IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,	
v.	**C.A. No. 1:11-cv-00160-RWR**
KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.*	**Hon. Richard W. Roberts**

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs respectfully request that this Court enjoin Ken Salazar, Secretary of the United States Department of the Interior (the "Department"), Larry Echo Hawk, Assistant Secretary-Indian Affairs of the United States Department of the Interior ("Assistant Secretary"), and Michael Black, Director of the Bureau of Indian Affairs within the United States Department of the Interior (collectively, "Defendants") from taking any action to implement the Assistant Secretary's December 22, 2010 decision regarding the organization and membership of the California Valley Miwok Tribe ("Tribe") (the "2010 Decision").

Plaintiffs have a high likelihood of succeeding on the merits of their claims in this action. As set forth in Plaintiffs' Memorandum of Points and Authorities in Support of this Motion and the supporting Affidavits (hereby collectively incorporated by reference), Plaintiffs are likely to prevail on their claims that the 2010 Decision was precluded by this Court's prior decision in *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197 (D.D.C. 2006), *affirmed*, 515 F.3d 1262 (2008), that the 2010 Decision reversed the Department's longstanding position and prior determinations without adequate analysis or explanation, and that the 2010 Decision

was otherwise arbitrary, capricious, and in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

Absent preliminary injunctive relief, Plaintiffs will suffer irreparable harm to fundamental membership rights and to tribal self government activities, which cannot be remedied by relief granted later, should Plaintiffs prevail on the merits. A preliminary injunction will not cause substantial harm to federal defendants or third parties, because it will simply preserve the status quo that has existed since at least 2004, while the Court decides Plaintiffs' claims on the merits. Finally, an injunction is in the public interest because it will protect majoritarian values.

REQUEST FOR HEARING

Plaintiffs respectfully request that a hearing be held on this Motion within 21 days of filing of this Motion, as permitted by Local Rule 65.1(d).

RULE 7(m) CERTIFICATION

Pursuant to Local Rule 7(m), undersigned counsel for Plaintiffs on March 9, 2011 transmitted a letter to counsel for Defendants, Kenneth Rooney, in order to determine whether Defendants would consent to the relief sought in this Motion and to attempt to narrow the areas of disagreement. At Defendants' request, Plaintiffs twice delayed the filing of this Motion to allow Defendants additional time to consider whether to consent to the Motion. On March 15,

2011, Defendants informed Plaintiffs that they did not consent to the Motion, and Plaintiffs have notified Defendants that they intend to file the Motion as a contested motion.

Respectfully submitted,

/s/
M. ROY GOLDBERG
(D.C. Bar No. 416953)
CHRISTOPHER M. LOVELAND
(D.C. Bar No. 473969)
Sheppard Mullin Richter & Hampton LLP
1300 I Street, N.W., 11th Floor East
Washington, DC 20005-3314
Tel: (202) 772-5313
Fax: (202) 218-0020
rgoldberg@sheppardmullin.com
cloveland@sheppardmullin.com

Of Counsel:

ROBERT J. URAM (*pro hac vice* pending)
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Tel: 415-434-9100
Fax: 415-434-3947
ruram@sheppardmullin.com

Dated: March 16, 2011

CERTIFICATE OF SERVICE

I certify that on March 16, 2011, I caused a true and correct copy of the foregoing Motion for Preliminary Injunction, the Supporting Memorandum of Points and Authorities, and a proposed Order to be served on the following counsel for Defendants via electronic filing:

Kenneth D. Rooney
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663

____/s/_____
M. Roy Goldberg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,	
v.	**C.A. No. 1:11-cv-00160-RWR**
KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.*	**Hon. Richard W. Roberts** **Complaint filed January 24, 2011**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

M. ROY GOLDBERG
(D.C. Bar No. 416953)
CHRISTOPHER M. LOVELAND
(D.C. Bar No. 473969)
ATTORNEYS FOR PLAINTIFFS
Sheppard Mullin Richter & Hampton LLP
1300 I Street, N.W., 11th Floor East
Washington, DC 20005-3314
Tel: (202) 772-5313
Fax: (202) 218-0020
rgoldberg@sheppardmullin.com
cloveland@sheppardmullin.com

Of Counsel:

ROBERT J. URAM (*pro hac vice* pending)
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Tel: 415-434-9100
Fax: 415-434-3947
ruram@sheppardmullin.com

Dated: March 16, 2011

TABLE OF CONTENTS

Exhibits

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

COURT RULES

MISCELLANEOUS

This case involves a dispute over the organization of the California Valley Miwok Tribe, also known as the Sheep Ranch Rancheria of Me-wuk Indians of California ("Tribe"). Plaintiffs,[1] individually and as the rightful representatives of the Tribe,[2] seek a preliminary injunction[3] to enjoin federal Defendants from taking any action to implement the Assistant Secretary – Indian Affairs' December 22, 2010 decision granting control of the Tribe to four people. [Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Yakima Dixie (Dec. 22, 2010) (the "2010 Decision") (Exhibit "A" to Affidavit of Robert J. Uram ("Uram Affidavit", attached as Exhibit "1").] The 2010 Decision erroneously reverses long-standing determinations, confirmed by the Court of Appeals for the District of Columbia Circuit, that the organization of the Tribe must include the entire Tribal community. *California Valley Miwok Tribe v. United States,* 515 F.3d 1262, 1267-1268 (D.C. Cir. 2008) [hereinafter *CVMT*]. It cedes full control of the Tribe to Silvia Burley ("Burley"), her two daughters and her granddaughter (collectively, the "Burleys"), causing irreparable injury to the Tribe and to hundreds of tribal members whom the Burleys seek to exclude.

[1] Plaintiffs are the Tribe, Yakima Dixie, and Tribal Council members Velma Whitebear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antone Azevedo, individually and as members of the Tribal Council.

[2] Appellants acknowledge that the United States currently recognizes Silvia Burley and Rashel Reznor as the representatives of the Tribe. The use of the Tribe's name is not meant to suggest that Burley or her recently formed Tribal Council authorized this suit or that the United States currently recognizes Plaintiffs' Tribal Council as authorized to act for the Tribe. As fully set forth in this brief and in Plaintiffs' complaint, the validity of the decision to recognize Burley and Reznor as tribal representatives lies at the heart of Plaintiffs' claims.

[3] Pursuant to Local Rule 7(m), undersigned counsel for Plaintiffs conferred with counsel for Defendants in order to determine whether Defendants would consent to the relief sought in Plaintiffs' Motion and to attempt to narrow the areas of disagreement. Defendants did not consent to the relief sought in Plaintiffs' Motion.

I. INTRODUCTION

The California Valley Miwok Tribe is located in Calaveras County, California. It is a federally recognized tribe.[4] For the past twelve years, the membership and leadership of the Tribe, and its status under the Indian Reorganization Act ("IRA"), have been disputed. In two prior determinations, made in 2004 and 2005, the United States Department of the Interior ("Department") determined that the Tribe was not organized and that its organization must involve the whole Tribal community (estimated at 250 people, including Plaintiffs). The Department rejected Burley's efforts to organize the Tribe under a purported constitution that she and her two daughters had "adopted" without involving the rest of the Tribal community.

Burley challenged the Department's 2004 and 2005 determinations in federal court. She claimed the Department had to recognize the Tribe as organized under her constitution, even though it would have limited Tribal membership to the Burleys. The district court upheld the Department's decisions in *California Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197, 203 (D.D.C. Mar. 31, 2006) [hereinafter *CVMT*]. The Court of Appeals affirmed, holding that "[Burley's] antimajoritarian gambit deserves no stamp of approval from the Secretary." *CVMT,* 515 F.3d at 1267. (These decisions are collectively referred to as the "Burley Litigation.") Both courts recognized that the Secretary of the Interior ("Secretary") has a trust obligation to ensure that the Department deals only with legitimate representatives of the entire Tribal community.

After the District Court decision, in November 2006, the Bureau of Indian Affairs ("BIA") (an agency within the Department) sent Burley a letter stating that it would assist the

[4] The United States recognizes the California Valley Miwok Tribe as a federal Indian on the list of federally recognized tribes published annually under the Tribe List Act, Pub. L. 103-454, 108 Stat. 4791, 4792 (25 U.S.C. § 479a). Inclusion on the list does not mean that the tribe is "organized" under the IRA or that its membership has been determined. *See generally CVMT*, 515 F.3d at 1264.

Tribe in the organization process. Instead of cooperating, Burley appealed the 2006 letter to the Interior Board of Indian Appeals (the "Board"). *California Valley Miwok Tribe v. Pacific Regional Director*, *Bureau of Indian Affairs*, 51 IBIA 103 (Jan. 28, 2010) [hereinafter *CVMT*]. The Board rejected Burley's claims, but referred one narrow issue to the Assistant Secretary – Indian Affairs ("Assistant Secretary"). Instead of addressing that narrow issue, however, the Assistant Secretary reversed the Department's prior position and rescinded its 2004 and 2005 decisions. Relying on a talismanic invocation of tribal sovereignty, his 2010 Decision abandoned the Department's judicially sanctioned obligation to ensure that the entire Tribal community participates in the organization process. He turned control of the Tribe over to the Burleys, allowing them to exercise sole control over membership in the Tribe.

The 2010 Decision is barred by collateral estoppel and judicial estoppel. It is arbitrary and capricious and otherwise in violation of the Administrative Procedure Act. Unless this decision is first preliminarily and then permanently enjoined, the Plaintiffs will be irreparably injured. Individual Plaintiffs will be deprived of the tangible and intangible benefits of Tribe membership, and the Tribe's cultural, social and economic activities will be crippled.

These injuries affect the lives of many families and hundreds of people. At one point, the ties among the Tribal community were nearly lost, but since 2003 Plaintiffs have been working to identify the Tribe's membership and restore the Tribe's community structure and ties with the larger Indian community. Yakima Dixie ("Chief Dixie"), the Tribe's Hereditary Chief and Traditional Spokesperson, has established the Tribal Council ("Council") to guide the Tribe. The Council's monthly meetings are open to all and are typically attended by 30 to 100 people.

Plaintiffs have made great strides in rebuilding a functioning Tribe. The Tribe now participates in child custody proceedings on behalf of its members, cultural resources

consultations, cultural preservation and religious rituals, intertribal language preservation efforts, traditional crafts and skills, gathering of religious materials, construction of ceremonial buildings, community development programs, environmental restoration efforts, and food distribution programs. All of these activities are threatened unless the Court grants preliminary, and ultimately permanent, injunctive relief.

