

IN THE INTERIOR BOARD OF INDIAN APPEALS

CALIFORNIA VALLEY MIWOK TRIBE,

Appellant,

v.

BUREAU OF INDIAN AFFAIRS,

Appellee.

DOCKET NO. IBIA 09-13-A

**APPELLANT'S APPLICATION FOR  
LEAVE TO FILE A NOTICE OF  
DECISIONS AND SUPPLEMENT TO  
REPLY.**

The California Valley Miwok Tribe ("Tribe/s") requests leave to file a notice of decisions related to federal law directly impacting the adjudication of this matter, including a notice of decision and a supplemental brief regarding *Aleutian Pribilof Islands Association, Inc. v. Kempthorne*, 537 F. Supp. 2d (D. D.C. 2008) ("*Aleutian*"), a case undermining the Eastern District of California's procedural holding and substantive dicta in *California Valley Miwok Tribe v. Kempthorne*, 2009 U.S. Dist. LEXIS 13465 (E.D. Cal. 2009) ("*Miwok*"), which the Appellee's presented to this Board on February 24, 2009 as part of its Supplement to its Opposition to Appellant's Response to Board's Order to Show Cause ("Supplement").

The Tribe was unable to provide this notice at an earlier date because its prior counsel failed to zealously advocate on the Tribe's behalf. Following the Tribe's retention of Rosette & Associates as counsel of record in this matter on or about July 15, 2009, notice of which will be mailed to the Board on the morning of July 24, 2009, the new team of attorneys discovered the precedent and advised the Tribal Council to alert the Board of its existence as soon as possible so the Board may consider it alongside the other documents submitted in connection with this appeal. The Tribe respectfully requests that the Board allow the Tribe to file a notice of decisions, including a notice of decision and supplemental brief on *Aleutian*, so it may determine the legitimacy of the Bureau of Indian Affairs' ("BIA/s") actions in light of federal precedents that directly address the issue and stand in stark contrast to the dicta in *Miwok*. Moreover, leave

will allow the Tribe to avoid the prejudice that will inevitably result if the appeal is decided in Appellee's favor and it has to submit this evidence for the first time in a motion for reconsideration or a federal appeal, both of which carry much harsher standards of review.

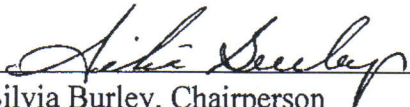
In the Supplement, the Appellee argues that the Board should dismiss the Tribe's IBIA appeal since the Eastern District recently dismissed a substantively similar appeal on procedural grounds, and further stated in dicta that the Tribe wasn't likely to succeed on the merits of its claim because the BIA based its decision to withhold self-determination funds on the legitimate ground that the Tribe lacks a recognizable governing body. See *Miwok*, \*13-17, \*23-24. The text of the *Miwok* holding indicates it's distinguishable from *Aleutian* with regards to the exhaustion of remedies claim. However, the Court fails to reconcile its dictum about the efficacy of the BIA's actions with the express holding in *Aleutian*, despite the wholly contrary reading of 25 U.S.C. § 450f(a)(2)(A-E). Moreover, as dicta, the language is ineffectual and does nothing to lessen the precedential value of *Aleutian*, meaning there is sound and persuasive federal law casting serious doubt on the BIA's claim that it has the authority to withhold self-determination funds for reasons other than the five set forth in 25 U.S.C. § 450f(a)(2)(A-E). In pertinent part, *Aleutian* expressly holds that, "ex ante" determinations denying tribal self-determination funding requests, as the BIA did in this case, are "inconsistent with a Congressional statutory scheme that limits the Secretary's discretion to deny such proposals ... [to] one of the five statutorily-enumerated criteria." *Aleutian*, 537 F. Supp. 2d at 11-12 (emphasis added). Through this language, *Aleutian* brings to light the BIA's inapposite and untenable interpretation of Section 450f(a)(2), thereby justifying a grant of leave so the Tribe may fully notice and brief the case.

The Tribe further requests leave so it may notice the myriad of federal cases and Board decisions that unequivocally state that intra-tribal governmental disputes are to be resolved by the tribe and not the federal government; see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976); *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996); *Wheeler v. US Department of the Interior, Bureau of Indian Affairs*, 811; F.2d 549 (10th

Cir. 1987); *Wasson v. Western Regional Director*, 42 IBIA 141 (2006) (“*Wasson*”); *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130 (1996); that the BIA must recognize an interim Tribal government until such dispute is resolved so as to not “jeopardize the continuation of necessary day-to-day services on the reservation;” *Goodface v. Grassrope*, 608 F.2d 335, 338-339 (8th Cir. 1983); *Wasson*, 42 IBIA at 158; and that the deprivation of such services may constitute a breach of the federal government’s fiduciary duty, thereby exposing the government to liability for any damages suffered by the tribe; see *United States v. Mitchell*, 463 U.S. 206 (1983).

For the foregoing reasons, the Tribe respectfully requests leave to notice the aforementioned cases, and notice and brief *Aleutian*, a case not presently before the Board that directly addresses the principal substantive issue in this matter.

Dated this 22<sup>nd</sup> Day of July, 2009

By:   
Silvia Burley, Chairperson  
California Valley Miwok Tribe