California Valley Miwok Tribe

Reconsideration Brief

Honorable Assistant Secretary EchoHawk

California Valley Miwok Tribe
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I. INTRODUCTION

Pursuant to the April 8, 2011 letter issued by the Honorable Larry EchoHawk, Assistant Secretary – Indian Affairs ("Assistant Secretary"), the California Valley Miwok Tribe ("Tribe")[1] respectfully submits the following brief to be analyzed in the reconsideration of the Assistant Secretary's decision, dated December 22, 2010 ("Assistant Secretary's Decision").

II. BRIEF PROCEDURAL HISTORY

As elaborated further below, the Tribe consists of five recognized Tribal Members and is organized pursuant to Resolution #GC-98-01. Despite a ninety-six year history demonstrating the Tribe's unwillingness to enroll various heirs of a 1915 Census, on November 6, 2006, the Superintendent of the Bureau of Indian Affairs ("BIA"), Central California Agency ("Superintendent") made a decision to enroll the Non-Members[2] into the federally recognized Indian Tribe under the guise of "organizing" the Tribe. *See* Exhibit I. With no legal support or factual basis, and in direct contravention of the entire United States' history in dealing with the Tribe, the Superintendent's letter questioned the Tribe's existing and previously recognized governing body and allowed for certain Non Members, who had never previously been recognized as Tribal Members of the Tribe, to have the opportunity to participate in the organization of the Tribe along with the existing five Tribal Members ("Superintendant's Decision"). The Tribe appropriately and timely appealed the Superintendent's Decision, and on April 2, 2007, this decision was affirmed by the Regional Director. The BIA subsequently published a Public Notice in the *Ledger Dispatch* newspaper for the implementation of the Superintendant's Decision and enrollment of Non-Members into the Tribe, contrary to a century of BIA decision-making and final agency actions. ("*Ledger Dispatch* Public Notice"). *See* Exhibit J.

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[1] Ietan Consultants and Rosette & Associates represent the California Valley Miwok Tribe, which indisputably currently consists of five (5) recognized Tribal Members, specifically, Yakima Dixie, Rashel Reznor, Silvia Burley, Tristian Wallace and Anjelica Palk ("Tribal Members").

[2] The opposition consists of a group individuals identified in various court documents as Antonio Lopez, Michael Mendibles, Velma Whitebear, Evelyn Wilson, Antoine Azevedo ("Non-Members"). The Non-Members have been organized by a gentleman named Chadd Everone (a/k/a Chadd Allan Ludwig) in an attempt to build a casino. (For detailed discussion of the casino interests influencing the opposition, see Exhibit L). While the Non-Members include Yakima Dixie in their claims, it is important to recognize that Yakima Dixie is a recognized Tribal Member, and accordingly, Yakima Dixie's interests are protected by the interests of the Tribe and its Tribal Members. *See Canadian St. Regis Band of Mohawk Indians v. State of NY,* 573 F. Supp. 1530, 1537 (N.D.N.Y.1983) (holding that individual tribal members lack standing to assert claims on behalf of the Tribe); *See Also*, *California Valley Miwok Tribe v. California Gambling Control Commission,* Case No.:37-2008-00075326-CU-CO-CTL (Order dated March 11, 2011) (finding that Yakima Dixie's interests as an individual Tribal Member are protected actions brought by the Tribe).

Reiterating its position that the BIA's decision to reorganize the Tribe was inconsistent with longstanding federal Indian law and United States policy, as the Tribe had previously organized itself and was comprised of an established, federally-recognized membership of five individuals, the Tribe then appealed the Superintendent's Decision to the Interior Board of Indian Appeals ("IBIA").

On January 28, 2010, almost three years after the Tribe's appeal was filed, the IBIA issued an opinion that referred the Tribe's claim regarding Tribal Membership and enrollment to the Assistant Secretary for final determination ("IBIA Decision"). *See California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs,* 51 IBIA 103 (January 28, 2010). Finding that the *Ledger Dispatch* Public Notice—which would ultimately enroll the Non-Members into the Tribe—was published prematurely and done in an "undefined capacity," the IBIA properly held that it "lack[ed] jurisdiction to adjudicate tribal enrollment disputes." *Id.* at 121-122. The IBIA reasoned: "[u]nderstood in the context of the history of this Tribe and the BIA's dealings with the Tribe since approximately 1999, ***this case is properly characterized as an enrollment dispute***." *Id.* at 122; (emphasis added). In doing so, the IBIA then referred the tribal enrollment dispute to the Assistant Secretary for final determination, pursuant to 43 C.F.R. 4.330.1(b). The IBIA noted that by resolving the Tribal Membership issues of the Tribe, the Assistant Secretary could then resolve other specific issues as follows: "claims that BIA improperly determined that the Tribe is 'unorganized,' failed to recognize [Silvia Burley] as Chairperson, and is improperly intruding into tribal affairs by determining the criteria for a class of putative tribal members and convening a general council meeting that will include such individuals." *Id* at 123-124. Despite the Non-Member faction's attempt to distort the holding of the IBIA, at no time in its opinion did the IBIA state that the Tribe was attempting to relitigate issues previously decided by the BIA or the federal courts. Rather, the IBIA appropriately recognized that issues of Tribal membership and enrollment – those very issues that were initiated by the Superintendant's Decision – were outside of the IBIA's jurisdiction and the determination of the Tribe's membership by the Assistant Secretary could resolve all of the other issues with regard to leadership and Tribal enrollment. Succinctly put, the IBIA requested the Assistant Secretary to determine the Tribal Membership because the IBIA did not have authority to do so.