Plaintiffs' ultimate goal is to formally organize the Tribe under the IRA so that the Tribe and its members can enjoy the full benefits of federal recognition. All those with legitimate claims to Tribal membership, based on their descent from historic Tribe members, are welcome to participate in the organization of the Tribe, to be recognized as members, and to participate in the cultural and economic life of the Tribe.

If the Decision stands and the Burleys consolidate their control of the Tribe, the harm to Plaintiffs will be swift, complete and irreparable. Plaintiffs will be permanently stripped of their identity, their cultural heritage and their place in the Indian community. The real Tribe will be erased and replaced by the "Burley tribe," which effectively consists of just four people.[5] This is precisely the kind of "antimajoritarian gambit" that this Court and the Court of Appeals previously rejected.

II. STATEMENT OF FACTS

A. History of the California Valley Miwok Tribe

The Sheep Ranch Rancheria was created in 1916, when the United States purchased approximately two acres of land to benefit approximately twelve Miwok Indians living in or near Sheep Ranch, California, in Calaveras County. [Letter from Edith Blackwell, Associate

[5] Although Chief Dixie is currently a member of the Tribe as recognized by Burley (making a total of five members), he has no control and could be excluded at any time by a vote of the Burleys. As explained below, the Burleys previously purported to "disenroll" Chief Dixie from the Tribe, but later "reenrolled" him when it became expedient for litigation purposes.

Solicitor, Indian Affairs, to Peter Kaufman, California Deputy Attorney General (Dec. 2, 2008) (the "Solicitor's Letter") (Exhibit "B" to Uram Affidavit, attached as Exhibit "1").] In 1935, the Tribe, acting through Jeff Davis, a Tribal member, voted to accept the IRA. [Letter from O.H. Lipps, Sacramento Indian Agency Superintendent, to Roy Nash, U.S. Indian Field Service, Re Rancheria Election Results (June 14, 1935) (Exhibit "C" to Uram Affidavit, attached as Exhibit "1").] The IRA allows tribes to adopt a constitution, form a government, and elect officials, subject to its substantive and procedural requirements. 25 U.S.C. § 476. Although it accepted the IRA, the Tribe did not take action to become "organized." [*See* Solicitor's Letter p. 1.]

In 1965, the BIA listed Mabel Hodge Dixie as the only Indian living on Sheep Ranch Rancheria. In 1966, the Federal government attempted to "terminate" the Sheep Ranch Rancheria (as well as other California Rancherias), but the termination process for the Sheep Ranch Rancheria was never completed. [2010 Decision p. 1.] In 1971, Ms. Dixie died, and her son Yakima Dixie inherited the position of Hereditary Chief and Traditional Spokesperson of the Tribe. [Exhibit "2", Affidavit of Yakima Dixie ¶ 3 ("Dixie Affidavit")].

B. Burley's Efforts to Gain Control of the Tribe

In 1998, Sylvia Burley consulted with the BIA on how to become a member of a Tribe. The BIA advised Burley to contact Chief Dixie. At Burley's request, Chief Dixie agreed to enroll Burley, her two daughters, and her granddaughter in the Tribe so they could receive federal education and health benefits available to Indian tribe members. [Sheep Ranch Rancheria Tribal Adoption and Enrollment Document (Aug. 5, 1998) (Exhibit "D" to Uram Affidavit, attached as Exhibit "1").] Under the guidance of the BIA, Chief Dixie and the Burleys then began preliminary efforts to organize the Tribe under the IRA. [Solicitor's Letter p. 1.]

In 1998, Burley submitted the 1998 Resolution, which purported to establish a General Council to serve as the governing body of the Tribe. [Resolution # GC-98-01 ("1998 Resolution") (Exhibit "E" to Uram Affidavit, attached as Exhibit "1").] The 1998 Resolution bore the signatures of only two people—Chief Dixie and Burley. [1998 Resolution p. 3.] Burley then filed a document purporting to be Chief Dixie's resignation from the position of Tribal Chairperson. Chief Dixie immediately denied the validity of the document and continues to do so. [Exhibit "2", Dixie Affidavit ¶ 8, 10.] [Solicitor's Letter p. 1.] These actions led to an ongoing dispute over the organization, membership and leadership of the Tribe, in which Burley has sought to limit the membership of the Tribe to herself and her immediately family, *CVMT,* 424 F.Supp.2d at 203 n. 7, even attempting to disenroll Chief Dixie from the Tribe. [Letter from BIA Pacific Regional Director to Silvia Burley (April 2, 2007) (the "2007 Decision") (Exhibit "F" to Uram Affidavit, attached as Exhibit "1").] [Exhibit "2", Dixie Affidavit ¶ 24.]

C. The BIA and the Department Reject Burley's Efforts to Take Control Of The Tribe

After efforts to resolve the conflict with Burley failed, Chief Dixie began working in 2003 to organize the Tribe without Burley's assistance and with the participation of the entire Tribal community. Chief Dixie formed a Tribal Council composed of individuals recognized within the Tribal community as figures of authority. In addition to Chief Dixie, the Council currently includes Plaintiffs Velma Whitebear, Antonia Lopez, Michael Mendibles, Evelyn Wilson and Antone Azevedo. [Exhibit "2", Dixie Affidavit ¶ 14, 16.] [Exhibit "3", Affidavit of Velma Whitebear ¶ 6, 8 ("Whitebear Affidavit").] Each of the members of the Council is a lineal descendant of a historical member or members of the Tribe. The Council has held open meetings, at which all Tribe members are welcome to attend, approximately once each month since late 2003. [Exhibit "2", Dixie Affidavit ¶ 3.] [Exhibit "3", Whitebear Affidavit ¶ 3.]

[Exhibit "4", Affidavit of Antonia Lopez ¶ 3 ("Lopez Affidavit").] [Exhibit "5", Affidavit of Michael Mendibles ¶ 3 ("Mendibles Affidavit").] [Exhibit "6", Affidavit of Evelyn Wilson ¶ 3 ("Wilson Affidavit").] [Exhibit "7", Affidavit of Antone Azevedo ¶ 3 ("Azevedo Affidavit").]

The Council met with the BIA in September 2003 and documented their legitimate claims to Tribal membership and authority. They provided a list of Tribal community members and asked the BIA to call an election under the IRA to select a Tribal government that the United States could recognize. The BIA did not act on the Council's request but continued to meet regularly with the Council to discuss efforts to organize the Tribe. [Exhibit "2", Dixie Affidavit ¶ 15.] [Exhibit "6", Wilson Affidavit ¶ 7.] [Exhibit "2", Whitebear Affidavit ¶ 7.]

Burley responded to Chief Dixie's efforts to organize the Tribe by submitting yet another proposed constitution to the BIA, in February 2004. This constitution would have limited Tribal membership to the Burleys. *CVMT*, 424 F.Supp.2d at 203 n. 7. The BIA declined to approve this constitution. [Letter from Dale Risling Sr., Superintendent, Bureau of Indian Affairs Central California Agency, to Silvia Burley (Mar. 26, 2004) (the "2004 Decision") (Exhibit "G" to Uram Affidavit, attached as Exhibit "1").] The BIA explained:

> Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was attempted or has occurred with the purported organization of your tribe. . . . To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts, were you and your two daughters . . .. It is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified.

[2004 Decision pp. 1-2.] The BIA's letter identified several groups of Tribe members who should be involved in the initial organization efforts. The BIA's letter also stated that "the BIA does not yet view your tribe to be an 'organized' Indian Tribe" and that, as a result, the BIA could

not recognize Burley as the Tribe's Chairperson. [2004 Decision pp. 1-2.] Burley did not file an administrative appeal of the 2004 Decision.

On February 11, 2005, the Assistant Secretary – Indian Affairs reiterated the determinations expressed in the BIA's 2004 Decision. [Letter from Michael Olsen, Acting Assistant Secretary – Indian Affairs, to Yakima Dixie (Feb. 11, 2005) (the "2005 Decision") (Exhibit "H" to Uram Affidavit, attached as Exhibit "1").] The Assistant Secretary stated:

> In [the 2004 Decision], the BIA made clear that the Federal government did not recognize Ms. Burley as the tribal Chairman. . . . Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal Chairman. I encourage you . . . to continue your efforts to organize the Tribe along the lines outlined in the March 26, 2004 letter so that the Tribe can become organized and enjoy the full benefits of Federal recognition. The first step in organizing the Tribe is identifying putative tribal members.

[2005 Decision p. 1.] The BIA then sought to work with Chief Dixie's Tribal Council and the Tribe to complete the organization process, and invited Burley to participate. [Solicitor's Letter p. 3.] Burley again refused and instead filed suit challenging the 2004 and 2005 Decisions.

D. The Burley Litigation: This Court and the Court of Appeals Uphold the Department's Decision

In April 2005, Burley filed suit in this Court. *CVMT*, 424 F.Supp.2d 197. Her suit challenged the Secretary's refusal to approve her proposed constitution and to recognize her Tribal government, and sought a judgment that the Tribe was organized pursuant to its inherent authority, despite Burley's failure to comply with the procedures set forth in the IRA. *Id.* at 201. This Court dismissed Burley's claims, holding that the Secretary has "a responsibility to ensure that [she] deals only with a tribal government that actually represents the members of a tribe." *Id.* The Court also held that the 2004 and 2005 Decisions were consistent with the BIA's "duty to ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members." *Id.* at 202-203. The

Court noted that the Burleys' constitution "conferred tribal membership only upon them and their descendants . . . [but] the government estimates that the greater tribal community, which should be included in the organization process, may exceed 250 members." *Id.* at 203 n.7.

Burley appealed this Court's decision. The Court of Appeals affirmed, stating that the Department's decisions fulfilled a cornerstone of the United States' trust obligation to Indian tribes: to "promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." *CVMT*, 515 F.3d. at 1267. The court further explained:

> In Burley's view, the Secretary has no role in determining whether a tribe has properly organized itself . . .. That cannot be. . . . [T]he Secretary has the power to manage *'all* Indian affairs and *all* matters *arising out of Indian relations*.' . . . The exercise of this authority is especially vital when, as is the case here, the government is determining whether a tribe is organized, and the receipt of significant federal benefits turns on the decision. The Secretary suggests that her authority . . . includes the power to reject a proposed constitution that does not enjoy sufficient support from a tribe's membership. Her suggestion is reasonable, particularly in light of the federal government's unique trust obligation to Indian tribes.

Id. (emphasis in original). The Court of Appeals concluded: "Although [the Tribe], by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary." *Id*. at 1267.

