, without regard to whether the tribe appeared on the Secretary’s list of tribes.

Justice Breyer’s concurring opinion dealt specifically with Michigan tribes such as the Mackinac.<sup>40</sup> Citing *Grand Traverse Band of Ottawa & Chippewa*

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

40It is probable that J. Bryer was responding to issues raised about Michigan

*Indians v. Office of U.S. Attorney for Western Dist of Mich.*, 369 F. 3d 960, 961 (6<sup>th</sup> Cir., 2004), Justice Breyer noted “in 1934 the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. But later the Department recognized the Tribe, considering it to have existed continuously since 1675.” *Carcieri*, 555 US at 399. He concludes that the BIA mistakes in dealing with recognition do not preclude a tribe from the definition of tribe for IRA purposes. Thus, the term “tribe,” as used in the IRA would include Michigan tribes thought by the BIA to have not existed in 1934, but later determined to have existed and under federal jurisdiction in 1934 – which is the case with the Mackinac.

As noted above, the federal government recognized the Mackinac as a tribe in the 1855 Treaty. Moreover, the federal government exercised jurisdiction over the Mackinac before, during and after 1934, including the Durant Enrollment and associated claims settlement (1910), the Meriam Report (1926), and the Indian Claims Commission proceedings (1948-1972). The Mackinac clearly fall within the definition of Indian tribe for IRA purposes, as clarified by the Court in *Carcieri*.

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recognition by Amicus. See *Brief of Law Professors Specializing In Federal Indian Law As Amicus Curiae Supporting Respondents*, U.S. Sup. Ct., No. 07-526, at 34-35 (August 25, 2008), available online at [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_07\\_08\\_07\\_526\\_RespondentAmCuLawProfsofFedInLaw.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_526_RespondentAmCuLawProfsofFedInLaw.authcheckdam.pdf) (last accessed August 24, 2015).

## **B. The IRA Regulations [25 C.F.R. Part 81].**

The BIA regulations implementing the IRA, found at 25 C.F.R. Part 81, define “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)<sup>41</sup> 25 C.F.R. Part 81.1 (2014)

Part 81 regulations do not say that the applicant tribe must be on the list or go through the acknowledgment process set forth in 25 C.F.R. Part 83; rather, the regulation clearly includes tribes that are “eligible” to be on the list, but, for some reason, are not on the list.

The Mackinac are clearly eligible to be on the list, in that they were recognized as an Indian tribe in the 1855 Treaty, and that recognition was never withdrawn by Congress.<sup>42</sup> There is no question that the Secretary’s policy requiring a tribe to be on her list of federally acknowledged tribes does not comply with the BIA regulations implementing the IRA, as clarified in the following section.

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<sup>41</sup>25 C.F.R. Part 81.1(w)

<sup>42</sup>See Sec. IV, *infra*.

### C. Summary.

There is no requirement in the IRA statute, nor implementing regulation that requires a tribe to exhaust administrative processes under 25 C.F.R. Part 83 prior seeking reorganization under the IRA. Indeed, the US Supreme Court in *Carcieri* clearly held that the determination as to a tribe's eligibility for IRA benefits is made without consideration as to whether the tribe has successfully negotiated the Part 83 acknowledgment process. The District Court's holding is contrary to the statutory regulations and interpretation of the statute provided by the Supreme Court. The District Court's holding should be reversed and remanded.

### III. THE ILLEGAL "ADMINISTRATIVE TERMINATION" OF THE MACKINAC CANNOT JUSTIFY NOR EXCUSE THE SECRETARY FROM COMPLYING WITH THE REQUIREMENTS OF THE IRA.

The District Court's decision violates the venerable maxim *injuria non excusat injuriam* – one wrong does not justify another. *See* Broom, *A Selection of Legal Maxims*, 268, 386, 394 (1847). In this case, the maxim at issue is only slightly older than the wrong committed.

The District Court's holding rests upon the premise that the Mackinac are do not appear on the Secretary's list of federally recognized tribes. While that fact is not disputed, it is also not determinative of eligibility under the IRA. (*supra*, Section III) Moreover, the Court's premise perpetuates a 126 year history of continuing violation of the 1855 Treaty and disregard for Congress' directive to the

Secretary contained in the Federally Recognized Indian Tribe List Act of 1994. 25 U.S.C. § 479a-1. In substance, the District Court excuses the Secretary's violation of the IRA based upon her past violations of treaties and Congressional mandates. As illustrated below, the decision's rationale is an extreme violation of the maxim *injuria non excusat injuriam*.