After nearly a year of deliberation on the matters referred by the IBIA, the Assistant Secretary issued his Decision. Acting consistent with the scope of the IBIA's referral, pursuant to 43 C.F.R. 4.330.1(b), in his Decision, the Assistant Secretary appropriately considered previous BIA final agency actions from nearly a century of dealings with the Tribe, which clearly recognized the Tribe's membership and organization, as well as two previous BIA letters in 2005 and

2006, with which the Non-Members attempted to create confusion regarding the Tribe's membership and organizational status. In doing so, the Decision recognized the validity of the Tribe's previously recognized governing body and resolution form of government, pursuant to Resolution #GC-98-01 and re-established the government-to-government relationship between the Tribe and the United States. Most importantly, based on previous actions taken by the Tribe and previous federal government recognition, the Decision appropriately recognized the members of the Tribe as being Rashel Reznor, Yakima Dixie, Sylvia Burley, Anjelica Paulk and Tristian Wallace, and states that "[o]nly those individuals who are actually admitted as citizens of the Tribe are entitled to participate in its government." *See* Assistant Secretary Decision. Recognizing that Tribal Members are the governing body of the Tribe, the Decision also provides that, consistent with well-established federal Indian law, the Tribe "is a distinct political community possessing the power to determine its own membership" and is "vested with the authority to determine its own form of government." *Id*.

On January 6, 2011, the Non-Members sought a stay and reconsideration of the Decision from the Honorable Secretary Salazar. The Department of Interior issued a response on behalf of Secretary Salazar on January 21, 2011 in which it declined to reconsider the Assistant Secretary's Decision.

On April 1, 2011, based upon arguments raised in litigation by the Non-Members seeking judicial review of the Assistant Secretary's Decision, the Assistant Secretary set aside his Decision and subsequently provided a list of issues to be briefed for reconsideration of the Decision.

III. ANALYSIS OF ISSUES FOR RECONSIDERATION

The following issues are analyzed and set forth in the order outlined in the Assistant Secretary's letter dated, April 8, 2011 ("Assistant Secretary's Request").

A. It is undisputed that the Federal government currently recognizes five people as members of the tribe. The September, 24, 1998 letter from Superintendent Risling to Yakima Dixie, mentioned the development of enrollment criteria that "will be used to identify other persons eligible to participate in the initial organization of the Tribe" (emphasis added). Please brief your views on whether the Secretary has an obligation to ensure that potential tribal members participate in an election to organize the Tribe.

The question posed in the first issue of the Assistant Secretary's Request presupposes that the Tribe is currently not organized. However, as elaborated further below, in conjunction with the undisputed fact that the federal government recognizes five people as members of the Tribe, is the undisputed fact that on November 5, 1998, the Tribe formally organized itself pursuant to Resolution #GC-98-01, which established the Tribe's governing body and resolution form-of-government.

Because allowing the Non-Members to participate in a Tribal election would logically afford these individuals with the opportunity to become enrolled into the Tribe, the issue at hand poses the question of whether the Assistant Secretary has an obligation to the Non-Members of the Tribe. In examining whether the Assistant Secretary owes an obligation to, or should enroll Non-Members into the Tribe, the Assistant Secretary's review should focus on two areas that are intertwined, to wit: i) the unique history of the Tribe; and ii) well-established U.S. Supreme Court Indian legal precedent in the context of the Tribe's history.