E. The BIA Proceeds to Implement the 2004 and 2005 Decisions

On November 6, 2006, after the district court had dismissed Burley's claims, the BIA wrote to Burley and Chief Dixie that the BIA "remain[ed] committed to assist the [Tribe] in its efforts to reorganize a formal governmental structure that is representative of all Miwok Indians" [Letter from Troy Burdick, Superintendent, BIA Central California Agency, to Silvia Burley and Yakima Dixie (Nov. 6, 2006) (the "2006 Decision") (Exhibit "I" to Uram Affidavit, attached as Exhibit

"1").] The BIA offered to facilitate a public meeting of existing and Putative Members–i.e., those with a legitimate claim to Tribal membership. [2006 Decision p. 1.]

The Burleys appealed the Superintendent's 2006 Decision to the Regional Director. The Regional Director affirmed, stating, "We believe the main purpose [of the 2006 Decision] was to assist the Tribe in identifying the whole community, the 'putative' group, who would be entitled to participate in the Tribe's efforts to organize a government that will represent the Tribe as a whole. . . . It is our belief that until the Tribe has identified the 'putative' group, the Tribe will not have a solid foundation upon which to build a stable government." [2007 Decision p. 5.]

The BIA then published public notice of a meeting to organize the Tribe and requested that Putative Members submit documentation of their membership claim to the BIA (e.g., personal genealogies). The public notice defined the Putative Members as lineal descendants of: (1) individuals listed on the 1915 Indian Census of Sheep-ranch Indians; (2) Jeff Davis (the only Indian listed as an eligible voter on the federal government's 1935 voting list for the Rancheria); and (3) Mabel Hodge Dixie. [Amador Ledger Dispatch Legal Announcements (April 11, 2007) (Exhibit "J" to Uram Affidavit, attached as Exhibit "1").]

Each of the individual Plaintiffs submitted genealogies in response to the BIA in response to the April 2007 public notice. Plaintiffs understand that several hundred other persons also submitted personal genealogies to the BIA but that none of the Burleys did so. [Exhibit "2", Dixie Affidavit ¶ 18.] [Exhibit "3", Whitebear Affidavit ¶ 19.] [Exhibit "4", Lopez Affidavit ¶ 19.] [Exhibit "5", Mendibles Affidavit ¶ 20.] [Exhibit "6", Wilson Affidavit ¶ 19.] [Exhibit "7", Azevedo Affidavit ¶ 19.] The BIA has taken no action on the information submitted.[6]

[6] Count 2 of the Complaint in this case asserts that the BIA's failure to complete its review of the genealogies violates the APA as agency action unreasonably withheld.

F. Burley Attempts to Relitigate Her Claims Before the Board

Burley appealed the Regional Director's 2007 Decision to the Interior Board of Indian Appeals. Burley argued that the BIA's decision to involve the Tribal community in the initial organization of the Tribe was an impermissible intrusion into Tribal government and membership matters, because the Tribe was *already* organized. *CVMT*, 51 IBIA at 104. In January 2010, the Board held that the Assistant Secretary's 2005 Decision and the Burley Litigation had already finally determined that: (1) the Department did not recognize the Tribe as being organized; (2) the Department did not recognize any tribal government that represents the Tribe; (3) the Tribe's membership was not necessarily limited to the Burleys and Yakima Dixie; and (4) the Department had an obligation to ensure that a "greater tribal community" was allowed to participate in organizing the Tribe. *Id.* at 120-121. The Board held that, to the extent Burley's appeal attempted to relitigate those issues, it had no jurisdiction over her claims. *Id.* at 104-105. The Board dismissed all of Burley's claims except for a single, narrow issue.

According to the Board, the 2007 Decision raised one issue that had not already been decided: the process for determining "who BIA will recognize, individually and collectively, as members of the 'greater tribal community' that BIA believes must be allowed to participate in the general council meeting of the Tribe for organizational purposes." *Id.* at 105. The Board characterized Burley's this issue as a "tribal enrollment dispute" and referred the issue to the Assistant Secretary for resolution, because the Board lacks jurisdiction over such questions. *Id.*

G. The Assistant Secretary's 2010 Decision

Instead of deciding the issue the Board referred to him, the Assistant Secretary inexplicably, and without any reasoned explanation, reopened issues long settled and not subject to appeal. The Assistant Secretary rescinded the 2004 and 2005 Decisions. Contrary to the

Court of Appeals ruling, the Assistant Secretary declared that the Tribe was already organized pursuant to the 1998 Resolution, with a General Council form of government. He ordered the BIA to rescind its 2006 and 2007 Decisions to help the Tribe organize according to majoritarian principles. And he directed the BIA to carry on government-to-government relations with the Tribe as organized under the 1998 Resolution. [2010 Decision pp. 5-6.]. His action does exactly what the Court of Appeals decision said the Department could not do—recognize a Tribal government that does not represent the entire Tribal community.[7]

Since the 2010 Decision was issued, the BIA has moved to recognize the Burleys as the government of the Tribe, based on a so-called tribal election held on January 7, 2011**.** [Public Notice Re Special Meeting of the General Council of the California Valley Miwok Tribe (Dec. 23, 2010) (Exhibit "K" to Uram Affidavit, attached as Exhibit "1").] [Letter from BIA Central California Agency Superintendent Troy Burdick to Silvia Burley (Jan. 12, 2011) (Exhibit "L" to Uram Affidavit, attached as Exhibit "1").][8] Only the Burleys participated in that election.[9]

---

[7] In light of the Department's extraordinary reversal of position, Plaintiffs anticipate seeking discovery from the deciding officials.

[8] Plaintiffs have filed an administrative appeal challenging the BIA's recognition of the election. [Notice of Appeal (Feb. 9, 2011) (Exhibit "M" to Uram Affidavit, attached as Exhibit "1")]. Pursuant to 25 C.F.R. § 2.6(b), the appeal stays the effectiveness of *that decision* during the pendency of the appeal. Plaintiffs do not believe that the stay of the BIA's election recognition decision eliminates the need for a preliminary injunction to prevent irreparable harm to Plaintiffs resulting from the implementation of the 2010 Decision. Plaintiffs' administrative appeal concerns a narrow issue related to recognition of Silvia Burley and Rashel Reznor as officials of the Tribe. It does not relate to the validity or effectiveness of the 2010 Decision, which is much more broad and concerns fundamental issues related to Tribal organization that will not be addressed in Plaintiffs' administrative appeal, even if the BIA's election recognition decision is reversed. A preliminary injunction is still needed to protect Plaintiffs' interests in Tribal organization and membership, and Plaintiffs' legitimate Tribal self-government activities, from irreparable harm while this Court hears Plaintiffs' claims.

[9] As the only other member of the Tribe recognized by the Burleys, Chief Dixie was eligible to participate. He filed a notice of objection to the election notice but did not participate, as his vote was meaningless. [Letter from Robert Uram to Silvia Burley (Jan. 6, 2011) (Exhibit "N" to Uram Affidavit, attached as Exhibit "1").]

III. APPLICABLE LEGAL STANDARDS

A. Preliminary Injunctive Relief

A party seeking a preliminary injunction must show that four factors, taken together, weigh in favor of the injunction: (1) a substantial likelihood of success on the merits; (2) the likelihood of irreparable harm to the movant in the absence of injunctive relief; (3) the possibility of substantial harm to the nonmovant, and (4) the public interest. *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009), *rehearing en banc denied*. *See also* Fed. Rule Civ. Proc. 65(a). The four factors have traditionally been evaluated on a "sliding scale." *Id.* at 1291-1292.

The Court of Appeals for the D.C. Circuit has suggested that the Supreme Court's recent opinion in *Winter v. NRDC* "could be read to create a more demanding burden," in that it calls into question whether each of the four factors must be separately satisfied. *Id.* at 1292. But it has not yet squarely addressed the question in a majority opinion, and the district courts in this circuit have so far continued to apply the traditional "sliding scale" test. *Compare Davis*, 571 F.3d at 1292 (majority opinion questioning the effect of *Winter*), with *Davis*, 571 F.3d at 1295-1296 (concurring opinion, interpreting *Winter* and *Munaf v. Geren*, 553 U.S. 674, 690-691 (2008), as requiring the movant to meet "four independent requirements") (Kavanaugh, C.J., concurring). *See also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 12 (D.D.C. 2009) (finding that the sliding scale test "remains viable" after *Winter*, but requiring a showing of "at least some injury"). In any event, the debate is academic here. Each of the four factors, considered independently or on a sliding scale, supports the grant of a preliminary injunction.

B. Judicial Review Under the Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), provides that a court must hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although the court should not substitute its judgment for that of the agency, its review must be "searching and careful." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (citation omitted). "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 149 (D.D.C. 1999) (citation omitted).

C. The Indian Reorganization Act

The IRA, 25 U.S.C. § 461 *et seq.*, authorizes Indian tribes to "organize for [their] common welfare" by adopting a tribal constitution and bylaws. 25 U.S.C. § 476(a). Among other things, a constitution or bylaws adopted pursuant to the IRA must be (1) ratified by a majority vote of the tribe's adult members in a special tribal election called by the Secretary,[10] and (2) approved by the Secretary. *Id.* The IRA also allows tribes to adopt governing documents under procedures other than those specified in Section 476. 25 U.S.C. § 476(h). But such documents are still subject to approval by the Secretary and still must comply with majoritarian values, including the full and fair participation of the entire tribal community in the organization process. *CVMT*, 515 F.3d at 1267-1268. If they do not, the Secretary must reject

[10] The Secretary has also promulgated regulations that govern special elections. *See generally* 25 C.F.R. Part 81. These rules address, among other things, voter eligibility, *id.* § 81.6, voter registration, *id.* § 81.11, election notices, *id.* § 81.14, and ballots, *id.* § 81.20.

them. *Id.* This conclusion, like the Secretary's other powers and responsibilities under the IRA, is informed by the United States' obligations as a trustee to Indian tribes and the Indian people. *Id.* at 1267. *See also*, *e.g.*, *United States v. Mitchell*, 436 U.S. 206, 225 (1983) (holding that "[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"); *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 147 (D.D.C. 2002) (finding that the Department's "distinctive obligation of trust" to Indian peoples required it to intervene in tribal elections to protect minority tribe members) (citing *Seminole Nation v. United States*, 316 U.S. 286 (1942)).

IV. ARGUMENT

A preliminary injunction is needed to protect Plaintiffs' ongoing activities on behalf of the Tribe and its members, and to ensure that all members of the Tribal community can participate in the initial organization of the Tribe. Without a preliminary injunction, Plaintiffs' ability to protect their interests in Tribal membership and self-governance will be irreparably lost.