#### **A. Illegal Administrative Termination.**

There can be little question that the 1855 Treaty restructured the Michigan tribes; dissolving the Ottawa and Chippewa Nation, and promising direct government-to-government relations with the various bands granted reservations under the treaty, which included the Mackinac. *U.S. v. Michigan*, 471 F. Supp 192, 264-65 (1979); Art. V, Treaty of 1855. By its terms, the 1855 Treaty extended recognition and promised to continue such recognition to the Mackinac. Remarkably, the Secretary has never denied nor contested that the Mackinac became a recognized tribe by operation of the 1855 Treaty. The Secretary's denial of status to the Mackinac rests upon the historical violation of the treaty.

The 1889 administrative termination of the Michigan Indian tribes and the continuing non-recognition of the Mackinac violated and continues to violate the promises of the 1855 Treaty. It is well established that tribes recognized through treaty require congressional termination before they legally lose their status. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968). Administrative

termination of treaty tribes in the absence of Congressional action does not terminate the federally recognized status of Indian tribe. *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902-903 (D. Mass. 1977), *aff'd in* 592 F. 2d 575; *U.S. v. Washington*, 641 F.2d 1368, 1373-74 (9<sup>th</sup> Cir. 1981); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F.Supp 649, 663 at n.15 (D. Maine, 1975); *U.S. v. Livingston*, 2020 WL 3463887 (E.D. Cal. 2010) at 2, citing *Tille Hardwick, et al. v. U.S.*, No. C-79-1710 SW (N.D. Cal. 1979) (unpublished). In all these cases, federal recognition survived an illegal administrative termination similar to that experienced by the Mackinac. More to the point, the principal has been applied to Michigan tribes who were subjected to the same administrative termination experienced by the Mackinac. *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 (6<sup>th</sup> Cir. 2004).

The proper question before the District Court was not whether the BIA has extended recognition to the Mackinac. Rather, the critical question is whether Congress terminated recognition of the Mackinac. The answer to that question is clearly in the negative. Congress never acted to terminate the tribal status of the Mackinac promised in the 1855 Treaty. Neither the Secretary nor the District Court suggests that Congress acted to terminate the status of the Mackinac promised in the 1855 Treaty. In the absence of such congressional action, there is



no question that Secretary Delano's actions in 1872 violated the treaty and federal law, and the District Court's conclusion that the Mackinac are not a federally recognized tribe rests squarely upon those violations of the treaty and established federal law.

**B. Violation of the Federally Recognized Indian Tribe List Act of 1994.**

The wrong committed by the BIA against the Mackinac by an historic illegal administrative termination was compounded by the Secretary's violation of federal law which required her to place the Mackinac on the list of federally recognized tribes.

In 1994, Congress passed the Federally Recognized Indian Tribe List Act of 1994 [P.L. 103-454; 108 Stat. 4791] ("List Act"). The Act provides, the Secretary "shall publish . . . a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a). The Act is a mandate to the Secretary. "The purpose of H.R. 4180 is to require the Secretary of the Interior to publish an annual list of all Indian tribes eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (emphasis added) H.R. Rep. 103-781, at 2 (October 3, 1994). Congress clearly found that "the list of federally recognized tribes which the Secretary publishes should reflect **all** of the federally recognized Indian tribes in

the United States” P.L. 103-454, Title I, § 103 (8) (emphasis added). Congress clearly expressed that in stating “all tribes” it meant to include tribes that were recognized by Congress and the Courts, as well as by the Secretary. *Id.*, at § 103.

Moreover, in enacting the List Act, Congress clearly intended to address the Secretary’s ability to administratively terminate tribes. Congress found that “a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress.” *Id.*, § 103 (4). Indeed, one of the main reasons that Congress enacted the List Act was to address the fact that “Twice this Congress, the Bureau of Indian Affairs (BIA) has capriciously and improperly withdrawn federal recognition for a native group or leader.” H.R. Rep. 103-781, at 3. Indeed, the Committee stated

The Committee cannot stress enough its conclusion that the Department may not terminate the federally-recognized status of an Indian tribe absent an Act of Congress. Congress has never delegated that authority to the Department, or acquiesced in such a termination. Any attempt to the contrary by the Department will surely result in a more concrete and compelling assertion of Congressional primacy.

*Id.*, at 4

### **C. Summary.**

The District Court erred by excusing the Secretary’s violation of duty under the IRA because of the Secretary’s historical violation of the Tribe’s treaty, illegal administrative termination, and refusal to perform her duty to list all recognized

tribes mandated by the List Act. An historical pattern of violating the law is no justification nor excuse for the present violation of the law - *injuria non excusat injuriam*.

#### **IV. THE PART 83 PROCESS IS NOT AN EXCLUSIVE MANNER OF ACKNOWLEDGING AN INDIAN TRIBE.**

Implicit in the District Court's decision is the assumption that 25 C.F.R. Part 83 is the only process available to a tribe to reaffirm federal recognition of its status. This assumption is very clearly wrong.