1. The Tribe and Its Tribal Membership Has Been Indisputably Defined Throughout United States' Relations with the Tribe.

In order to effectively address membership issues in the context of federal Indian law, it is important to examine the United States' history with the Tribe and its Tribal Members, as well as the United States' history with the Non-Members currently challenging the Assistant Secretary's Decision. Indeed, the unique legal posture of tribes in relation to the federal government is deeply rooted in American history, and knowledge of historical context is perhaps more important to the understanding of Indian Law than of any other subject. Indian law has always been heavily intertwined with federal Indian policy, and over the years, the law has shifted back and forth with the flow of popular and governmental attitudes toward Indians. *See generally* William C. Camby, *Indian Law in a Nutshell*, 4th ed. pp.1-2 (2004). As succinctly stated in *Cohen's Handbook of Federal Indian Law,* 2005 Ed., p.3, "Indian law and history are at the opposite sides of the same coin. Legal issues are pervasive in the lives of contemporary American Indians and their tribes."[3] Specifically, examination of the United States' history with the Tribe in the following historical periods will aid in providing a better understanding of the Tribe and its Tribal Members legal status: the Indian Reorganization Era (1928-1942); the Termination Era (1943-1961); and the Self-Determination and Self-Governance Era (1961-present). [4] By reviewing the Tribe's history in these three policy eras, it is evident that the United States has continuously and appropriately owed its trust responsibility to the Tribe's governing body and not to the Non-Members.

[3] *Cohen's Handbook of Federal Indian Law*, first published in 1941, synthesized more than a century and a half of American Indian law and has played an important role in both the history of federal Indian law and in the evolution of American jurisprudence. *The Handbook* was edited in 2005 and 2007 by thirty six (36) of federal Indian law's most respected attorneys and legal scholars and is currently universally recognized as the leading treatise of federal Indian law. Therefore, this brief cites substantive provisions of *The Handbook of Federal Indian Law,* 2005 edition (2007 Supplement).

[4] *See generally,* F. Cohen, *Handbook of Federal Indian Law,* at Sections 1.05 through 1.07 for a comprehensive discussion of these eras and their inevitable influence on Indian legal jurisprudence and policy.

a. *The United States Did Not Recognize an Obligation to Allow the Non-Members to Participate During the Indian Reorganization Era in 1935.*

In 1915, a federal Indian Agent forwarded to the Commissioner of Indian Affairs a census comprised of a cluster of twelve Indians living on 160 acres in or near the city of Sheep Ranch, California. *See California Valley Miwok Tribe v. U.S., et al.,* 424 F. Supp. 2d 197 (2006).[5] After the 1915 Indian Census took place, a marked change in attitude toward Indian policy occurred through adoption of the Wheeler-Howard Act (Indian Reorganization Act or "IRA"), 48 Stat. 984-988 (1934) (codified and amended at 25 U.S.C. §461 et seq.), from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture. *See* Cohen *Handbook* at 84. In fact, the IRA was clear that application of the IRA provisions were restricted pursuant to the will of tribal members. See 25 U.S.C. §461 et seq.; *see also* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972). Significantly, at the time that Congress enacted the IRA in 1934, the Tribal Membership of the Tribe dwindled to only one individual, Jeff Davis, who was identified by the United States as the Tribe's sole eligible IRA voter. *See* Exhibit A.

It is important to note that, with the exception of Jeff Davis, the BIA did not adopt any of the 1915 Census Indians during the adoption by the Tribe of the IRA in 1934. The BIA's decision to decline membership to these individuals should not be taken lightly—let alone ignored or overturned—as the BIA's determination of tribal status following the passage of the IRA involved an extremely arduous process.[6] Section 16 of the IRA enabled "[a]ny Indian tribe, or tribes, residing on the same reservation" to organize. 25 U.S.C. §476. Thus, under the IRA, that a group be considered a tribe was deemed a prerequisite to holding a referendum on whether to accept the IRA in the first place. *See* Cohen, pg. 149. Section 19 of the IRA defines "tribe" for the purposes of the IRA as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. §479. The very fact that the BIA allowed one single member of the Tribe

[5] Specifically, the August 13, 1915 Census names the following individuals as living at and near Sheep Ranch: Peter Hodge, Anita Hodge, Malinda Hodge, Lena Hodge, Tom Hodge, Andy Hodge, Jeff Davis, Betsey Davis, Mrs. Limpy, John Tecumchey, Pinkey Tecumchey, and Mamy Duncan. These are the very individuals that are collectively identified in the BIA's *Ledger Dispatch* Public Notice, in an attempt to enroll their descendants into the Tribe, despite subsequent determinations made by the United States that such individuals had no claims to membership in the Tribe.

[6] *Cohen's Handbook* identifies the following factors relied upon within the Department of Interior for the U.S. government's recognition of a tribe or its governing body: "…that the group has had treaty relations with the United States, that the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe, that the group has been treated as a tribe or band by other Indian tribes, *and that the group has exercised political authority over its members, through a tribal council or other governmental forms.* Other factors considered, although not seen as conclusive, are the existence of special appropriation items for the group, and the social solidarity of the group. Ethnological and historical considerations, although not conclusive, are also entitled to great weight in determining the question of tribal existence under the IRA." See Cohen, at 149; (emphasis added).

to serve as the governing body and vote on the IRA demonstrates that the remaining 1915 Census Indians were never recognized as members of the Tribe.