A. Plaintiffs Are Likely to Succeed On the Merits of Their Claim that the Assistant Secretary's 2010 Decision Was Arbitrary, Capricious and Unlawful

Plaintiffs are likely to prevail on the merits of their claims. The 2010 Decision is precluded by the prior judicial proceedings under the doctrines of collateral estoppel and judicial estoppel. The 2010 Decision fails to provide a reasoned analysis supporting the Assistant Secretary's reversal of longstanding Department policy and previous decisions regarding the Tribe. The 2010 Decision decides issues not properly before the Assistant Secretary. The Decision violates the IRA and the Secretary's trust responsibility to the Tribe.

1. The 2010 Decision is Precluded by This Court's Prior Decision Regarding the Burleys and the BIA's Obligation to Uphold Majoritarian Values In the Organization Process

a. Collateral Estoppel Bars the 2010 Decision

Once a court has decided an issue of law or fact necessary to its judgment, the doctrine of collateral estoppel (or issue preclusion) prevents the relitigation of that issue in a subsequent proceeding involving a party to the first case.[11] *Allen v. McCurry*, 449 U.S. 90, 94 (1980). A prior proceeding has preclusive effect when (1) the same issue was contested and submitted for judicial determination in a prior case; (2) the issue was actually and necessarily decided in that case, and (3) preclusion would not work a "basis unfairness" to the party bound by the prior judgment. *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). Issue preclusion applies to both judicial actions and administrative decisions. *Deerfield v. F.C.C.*, 992 F.2d 420, 424-428 (2d Cir. 1993) (holding that a federal court decision precluded the FCC's administrative finding that an FCC regulation preempted local law). *See also Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission*, 75 F.3d 63, 64-66 (1st Cir. 1996) (Federal Marine Commission could not reverse determination made by federal court); *Spawr*

[11] The Secretary was a party to the Burley Litigation. Plaintiffs were not parties to the Burley Litigation, but Chief Dixie participated as a proposed intervenor in the District Court proceedings and as amicus curiae in the Court of Appeals proceedings. *CVMT*, 424 F.Supp.2d at 198 n. 2 (stating that Chief Dixie's motion to intervene was mooted by the court's decision dismissing Burley's claims); *CVMT*, 515 F.3d at 1263. If a party would be precluded from relitigating an issue with the person who was the opposing party in the first action, he is also precluded from doing so with another person, unless he lacked a full and fair opportunity to litigate the issue in the first action, or some other special circumstances make issue preclusion inappropriate. *Yamaha*, *infra*, 961 F.2d at 254 n.11 (citing Restatement (Second) of Judgments § 29 (1982)). Here, both the Secretary and Burley had a full and fair opportunity to litigate the issues of Tribal organization in the Burley Litigation. *E.g.*, *CVMT*, 424 F.Supp.2d at 201 (summarizing Burley's claims). Thus, the fact that Plaintiffs were not parties in the Burley Litigation does not prevent the Court from giving preclusive effect to that judgment here.

Optical Research, Inc. v. Baldrige, 649 F. Supp. 1366, 1369 (D.D.C. 1986) (Issue determined in judicial proceeding "accorded preclusive effect at a later administrative proceeding").

(1) The 2010 Decision Addresses the Same Issues Previously Raised Before This Court

This Circuit applies the RESTATEMENT (SECOND) OF JUDGMENTS approach in determining whether "essentially the same" issue was decided in a prior proceeding. Courts consider whether the issues in the two suits are "very closely related;" whether there is a "substantial overlap between the evidence or argument[s] . . . advanced" in the first and second proceedings; and whether "evidentiary proceedings in the first action could reasonably be expected to have embraced the matter sought to be presented in the second." *McLaughlin v. Bradlee*, 803 F.2d 1197, 1203 (D.C. Cir. 1986) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27, comment c (1982)); *see also Estate of Gaither v. D.C.*, 655 F.Supp.2d 69, 81 (D.D.C. 2009). Here, all three factors demonstrate that the 2010 Decision attempts to reopen the issues previously considered in the Burley Litigation.

First, the issues addressed by the Assistant Secretary are not only "very closely related" to the issues raised in the Burley Litigation, they are essentially identical. In the Burley Litigation, the Court found that the BIA has a "duty to ensure that the interests of all tribe members are protected during organization"—regardless of whether organization occurs under IRA procedures. *CVMT*, *supra*, 424 F.Supp.2d at 202-203. Therefore, the BIA's insistence that organization efforts involve the entire Tribal community did not constitute improper federal interference in the Tribe's internal affairs. *Id.* at 202-203. The Court thus found that the BIA properly rejected Burley's constitution and refused to recognize the Burleys as the Tribe's government. *Id.* at 201, 203, 203 n. 7. Implicit in the decision was the finding that the Tribe was

not already organized, contrary to Burley's allegations. *See id.* at 201. The Court of Appeals affirmed. *CVMT*, *supra*, 515 F.3d 1267-1268.

The 2010 Decision arises from Burley's 2007 appeal to the Board, in which she alleged, *inter alia*, that the Tribe was already organized and that BIA's decision to involve the Tribal community in the initial organization of the Tribe was an impermissible intrusion into Tribal government and membership matters. *CVMT*, 51 IBIA at 104. The Board recognized that those issues had already been decided by this Court. *Id.* at 105. But the Assistant Secretary did not.

The 2010 Decision abandons the Court of Appeals' holding that the BIA and the Department have a duty to ensure that Tribal governing documents reflect the will of a majority of the Tribe's members. It finds, instead, that decisions regarding Tribal organization, and who should participate in that process, must be left entirely to the Tribe, and that the federal government has no role in those decisions: "The determination of whether to adopt a new constitution, and whether to admit new tribal citizens to participate in that effort, must be made by the Tribe in the exercise of its inherent authority." [2010 Decision p. 5.] The Decision goes on to find that the Tribe is already organized pursuant to the 1998 Resolution. [2010 Decision p. 5.] It recognizes the General Council created under the 1998 Resolution as the Tribe's government, effectively recognizing the Burleys as the Tribe's representatives. [2010 Decision p. 6.] And it rescinds the BIA's efforts to protect the interests of all members during the Tribe's organization, stating that "there is no need for the BIA to continue its previous efforts to organize the Tribe's government . . . [or] to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area." [2010 Decision p. 5.]

In summary, the 2010 Decision turns on the very same question addressed in the Burley Litigation: whether the BIA has the right, and the duty, to ensure that any Tribal government it

recognizes actually reflects a majority of the Tribal community. The Assistant Secretary's efforts to recast the issue as a membership issue cannot avoid the binding effect of this Court's prior decision on that issue. *See Starker v. United States*, 602 F.2d 1341, 1345 (9th Cir. 1979) (holding that plaintiff was collaterally estopped from raising argument in second court that was merely "a switch in the verbal formula" of the argument used in first proceeding).

Second, there is "substantial overlap between the evidence or arguments" advanced before this Court and those considered by the Assistant Secretary. Indeed, the arguments are essentially identical. Burley argued in the Burley Litigation that the BIA has no authority to ensure that all members are included in the organization process and that the BIA has no choice but to recognize her antimajoritarian government. *See CVMT*, 424 F.Supp.2d at 201; *CVMT*, 515 F.3d at 1267. The 2010 Decision merely adopts that view. [2010 Decision pp. 4-5.][12]

Third, the evidentiary proceedings before this Court in the Burley Litigation "could reasonably be expected to have embraced the matter" addressed in the 2010 Decision. *McLaughlin*, 803 F.2d at 1203. Consideration of this factor is intended to guarantee fairness by ensuring that the pretrial preparation and discovery in the first proceeding provided an adequate basis for resolving the issue addressed in the second proceeding. *See Starker v. United States*, 602 F.2d 1341, 1344 (9th Cir. 1979). Because the Burley Litigation was an APA challenge based on the administrative record; there are no discovery issues to consider. The information considered by the Assistant Secretary is essentially the same as was available to the Court. For these reasons, Plaintiffs are likely to prevail on the issue of whether the 2010 Decision addresses the same issues previously raised in the prior proceedings.

[12] The December 22 Decision addresses the BIA's 2006 and 2007 Decisions, but in doing so it does not rely on any new information that was not before this Court in the Burley litigation. [*See generally* December 22 Decision pp. 1-5.]

(2) This Court Actually and Necessarily Determined the Issues Addressed In the 2010 Decision

The preclusive effect of a prior judgment extends to all issues "actually and necessarily determined" in the prior litigation, including both matters explicitly addressed by the court and matters that the court "must necessarily, albeit implicitly," have decided in order to reach its judgment. *Yamaha*, 961 F.2d at 254, 256. Furthermore, "once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Id*. at 254 (internal quotations and citations omitted) (emphasis in original).

In the Burley Litigation, Burley claimed that the documents the Tribe had adopted were "valid, governing documents," and that the Tribe was already "lawfully organized pursuant to its inherent sovereign authority." *CVMT*, 424 F.Supp.2d at 201. In dismissing Burley's complaint for failure to state a claim, the Court necessarily determined that the Tribe was not organized in 2005 when the complaint was filed. *See id.* at 203. The Court's determinations not only apply to the particular arguments raised in the Burley Litigation, but preclude *any* attempt to relitigate the *issue* of whether the Tribe was already organized. *Yamaha*, 961 F.2d at 254; *Seminole Nation v. Norton*, 223 F.Supp.2d 122, 133-134, 133 n.14 (D.D.C. 2002).

In *Seminole Nation*, the court gave preclusive effect to a determination that the Department had the authority to approve or reject amendments to the Seminole constitution, and that the Department had acted properly in refusing to recognize the results of tribal elections from which tribal members descended from former slaves had been excluded. 223 F.Supp.2d at 133 n.14. Although the prior court's decision had not addressed the specific tribal election at issue, the court found that the prior determinations applied equally to the new election. *Id.*

Similarly, the Burley Litigation decided that the Secretary has an obligation to ensue that she "deals only with a tribal government that actually represents the members of a tribe," and that

"tribal actions reflect the will of a majority of the tribal community—whether or not they choose to organize under the IRA procedures." *CVMT*, 424 F.Supp.2d at 201-202. That determination applies not only to the specific Tribal documents and actions before the court in the Burley Litigation, but to *any* Tribal government or governing documents for which BIA recognition is sought. *Seminole Nation*, 223 F.Supp.2d at 133-134; *Yamaha*, 961 F.2d at 254. The 1998 Resolution cannot possibly meet the requirement of majority participation, because it was approved by at most *two people*, even though Burley and the Department concede that the Tribal community numbers in the hundreds. *See CVMT*, 223 F.Supp.2d at 203 n. 7 (rejecting a constitution adopted only by Burley and her two daughters); *CVMT*, 515 F.3d at 1266-1267 (same). For these reasons, the Plaintiffs are likely to prevail on the issue of whether the Burley Litigation actually and necessarily determined the issues addressed in the 2010 Decision.