There is a long history of judicial determination of tribal status arising out of lawsuits where the issue of tribal status has importance. In *Montoya v. U.S.*, 180 U.S. 261 (1901), the Courts set out the standard by which tribal status may be determined. It is important to understand that the Court's do not confer recognition, but rather confirm whether Congress or the Executive branch has conferred recognition. *Native Village of Noatak v. Hoffman*, 896 F.2d 1160 (9<sup>th</sup> Cir. 1988). In *Noatak*, the Secretary had not listed Alaska Native tribes on his list; nonetheless, the Court determined that two Alaska Native Villages – Noatak and Circle – were Indian tribes using the *Montoya* standard. *Id.* Using the same standard, the Court in *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) determined that seventeen (17) California rancherias not

appearing on the Secretary's list had not be administratively terminated, and were federally recognized tribes.

In enacting the List Act, Congress confirmed that the Federal Courts continue to have the power to determine tribal status when the issue arises in judicial proceedings. Indeed, Congress found that "Indian tribes presently may be recognized . . . by a decision of a United States court" P.L. 103-454, Title I, § 103 (3) This case is one such case in which the issue arises in a judicial context.

The IRA expressly authorizes the Court's to enforce its mandates to hold elections upon an "appropriate tribal request" and whether the action complies with "applicable laws." 25 U.S.C. § 476(d)(2). The term "applicable laws" includes whether the proposed action complies with any treaties. P.L. 100-581, Title I, § 102 (1). In this case, the answer to that question requires a determination as to whether the 1855 Treaty promised that the federal government would undertake government-to-government relations with the Mackinac in the future. Equally, the term "appropriate tribal request" is defined to include a "duly enacted tribal resolution". *Id.*, at § 102 (2). In this case, whether the Mackinac are a federally recognized tribe by virtue of the 1855 Treaty is partially determinative of whether the Secretary received an "appropriate tribal request." Thus, the 1988 Amendments clarifies that these matters were properly before the District Court.

Therefore, to the extent that the District Court's decision rests upon the erroneous assumption that the Court was without power to determine the tribal status of the Mackinac, this Court should reverse and remand the District Court's decision.

### **CONCLUSION**

The Order of Dismissal of the District Court should be reversed because 1) there is no requirement in the IRA statute, nor implementing regulation that requires a tribe to exhaust administrative processes under 25 C.F.R. Part 83 to prior seeking reorganization under the IRA, 2) the failure to recognize the Mackinac as a tribe for IRA purposes rests upon 126 years of illegal administrative termination in violation of the 1855 Treaty with the tribe, and 3) the Court has the power to determine the tribal status of the Mackinac for IRA purposes.

### **REQUEST FOR ORAL ARGUMENT**

Appellant requests oral argument in this case.

Dated: August 28, 2015

Respectfully submitted,

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## **ADDENDUM**

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## **PERTINENT STATUTES**

### **25 U.S.C. § 476**

#### **(a) Adoption; effective date**

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

- (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
- (2) approved by the Secretary pursuant to subsection (d) of this section.

#### **(b) Revocation**

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

#### **(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, or to revoke such constitution and bylaws; or
  - (B) within ninety days after receipt of a tribal request for election to ratify an amendment to the 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.

**(d) Approval or disapproval by Secretary; enforcement**

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) 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.

**(e) Vested rights and powers; advisement of presubmitted budget estimates**

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

**(f) Privileges and immunities of Indian tribes; prohibition on new regulations**

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C.461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

**(g) Privileges and immunities of Indian tribes; existing regulations**

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

**(h) Tribal sovereignty**

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

**25 U.S.C. § 479**

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. 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. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

**25 U.S.C. § 479a-1****(a) Publication of list**

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

**(b) Frequency of publication**

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE  
REQUIREMENTS**

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(a).

  X   The brief contains 6,966 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or

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2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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August 28, 2015  
Dates

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*Counsel for Appellant*

**United States Court of Appeals  
for the District of Columbia Circuit**  
*Mackinac Tribe v. Sally Jewell*, No. 115-5118

**CERTIFICATE OF SERVICE**

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by POSEY LEBOWITZ PLLC, Attorneys for Appellant to print this document. I am an employee of Counsel Press.

On **August 28, 2015**, counsel has authorized me to electronically file the foregoing **Opening Brief for Appellant** with the Clerk of Court using the CM/ECF System, which will serve, via e-mail notice of such filing, to any of the following counsel registered as CM/ECF users:

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A courtesy copy has also been mailed to the above listed counsel.

Unless otherwise noted, 8 paper copies have been filed with the Court on the same date via Express Mail.

August 28, 2015

/s/ Elissa Matias  
Elissa Matias  
Counsel Press