(3) Giving Preclusive Effect to This Court's Decision Would Not Work A 'Basic Unfairness'

Collateral estoppel applies only when giving preclusive effect to a prior judgment would not work "a basic unfairness" on the party to be precluded. *Yamaha*, 961 F.2d at 254. Courts apply this third prong only rarely, when "strict application of . . . estoppel principles . . . would violate an overriding public policy or result in manifest injustice." *Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594, 597 (5th Cir. 1977). *See also* WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (2d ed. 2006) § 4426.

Here, there is no overriding public policy or manifest injustice to either the Secretary or Burley that should bar the application of collateral estoppel. On the contrary, to the extent there is an overriding public policy interest implicated by the 2010 Decision, it is that majoritarian principles must be upheld whenever the Secretary acts to recognize a tribal government. *CVMT*, 424 F.Supp.2d at 202; *CVMT*, 515 F.3d at 1267-1268. It would be a manifest injustice to allow

the Department to reverse its prior position. Hundreds of people have spent countless hours participating in Tribal activities and cooperating with the BIA in anticipation that they would finally be recognized as members of this tribe. Neither the Secretary nor Burley will suffer any injustice by requiring that all members of the Tribal community be allowed to participate in the organization of this Tribe. For these reasons, the Plaintiffs are likely to prevail on the issue of whether giving preclusive effect to the 2010 Decision will cause a manifest injustice.

(4) This Court Should Grant Preclusive Effect to Its Prior Decision in the Burley Litigation

Plaintiffs are likely to prevail on their claims that the Burley Litigation decisions meet the collateral estoppel criteria. The Assistant Secretary lacks the power to disregard those binding judicial decisions. The sole means of disputing this Court's decision, after the Court of Appeals affirmed, was to seek certiorari with the Supreme Court. Neither Burley nor the Secretary did so, and the Burley litigation decisions became final. The Assistant Secretary cannot issue a new administrative decision that overturns those rulings. *Deerfield*, 992 F.2d at 428.

b. Judicial Estoppel Bars the Secretary From Repudiating His Obligation to Uphold Majoritarian Values

Judicial estoppel is a separate equitable doctrine that prevents a party from adopting one argument in order to prevail in one phase of a case, and then adopting a contrary position to prevail in another phase of that case or in another proceeding.[13] *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001) (citations omitted). Although this doctrine is not reducible to a simple formula, a court should consider: whether a party's position is clearly inconsistent with its earlier position; whether the court accepted the party's earlier position; and whether the party asserting the inconsistent position would "derive an unfair advantage or impose an unfair detriment on the

[13] The doctrine of judicial estoppel provides a separate and independent basis for rejecting the 2010 Decision, in addition to the doctrine of issue preclusion described above.

opposing party if not estopped." *Id*. at 751. The doctrine is intended to avoid inconsistent court determinations. *Id.* at 750-751. Judicial estoppel applies to the government as well as to private parties. *See, e.g.*, *Valentine-Johnson v. Roche*, 386 F.3d 800, 810-812 (6th Cir. 2004).

New Hampshire v. Maine involved a dispute, in 2000, over the meaning of a historical decree fixing the boundary between New Hampshire and Maine at the "Middle of the [Piscataqua] River." 532 U.S. at 745. New Hampshire asserted that "Middle of the River" actually meant the low water mark on the Maine shore—in effect placing the entire River , and a key port, within New Hampshire. *Id.* at 747. But New Hampshire and Maine had settled a 1977 dispute, involving a different section of the River boundary, by agreeing that the "Middle of the River" meant the middle of the River's main navigable channel. 532 U.S. at 745. The Supreme Court held that judicial estoppel barred New Hampshire from changing its position, accepted by the Court in the 1977 litigation, in order to gain an advantage in the 2000 litigation. *Id.* at 755.

The present case is analogous to *New Hampshire*. In briefs submitted to the Court of Appeals, the Secretary asserted that, "for an 'Indian tribe' to organize under the IRA, action by the tribe as a whole is required; action by an unrepresentative faction is insufficient." The Secretary argued that she could not recognize Burley's purported tribal government, or its constitution, because "the undisputed facts show that the Burley Government was elected, and its governing documents adopted, by just three people and without the participation of the vast majority of the potential members of the Tribe." The Secretary also recognized that she had not only the authority but the obligation to "ensure the legitimacy of any purported tribal government that seeks to engage in [a] government-to-government relationship with the United States." [Brief and Supplemental Appendix of Appellees, *California Valley Miwok Tribe v. U.S.*, 2007 WL 1700313, 12, 14-15 (D.C. Cir.) (Exhibit "O" to Uram Affidavit, attached as Exhibit "1").]

In the 2010 Decision, the Assistant Secretary repudiated each of those prior positions. He stated that the Tribe is organized under the 1998 Resolution. He rescinded the 2004 and 2005 Decisions and directed the BIA to engage in a government-to-government relationship with a government that was selected by an unrepresentative faction of the Tribe. He took the position that the United States must accept the Burleys' anti-majoritarian, self-serving theories of Tribal membership, in the name of respect for "tribal sovereignty." [2010 Decision pp. 4-6.]

The Assistant Secretary's position is not just "clearly inconsistent" with the Secretary's prior position; it is completely opposite. *New Hampshire*, 532 U.S. at 752. Moreover, this Court and the Court of Appeals wholeheartedly accepted the Secretary's position in the Burley Litigation, finding that the Department has an obligation to ensure that "tribal organization under the Act . . . reflect[s] majoritarian values," and upholding the Secretary's decisions in full. *CVMT*, 515 F.3d at 1267-1268. If this Court were to allow the Assistant Secretary to reverse that position now, "the risk of inconsistent court determinations would become a reality." *New Hampshire*, 532 U.S. at 755 (internal quotations and citation omitted). This Court cannot interpret the IRA as obligating the Department to uphold majoritarian values, and as *not* creating such an obligation, "without undermining the integrity of the judicial process." *See id.* at 755 (holding that the Court could not interpret "Middle of the River" to mean two different things).

Moreover, Plaintiffs would suffer an unfair detriment if the Assistant Secretary were not estopped from reversing the government's position. Plaintiffs have relied on the Secretary's prior position by making good faith efforts to organize the entire Tribal community, by submitting genealogies to the BIA, and by cooperating with the BIA's efforts to assist the Tribe, all while Burley filed a series of lawsuits and administrative appeals. The 2010 Decision pulls the rug from under Plaintiffs and abruptly hands control of the Tribe to Burley and her unrepresentative

government. *C.f. Valentine-Johnson*, 386 F.3d at 810-811 (after convincing a terminated employee to dismiss her administrative appeal in favor of a judicial action in federal district court, the U.S. Air Force was judicially estopped from arguing that the district court lacked jurisdiction because the employee had failed to exhaust her administrative remedies).

Finally, the Assistant Secretary has pointed to no change in the facts or law upon which the Burley Litigation was decided, or any "broad interest of public policy," to justify his change in position and prevent the application of judicial estoppel. *See New Hampshire*, 532 U.S. at 755-756. To paraphrase the Supreme Court, "What has changed between [2005] and today is [the Assistant Secretary's] interpretation of the historical evidence." *Id.* at 756. Plaintiffs are likely to prevail on their claim that the Department is judicially estopped.

2. The 2010 Decision Is Arbitrary And Capricious Because It Failed To Provide A Reasoned Analysis Explaining Its Complete Reversal Of Longstanding Policies And Determinations Regarding Burley And The Tribe

The Assistant Secretary's 2010 Decision abandons the Department's long-held positions that (1) the Department has an obligation, generally, to ensure it is dealing with legitimate representatives of a Tribe, (2) the Department cannot recognize the Burley government, specifically, because it does not represent a majority of the Tribal community, and (3) any Tribal organization efforts must involve the entire community. The D.C. Circuit has repeatedly explained that an "agency's unexplained 180 degree turn away from precedent [or] an agency's decision to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *Brady Campaign to Prevent Gun Violence*, *supra*, 612 F.Supp.2d at 18 (citing *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 184 F.3d 892, 897 (D.C. Cir. 1999)) (quotations omitted). "[A]n agency changing its course must supply a reasoned analysis." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 57 (1983)). This does not mean that an agency must always provide a more detailed

explanation than it would if acting on a "clean slate." *F.C.C. v. Fox Television Stations*, 129 S.Ct. 1800 (2009). But "[s]ometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary or capricious to ignore such matters." *Id.* In addition, an agency's reversal of position must be viewed in light of its statutory duties. *See Fund for Animals v. Norton*, 294 F.Supp.2d 92, 105 (D.D.C. 2003) (holding that National Park Service's reversal of position regarding snowmobile use in national parks must be considered "in view of the statutory [conservation] mandate that governs the agency's actions"), *appeal dismissed*, 2005 WL 375622 (D.C. Cir. Feb. 16, 2005).

In *Fund for Animals*, the court found that a National Park Service ("NPS") rule, allowing 950 snowmobiles in national parks each day, was arbitrary and capricious because the agency had failed to distinguish its previous position that "snowmobiling so adversely impacted the wildlife and resources of the Parks that all snowmobile use must be halted." 294 F.Supp.2d at 105. The NPS' original decision was preceded by "almost a decade of study" and a "lengthy, complex and complete" decision-making process. *Id.* at 105. Less than three years later, shortly after a change in political administrations, the NPS reversed its position, claiming that new snowmobile technology and the use of guided tours would reduce the impacts of snowmobile use. *Id.* at 106-107. The court found that these justifications were not supported by the record, were "weak at best," and could not support the agency's "180 degree reversal." *Id.* at 108.

Similarly, the 2010 Decision fails to explain how the 1998 Resolution can be the basis for a valid Tribal government when the Department previously rejected multiple efforts by Burley to organize the Tribe with the participation of only herself and her daughters. As Burley herself has admitted, the members of the Tribal community number in the hundreds. *See CVMT*, 515 F.3d at

1267. In addition, the 2010 Decision, like the NPS' invalid decision in *Fund For Animals*, comes shortly after a change in agency leadership. and reverses prior positions that were based on years of experience with Burley and the Tribe's leadership disputes.

In an unsuccessful attempt to distinguish the Department's prior decisions, the Assistant Secretary reasons that, because the Tribe is already organized as a General Council under the 1998 Resolution, the BIA has no authority to question whether that government actually represents the full membership of the Tribe. He argues that any challenge to the validity of Burley's purported government, including any claims that additional members were entitled to participate in the Tribe's organization, must be resolved by the very same tribal government whose legitimacy is challenged. [2010 Decision p. 5.] This circular argument cannot save the Assistant Secretary's decision.

As a threshold matter, a tribal government cannot rule on its own validity, or on the validity of the organic documents from which it claims to derive its authority. *See Ransom v. Babbitt*, 69 F.Supp.2d 141, 152 (D.D.C. 1999) (holding that "an incongruity exists when a [tribal] court rules on the validity of a document by which it itself was created") (citing *Luther v. Borden*, 48 U.S. 1, 37-39 (1849). Moreover, the Assistant Secretary's argument overlooks the basic premise that federal deference to Tribal authority is proper only when that authority is legitimate. The Department has the power and the obligation to "review tribal political procedures when it is forced to recognize a person or an entity as a tribe's legitimate representative in relations with the United States." *Ransom*, 69 F.Supp.2d at 151 (finding that the BIA violated the APA by recognizing a tribal government based on a constitution that was not validly adopted). *See also CVMT*, 515 F.3d at 1267-1268 (affirming Secretary's "responsibility to ensure that a tribe's representatives, with whom she must conduct government-

to-government relations, are valid representatives of the tribe as a whole") (citation and quotations omitted); *Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 552 (10th Cir. 1987) ("since the Department is sometimes required to interact with tribal governments, it may need to determine which tribal government to recognize"); *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667, 669-670 (8th Cir. 1997) (the Secretary has the authority to disapprove amendments to a tribal constitution when possible errors in voter eligibility determinations raise doubts about the "fundamental integrity and fairness" of tribal elections conducted under IRA § 476(a)). The Department's obligation to the Tribe must inform the Court's review of the 2010 Decision. *Fund for Animals*, 294 F.Supp.2d at 105.

Particularly in light of the Department's underlying duty to recognize only legitimately representative tribal governments, the Assistant Secretary's unexplained reversal is quintessentially arbitrary and capricious. *See Fund for Animals*, 294 F.Supp.2d at 105-106. Plaintiffs are likely to prevail on their claim that the Assistant Secretary's radical departure from the Department's prior actions violates the APA.

3. The 2010 Decision is Procedurally Defective

An agency action that does not comply with the agency's own rules and procedures violates the APA. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 713 (8th Cir. 1979). Here, the Assistant Secretary violated multiple regulations by reopening issues not subject to appeal.

a. The 2010 Decision Unlawfully addressed Issues Not Within the Jurisdiction of the Appeal Referred by the Board

The 2010 Decision arises out of the Regional Director's 2007 Decision, which Burley appealed to the Board. But the 2010 Decision attempts to revoke not only the 2007 Decision, but also the 2004 and 2005 Decisions. Review and revocation of the 2004 and 2005 Decisions was unlawful, for two procedural reasons.

First, the 2004 and 2005 Decisions were final for the Department and not subject to further appeal within the Department. The 2004 Decision became final when the time for filing an appeal expired without the filing of a notice of appeal. 25 C.F.R. § 2.6(b); 25 C.F.R. § 2.9(a). The 2005 Decision was final agency action immediately upon its issuance. 25 C.F.R. § 2.6(c). The Assistant Secretary is bound by these regulations and lacked authority to revisit the 2004 and 2005 Decisions in the context of Burley's appeal. *See Oglala Sioux Tribe*, 603 F.2d at 713.

Second, even if the 2004 and 2005 Decisions had been subject to further review, they were not within the scope of Burley's appeal to the Board. To the extent Burley's claim that the Tribe was already "organized" implicated the 2004 and 2005 Decisions, the Board recognized that this Court had already decided that issue, and therefore dismissed the claim. *CVMT*, 51 IBIA at 105. The Board referred to the Assistant Secretary only a narrow issue pertaining to the 2007 Decision, "to the extent it [went] beyond what was decided or confirmed by the Assistant Secretary [in the 2005 Decision]." *Id.* Thus, the 2004 and 2005 Decisions were not properly before the Assistant Secretary at all.

Even as to the 2007 Decision that was the subject of Burley's appeal, the 2010 Decision exceeded the Assistant Secretary's jurisdiction. The Board referred a single issue from Burley's appeal to the Assistant Secretary: the process for deciding "who BIA will recognize, individually and collectively, as members of the 'greater tribal community' that BIA believes must be allowed to participate in the general council meeting of the Tribe for organizational purposes." *Id.* The Board explicitly *dismissed* Burley's other claims, including her claims that the Tribe was already organized and that the BIA's efforts to assist with Tribal organization therefore interfered unduly in Tribal affairs. *Id.* at 104-105. The propriety of the BIA's efforts to assist the Tribe was not before the Assistant Secretary. Nonetheless, he instructed the BIA to rescind the 2006 and 2007

decisions in their entirety, thereby exceeding the scope of the issue properly before him. For these reasons, Plaintiffs are likely to prevail on the claim that the 2010 Decision unlawfully addressed issues not within the jurisdiction of the appeal referred to him by the Board.[14]

4. The 2010 Decision's Reliance on the 1998 Resolution is Arbitrary and Capricious

Without waiving any of the foregoing arguments, an additional basis for reversing the 2010 Decision is that reliance on the 1998 Resolution violates the APA.

a. The Recognition of the 1998 Resolution Violates the IRA and the Secretary's Trust Obligation to the Tribe

The Court of Appeals' holding in the Burley Litigation is that, for tribes that have accepted the IRA, any "organization" effort must comply with the substantive mandates of majoritarian participation and procedural fairness. *CVMT*, 515 F.3d at 1267-1268. This is true whether the tribe chooses to organize under the procedures defined in Section 476(a) of the IRA, or to exercise its sovereign powers under "non-IRA" procedures as permitted by Section 476(h). *Id.* at 1265, 1267-1268; *accord*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04(3)(b) n. 398 (2005 ed.) [2009 supplement] (citing the Court of Appeals' opinion in the Burley Litigation). The 2010 Decision purports to recognize the Tribe as organized based on the 1998 Resolution. But the 1998 Resolution does not come close to meeting the requirements of the IRA, under either subsection 476(a) or subsection 476(h).

[14].In October 2003, Chief Dixie filed an appeal with the Assistant Secretary, challenging the BIA's recognition (at that time) of Burley as Tribal Chairperson. In the 2005 Decision, the Assistant Secretary found that Chief Dixie's appeal was moot. [2005 Decision pp. 1-2.] Because the December 22 Decision purports to rescind the final 2004 Decision, Chief Dixie's appeal is no longer moot and the Assistant Secretary must decide the appeal before recognizing any Tribal government it was procedurally improper. *Cf. Bullcreek v. U.S. Dept. of Interior*, 426 F.Supp.2d 1221, 1229 (D. Utah 2006) (finding that, "even if this court were to reverse the IBIA's decisions regarding ripeness and standing, this court would be required to remand the case to the IBIA ").

IRA subsection 476(a) permits Indian tribes to organize by adopting a "constitution and bylaws." 25 U.S.C. § 476(a). Among other things, subsection 476(a) requires that a tribal constitution and bylaws shall be effective only after they are ratified by a majority vote of the adult members of a Tribe, at a special election authorized and called by the Secretary, and approved by the Secretary pursuant to subsection 476(d). 25 U.S.C. § 476(a). Neither the Assistant Secretary nor Burley even claims that the 1998 Resolution complied with those requirements. Nor does the 1998 Resolution purport to be either a tribal constitution or bylaws, which are necessary to organize a tribe under the plain language of subsection 476(a).

IRA subsection 476(h) allows Tribes to enact governing documents without observing the specific procedures set forth in subsection 476(a). *See* 25 U.S.C. § 476(h); *CVMT*, 515 F.3d at 1267. But the 1998 Resolution cannot have been enacted under 476(h), for two reasons. First, subsection 476(h) did not exist in 1998. It was added in 2004 by the Native American Technical Corrections Act of 2004. *See* 25 U.S.C.A. § 476 (West 2011); *CVMT*, 424 F.Supp.2d at 200. Second, the 1998 Resolution does not satisfy the *substantive* requirements of 476(a)—namely, adherence to majoritarian principles. As discussed above, the 1998 Resolution was signed by at most two people, while the potential membership of the Tribe numbers in the hundreds. *CVMT*, 515 F.3d at 1267. Like the constitution that the Burleys submitted in 2004, "this antimajoritarian gambit deserves no stamp of approval from the Secretary." *Id.*

This conclusion is reinforced by the Secretary's trust obligation to Indian tribes. In the context of the IRA, "a cornerstone of this obligation is to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." *Id.* (citing *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)). Giving Burley complete control over the Tribe, and over the state and

federal benefits available to the Tribe and its members, is directly at odds with the Secretary's trust obligation. *See*, *e.g.*, *Seminole Nation*, 223 F.Supp.2d at 138-140 (the Department upheld its trust obligation, and did not violate the APA, by refusing to recognize the results of tribal elections from which tribal members were excluded) (citing *Seminole Nation*, 316 U.S. at 297).

b. The 1998 Resolution Is Invalid On Its Face

Even assuming, for the sake of argument, that it did not violate the IRA's requirements, the 1998 Resolution is not a proper basis for recognition of a Tribal government because it is invalid by its own terms. The Resolution recites that it is signed by "a majority of the adult members of the General Council" of the Tribe. [1998 Resolution p. 3.] The General Council consists of all adult members of the Tribe. [1998 Resolution p. 2.]

The Resolution identifies "at least" five members: Chief Dixie and the four Burleys [1998 Resolution p. 1.] But in a letter to Chief Dixie dated September 24, 1998, the BIA stated that at least these five *and* Chief Dixie's brother, Melvin Dixie, were eligible to participate in the organization of the Tribe.[15] *CVMT*, 424 F.Supp.2d at 198; 2010 Decision p. 2. Of these six, the 1998 Resolution bears only two signatures. [1998 Resolution p. 3.] Thus, it could not represent the will of a majority of the Tribe, even if membership were limited to those six individuals.[16] Plaintiffs are likely to prevail on the claim that reliance on the 1998 Resolution violates the APA.

B. Plaintiffs Will Suffer Irreparable Injury If Defendants Are Allowed to Implement the 2010 Decision

Plaintiffs must show a likelihood of irreparable injury in order for this Court to issue a preliminary injunction against the implementation of the 2010 Decision. *Davis*, 571 F.3d at

[15] The 1998 Resolution says Melvin Dixie location was "unknown." [1998 Resolution p. 1.] Even if that were true, this would not change his status as a member. In fact, Melvin Dixie was known to be living in the Sacramento area. [Dixie Affidavit ¶ 7.]

[16] Chief Dixie also disputes the validity of his signature on the 1998 Resolution and other documents. Plaintiffs reserve the right to explore these issues in briefing on the merits.

1291. In this Circuit, to establish irreparable injury, two basic requirements must be met. First, the threatened harm must be imminent—i.e., "both certain and great, actual and not theoretical." *Chaplaincy Of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citation omitted). Second, the harm must be "beyond remediation." *Id.* (citation omitted). Thus, for example, the threat of "mere economic injury" is not usually sufficient to establish irreparable harm, because it normally can be remedied by an award of monetary damages if the plaintiff prevails on the merits. *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985).

Plaintiffs easily meet the test for irreparable injury. Defendants are already moving to implement the 2010 Decision by recognizing Burley and Reznor as the Tribal Council of the Tribe. Implementation of the 2010 Decision will irreversibly deprive Plaintiffs of Tribal membership and the opportunity to participate in the organization of the Tribe. These losses cannot be compensated by money and cannot be remedied after the fact, particularly because the Tribe's sovereign immunity may bar Plaintiffs and other members from challenging subsequent Tribal actions in a non-tribal forum. *See Smith v. Babbitt*, 857 F.Supp. 1353, 1369-1370 (D. Minn. 1995), *affirmed*, 100 F.3d 556 (members' claims in federal court against tribe were barred by sovereign immunity); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001) (finding irreparable injury where later relief against state action might not be available because of state's sovereign immunity). Furthermore, the Decision will significantly interfere with Tribal self-government, which is a per se irreparable harm. *See Comanche Nation, Oklahoma v. United States*, 393 F.Supp.2d 1196, 1205, 1211 (W.D. Okla. 2005).

1. Denial of Tribal Membership

The 2010 Decision denies Plaintiffs their rightful membership in the Tribe. Denial of tribal membership is a grievous harm to fundamental rights that necessarily constitutes

irreparable injury. *See Smith*, 875 F.Supp. at 1369-1370 (holding that denial of tribal membership to qualified individuals would constitute irreparable harm). *Cf. Richards v. Napolitano*, 642 F.Supp.2d 118, 134 (E.D.N.Y. 2009) (finding that deportation qualifies as "irreparable injury"). It deprives Plaintiffs of their cultural heritage, their place in the Indian community, and an important element of their personal identities. [Exhibit "3", Whitebear Affidavit ¶ 28.] [Exhibit "4", Lopez Affidavit ¶ 28.] [Exhibit "5", Mendibles Affidavit ¶ 29.] [Exhibit "6", Wilson Affidavit ¶ 28.] [Exhibit "7", Azevedo Affidavit ¶ 28.] Just as the violation of constitutional rights, such as freedom of religion, freedom of speech, and freedom of political association, is consistently held to establish irreparable harm, the denial of Tribal membership threatens irreparable harm to Plaintiffs. *See, e.g., Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("[i]t has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (quotation omitted); *Satiacum v. Laird*, 475 F.2d 320, 321 (D.C. Cir. 1972) (prohibition of Native American religious rituals interfered with freedom of religion and irreparably harmed tribal members).

2. Denial of Membership Benefits

Because the 2010 Decision deprives Plaintiffs of membership in a federally recognized Indian tribe, it will also deny them access to federal health, education and other benefits that flow from tribal membership. *See generally* 25 U.S.C. Ch. 18 (providing for various health care programs to benefit Indian tribes); 25 U.S.C. Ch. 7 (providing for Indian education programs). Although Plaintiffs may eventually receive those benefits if they prevail on the merits, they will never be compensated for the time during which the benefits are denied. Denial of these benefits is irreparable injury. *See, e.g., Beltran v. Myers,* 677 F.2d 1317, 1322 (9th Cir. 1982) (holding

the possibility that plaintiffs would be denied Medicaid benefits sufficient to establish irreparable harm); *Cota v. Maxwell-Jolly,* 688 F.Supp.2d 980, 997 (N.D. Cal. 2010) (finding that "the reduction or elimination of public medical benefits is sufficient to establish irreparable harm to those likely to be affected by the program cuts").

3. Denial of Participation in the Initial Organization of the Tribe

By declaring that Tribe is already "organized" under the invalid 1998 Resolution, the 2010 Decision denies Plaintiffs the irreplaceable opportunity to participate in the initial organization of the Tribe, including the drafting and ratification of a Tribal constitution, and the election of a representative Tribal government. Loss of this unique opportunity to participate in the Tribe's political process can never be recouped and cannot be compensated by money, and thus is a per se irreparable injury. *See Smith*, 875 F.Supp. at 1369-1370; *Reynolds v. Sims*, 377 U.S. 533, 552, 555, 585-587 (1964) (affirming the grant of injunctive relief to protect citizens' voting rights, which the Court described as the "essence of a democratic society"); *Elrod v. Burns*, 427 U.S. 347, 356-357, 373-374 (1976) (holding that interference with the rights of free political association and belief constitutes irreparable injury); *Prairie Band of Potawatomi Indians*, 253 F.3d 1234 (10th Cir. 2001) (defining irreparable injury).

Exclusion from the organization process also will lead to further injury. If the Burleys are allowed to define the Tribe's constitution, bylaws and membership criteria, Plaintiffs will be forever excluded from any future opportunity to participate in the Tribe.

4. Interference With Tribal Self-Government and Essential Services

Although the Tribe is not formally organized under the IRA, the Tribal Council has been meeting since late 2003 to govern the Tribe and conduct Tribal business. As long as the status of the Tribe's was in dispute, many local, state and federal agencies were willing to work with the

Tribe and to recognize its members, despite Burley's opposition to Plaintiffs' activities. Plaintiffs have established many programs that benefit the Tribe and its members, strengthen Tribal culture and traditions, and restore Tribal ties with the larger Native American community.

By recognizing the Burleys as the government of the Tribe, the Decision strips the Council of legitimacy and interferes with these vital programs and activities. Interference with Tribal self-government activities constitutes irreparable injury as a matter of law. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d at 1234 (state interference with tribe's vehicle registration laws interfered with tribal self-government and constituted irreparable harm); *Seneca-Cayuga Tribe of Oklahoma v. State of Okla.*, 847 F.2d 709, 716 (10th Cir. 1989) (interference with tribal self-government, and potential loss of jobs and income used to support tribe's social services, constituted irreparable harm); *Comanche Nation*, 393 F.Supp.2d at 1205, 1211 (W.D. Okla. 2005) (interference with tribal self-government "is sufficient to show irreparable harm").

a. Child Custody Proceedings

Since 2004, the Tribe has interceded in approximately ten child custody proceedings under the Indian Child Welfare Act ("ICWA"), on behalf of children of Tribe members. In those cases where a child is removed from its family, the Tribe seeks to have the child placed with an Indian family or a family with ties to Indian traditions, so that the child is not deprived of its cultural heritage and place in the Indian community. If allowed, the Tribe will continue to intercede in these cases on behalf of its members. [Exhibit "3", Whitebear Affidavit ¶ 10-12.]

The Burleys have opposed the Tribe's efforts in ICWA cases by claiming that the children at issue are not members of the Tribe (and thus not eligible for protection under ICWA), and that only Burley or Reznor is authorized to represent the Tribe in these proceedings. By granting the

Burleys sole authority to represent the Tribe, the 2010 Decision will prevent the Tribe from intervening in currently pending (and future) child custody cases under ICWA. As a result, these children will not be placed with Indian families and will be deprived of their cultural heritage and their ties to the Tribe and the larger Indian community. [Exhibit "3", Whitebear Affidavit ¶ 10-12.]

b. Cultural Resources Consultations

The Tribe's Cultural Preservation Committee has been recognized by the California Native American Heritage Commission. Several Tribe members have been trained to serve as cultural monitors on behalf of the Tribe and have performed monitoring at construction sites that may affect Native American cultural and religious artifacts. Burley has opposed the Tribe's right to participate in cultural monitoring. On at least one occasion, she publicly confronted members of the Tribe who were serving as monitors. On two other occasions, Burley contacted Caltrans and the Calaveras County Public Works Department and told those agencies that Tribe members were not authorized to serve as cultural monitors, resulting in the exclusion of the members from the site. By legitimizing Burley's claims to Tribal authority, the 2010 Decision will prevent Tribe members from serving as cultural monitors at development sites potentially affecting Indian cultural artifacts, remains or sacred sites. [Exhibit "8", Affidavit of Pete Ramirez ¶ 13-14 ("P. Ramirez Affidavit").] [Exhibit "9", Affidavit of Briana Creekmore ¶ 7-9 ("Creekmore Affidavit").] As a result, the Tribe will be unable to protect its cultural heritage.

c. Cultural Preservation and Religious Rituals

The Tribe is represented by a ceremonial Indian dance and cultural preservation group, the Sheep Ranch Rancheria Me-wuk Dancers ("Me-wuk Dancers"), at tribal events throughout California. The Me-wuk Dancers group was organized by tribe members Gilbert Ramirez and his son Pete Ramirez at the request of Tribal elders. The Me-wuk Dancers play an important role in

preserving the language, cultural identity and religious traditions of the Tribe. Burley has challenged the Me-wuk Dancers' right to represent the Tribe and has attempted to convince other tribes to exclude the Me-wuk Dancers from ceremonial events. As a result of the 2010 Decision, the Me-wuk Dancers will be unable to represent the Tribe at Indian cultural ceremonies, including upcoming springtime rituals beginning in April 2011. The Tribe will be deprived of an important connection to the larger Indian community and a vital means of preserving its language, cultural heritage and religious traditions. In addition, the members of the Me-wuk Dancers will be deprived of their role in the cultural and religious life of the community. [Exhibit "10", Affidavit of Gilbert Ramirez ¶ 7-12 ("G. Ramirez Affidavit").] [Exhibit "8", P. Ramirez Affidavit ¶ 7-12.]

d. Language Preservation

The Tribe participates, with other Miwok tribes, in an intertribal Miwok Language Restoration Group that teaches the Miwok language to younger tribe members so that the language and the tribal traditions are not lost. Plaintiff Evelyn Wilson represents the Tribe in the group. If the 2010 Decision is upheld, Plaintiffs will no longer be entitled to represent the Tribe in such efforts. [Exhibit "3", Whitebear Affidavit ¶ 13.] [Exhibit "6", Wilson Affidavit ¶ 12.]

e. Traditional Crafts and Skills

The 2010 Decision will prevent Tribe members, including Plaintiff Velma Whitebear, from gathering materials such as willow roots used in traditional crafts. These materials are found on public lands, and only members of Indian tribes may legally gather them. As a result, the Tribe will be unable to continue offering classes in the traditional crafts that use these materials, and those crafts and skills may be lost. [Exhibit "3", Whitebear Affidavit ¶ 16.]

f. Gathering of Religious Materials

In addition, the 2010 Decision will prevent Tribe members from gathering certain materials, such as raptor feathers, that are needed for cultural and religious ceremonies. These materials can only be legally possessed by members of Indian tribes. Because the 2010 Decision deprives the Plaintiffs and other members of membership in the Tribe, they will now be subject to criminal prosecution if they gather or possess those materials. [Exhibit "8", P. Ramirez Affidavit ¶ 15.] [Exhibit "10", G. Ramirez Affidavit ¶ 13.]

g. Construction of Ceremonial Buildings

The Tribe has been negotiating with the USFS regarding construction of a traditional Indian "brush house" on USFS land near the Tribe's ancestral village. A brush house is an open-roofed building for conducting dances and other traditional ceremonies. It is a key element in Indian cultural and religious traditions, equivalent to a tribe's church. The traditional materials needed for construction of a brush house are found on federal lands to which the USFS controls access. The 2010 Decision threatens the Tribe's access to those materials that are essential to the Tribe's cultural activities. [Exhibit "8", P. Ramirez Affidavit ¶ 16.] [Exhibit "10", G. Ramirez Affidavit ¶ 14.] [Exhibit "9", Creekmore Affidavit ¶ 15.]

h. Community Development and Environmental Restoration Programs

Since 2004, the Tribe has been participating in the Calaveras Healthy Impact Products Solutions project ("CHIPS"), a community supported project that seeks to reduce wildfire hazards to local communities while providing economic opportunity for local workers. CHIPS received a grant from the United States Department of Agriculture in 2007 to support retraining for workers to participate in new jobs within the forestry and vegetation control industry. Among other things, CHIPS has trained Native American workers, including Tribe members, to

perform restoration work on federal lands that contain sensitive Native American heritage resources. The 2010 Decision will deny CHIPS access to heavy equipment and support services available through the BIA to federally recognized tribes. This denial threatens the financial viability of the CHIPS Program and the jobs and Native American-owned businesses it supports. [Exhibit "9", Creekmore Affidavit ¶ 10-12, 14.]

Through CHIPS and the Amador-Calaveras Consensus Group ("ACCG"), a community coalition, the Tribe has been engaged in efforts to participate in the United States Forest Service's ("USFS") Collaborative Forest Landscape Restoration Program ("CFLRP"). Participation in the CFLRP would allow local workers to work with the USFS and Bureau of Land Management ("BLM") on landscape restoration and forest stewardship projects. In particular, the USFS is seeking Native American crews (such as those trained by CHIPS) to participate in programs to reintroduce fire as a management technique on federal lands with sensitive Native American heritage resources. The participation of the Tribe is important to the success of the community's CFLRP proposal. [Exhibit "9", Creekmore Affidavit ¶ 11-14.]

By depriving Plaintiffs of Tribal authority and status, the 2010 Decision prevents the Tribe from participating in the CFLRP. If the Tribe is unable to participate, not only the Tribe but the entire local community will be affected. The Tribe and the community will lose jobs, vocational training and funding they badly need. [Exhibit "9", Creekmore Affidavit ¶ 11-14.]

i. Food Distribution Programs

The Tribe participates in the annual Salmon Distribution Project in which it obtains several tons of fresh salmon from the Oroville Dam hatchery and distributes it to Tribe members. [Exhibit "3", Whitebear Affidavit ¶ 17.] Because of the 2010 Decision, the Tribe may not be

eligible to participate in the Salmon Distribution Project and other programs for the benefit of tribal members, such as the USDA's Food Commodities program.

j. Loss of Funding for Tribal Self-Government

In addition to these direct harms to Plaintiffs' Tribal self-government activities, the 2010 Decision will also deprive Plaintiffs of funds that rightfully belong to the Tribe and that are intended to support Tribal self-government and services for the Tribe's members. Among other things, Burley is currently prosecuting a suit in California state court that seeks to compel the California Gambling Control Commission to turn over to Burley more than $6 million in Revenue Sharing Trust Fund money that the state holds in trust for the Tribe. Just last week, that court issued a preliminary ruling granting Burley's motion for judgment on the pleadings, on the basis that the 2010 Decision establishes Burley as the Tribe's authorized representative, effective immediately. *California Valley Miwok Tribe v. California Gambling Control Commission*, No. 37-2008-00075326-CU-CO-CTL (San Diego Sup. Ct. Mar. 10, 2011) (Tentative Ruling Re Plaintiff's Motion for Judgment on the Pleadings). Plaintiffs understand that Defendants are also preparing to grant Burley access to federal funds provided to tribes under Public Law 93-638, which are intended to support tribal social services, such as the child custody proceedings in which Plaintiffs have intervened. If Burley gains access to the funds, Plaintiffs will be deprived of financial support for these Tribal self-government activities. In this context, the loss of funds is more than a mere economic injury, and represents irreparable harm to the Tribe. *See Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171-1172 (10th Cir. 1998) (holding that seizure of tribal assets "significantly interferes with the Tribe's self-government" and constitutes "a sufficient showing of irreparable harm as a matter of law"); *Winnebago Tribe of Nebraska v.*

Stovall, 216 F.Supp.2d 1226, 1233 (D. Kan. 2002) (finding irreparable harm where seizure of tribe's assets crippled its ability to provide health care, education, and services to its members).

5. The Harm to Plaintiffs is Imminent and Irremediable

As described above, the 2010 Decision will cause actual, concrete harm to the Tribe and to individual Plaintiffs, by interfering with fundamental interests in Tribal membership and self-governance. This harm is imminent. The Burleys have already moved to consolidate their hold on Tribal power by holding an election on January 7, 2011, in which only they participated. The BIA immediately recognized Burley and Reznor as Tribal officials based on that sham election.

The harm is also irremediable. If this Court does not enjoin the 2010 Decision, the Burleys will be able to adopt a Tribal constitution and bylaws that codify their antimajoritarian membership criteria and permanently exclude Plaintiffs and the other members from the Tribe.

C. Enjoining the 2010 Decision Will Not Harm Defendants or Nonparties

1. A Preliminary Injunction Will Cause No Harm to Federal Defendants

Enjoining the implementation of the 2010 Decision will cause no harm to Defendants. This dispute has been ongoing since 1999, and Defendants have never showed any urgency in resolving it. For years, the BIA refused to recognize Burley or anyone else as the authorized government of the Tribe. [2005 Decision p. 2.] No change in circumstances exists to justify a sudden need for haste or to support a claim that a few months of further delay would be harmful while this Court resolves Plaintiffs' claims. *See Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 26 (finding no substantial harm to federal defendants or other interested parties in temporarily enjoining a National Park Service rule that would lift restrictions on concealed firearms in national parks, where the restrictions had been in place for 25 years).

Furthermore, the government can have no interest in implementing a decision that clearly violates the law. As this Court and the Court of Appeals have determined, the BIA has a duty to the Tribe *not* to recognize any government of the Tribe that does not represent a majority of the Tribe's members. *CVMT*, 424 F.Supp.2d at 201; *CVMT*, 515 F.3d at 1267-1268.

2. A Preliminary Injunction Will Not Harm the Burleys

Enjoining the implementation of the 2010 Decision also will not harm the Burleys. A preliminary injunction would merely maintain the status quo that has existed since at least 2004, under which the BIA does not recognize any representative of the Tribe. In doing so, it would "prevent any escalation of the harm" to Plaintiffs that will otherwise result if Burley is allowed to consolidate her power over the Tribe and enact a constitution and bylaws that codify her authority. *See Comanche Nation*, 393 F.Supp.2d at 1206 (finding that a preliminary injunction was proper to prevent the publication of a gaming compact between the state of Oklahoma and a neighboring Indian tribe, since the plaintiff tribe would face "substantial impediments" to challenging the compact once it was published and became effective).

An injunction would temporarily prevent the United States from resuming funding to the Burleys under PL 93-638, and it may temporarily affect Burley's ability to divert state RSTF money held in trust for the Tribe. Under the circumstances, the irreparable harm to the Tribe's self-government activities and Plaintiff's membership rights far outweighs any temporary economic injury to the Burleys. *Id.* at 1211 (finding that "the harm to the Comanche Nation from the loss of tribal self-government is greater than the economic loss to the FSA tribe [from delaying the opening of Class III gaming activities]").

D. The Public Interest Favors An Injunction to Protect Majoritarian Values

There is a strong public interest in ensuring that the government recognizes only legitimate representatives of a tribe. This is particularly true given the federal government's trust obligations to Indian tribes. *See CVMT*, 515 F.3d at 1267 (citing *Seminole Nation v. United States*, 316 U.S. 286, 297; *Seminole Nation*, 223 F.Supp.2d 122, 140 (citation omitted); *Ransom*, 69 F.Supp.2d at 150-151 (citation omitted). A preliminary injunction would protect the rights of the estimated 250 members of the Tribe while Plaintiffs' claims are heard.

Ensuring that federal funds go only to legitimate representatives of the Tribe also will prevent the waste of taxpayer dollars. If funds are distributed to Burley and the 2010 Decision is vacated, there will likely be no way for the United States or the proper members of the Tribe to recover those funds. Avoiding waste of public funds is in the public interest**.**

V. CONCLUSION

For the reasons set forth above and in Plaintiffs' Complaint, the Court should issue a temporary injunction to prevent the implementation of the 2010 Decision. A proposed Order accompanies Plaintiffs' Motion.

Respectfully submitted,

___/s/_____
M. ROY GOLDBERG
(D.C. Bar No. 416953)
CHRISTOPHER M. LOVELAND
(D.C. Bar No. 473969)
ATTORNEYS FOR PLAINTIFFS
Sheppard Mullin Richter & Hampton LLP
1300 I Street, N.W., 11th Floor East
Washington, DC 20005-3314
Tel: (202) 772-5313
Fax: (202) 218-0020
rgoldberg@sheppardmullin.com
cloveland@sheppardmullin.com

Of Counsel:

ROBERT J. URAM (*pro hac vice* pending)
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
Tel: 415-434-9100
Fax: 415-434-3947
ruram@sheppardmullin.com

Dated: March 16, 2011

W02-EAST:9CML1\200376939.3