Despite the fact that the BIA was well aware of the 1915 Census Indians, the United States clearly only recognized a trust responsibility to one recognized member and governing body of the California Valley Miwok Tribe, and only allowed the single recognized Tribal Member to participate in the IRA election. Importantly, none of the remaining 1915 Census Indians challenged their exclusion of Tribal membership, and it has gone undisputed, in fact, that only one Tribal Member existed in 1934 as demonstrated by the single member's adoption of the IRA ("1934 Final Agency Action"). Equally important is the fact that the Assistant Secretary did not recognize an obligation to ensure the remaining 1915 Census Indians were enrolled as members of the Tribe, which is consistent with Supreme Court precedent. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978)

b. *The United States Did Not Recognize an Obligation to Allow the Non-Members to Participate During the Termination Era in 1966.*

Consistent with the United States' decision to only recognize a single Tribal member in 1934, was its decision in 1966 to also only recognize a single Tribal Member. In preparation for termination of the federal government's relationship with various Indian tribes in the state of California pursuant to the Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), in 1966, the BIA prepared a distribution plan to distribute the Tribe's assets. The BIA's distribution plan named Mabel Hodge Dixie as the only recognized Tribal member ("1966 Final Agency Action"). Further, in 1966, the government found there to be no evidence that Lena Shelton, her brother Tom Hodge, her daughter Dora Shelton Mata or her two granddaughters had ever lived on the Rancheria, and, therefore, denied their claims to membership in the Tribe and issued deed to the land to Mabel Dixie. *See* Exhibit C. Again, these same people are the non-Members that are now listed in the *Ledger Dispatch* Public Notice, which are inexplicably identified as eligible for Tribal membership, in direct contravention of the 1966 Final Agency Action.

Even though the Tribe was never actually terminated by the United States, the effort to identify to whom the Assistant Secretary owed an obligation is compelling. With regard to the BIA's dealings with the Tribe in 1966, the BIA was very careful that it properly identified the membership of the Tribe.[7] The BIA was careful because it wanted to

[7] The Sacramento Area Director, Leonard Hill, wrote a letter on Feb. 3, 1966 painstakingly detailing the process on identifying the Tribe's membership and noting, "When the (Area) Director is satisfied that the list is complete, he shall publish it once weekly for three successive weeks in a local newspaper. Within 15 days after the date of the last publication of the list, anyone may protest in writing the omission of a name from the list or the inclusion of any name therein. His written protest together with arguments to

ensure that it did not owe a legal or moral obligation to any other Indians in the area.[8] Indeed, the whole purpose of the United States' recognition of the single Tribal Member was prefaced on ensuring that there was no *legal or moral* obligation owed to any other ancestral Indian that may be in the area, including the 1915 Census Indians. Any modern day effort to reverse this 45 year precedent and Final Agency Action that has withstood judicial challenge would now be arbitrary and capricious.

Despite the fact that the United States was well aware of the 1915 Census Indians, the United States again clearly only recognized a trust responsibility to one single recognized Tribal Member of the Tribe, and only identified this single Tribal Member as a distributee of the Rancheria. Importantly, none of the 1915 Census Indians, nor any of their descendants (including Lena Shelton, her brother Tom Hodge, her daughter Dora Shelton Mata and her two granddaughters), challenged their exclusion of Tribal Membership. In fact, it has gone undisputed that only one Tribal Member existed in 1966 as demonstrated by the distributee plan. Equally important for the issue at hand is the fact that the Assistant Secretary, once again, did not recognize an obligation to ensure any Non-Members of the Tribe had any rights or benefits of enrollment within the Tribe.

c. *The 1966 Final Agency Action to Disallow the Non-Members to Participate in the Tribe Withstood Judicial Scrutiny in 1971 and Again in 1993.*

Upon the passing of Mabel Dixie, the United States government's previous actions and distribution plan were subsequently reanalyzed and reaffirmed by an Administrative Law Judge who issued an Order of Determination of Heirs on October 1, 1971, which was again reaffirmed on April 14, 1993, following a challenge from the Regional BIA Superintendent (1971 and 1993 Final Agency Actions"). *See* Exhibit C. Once again, the United States clearly only recognized a trust responsibility to the recognized member and governing body of the Tribe, and appropriately recognized the heirs of the single remaining Tribal Member as having rights to membership in the Tribe. Importantly, none of the Non-Members or 1915 Census Indians were recognized as Tribal Members, and at no time the Non-Members

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sustain it shall be presented to the (Area) Director who will render his decision *which shall be final.* (emphasis added). After all protests have been heard and have been duly disposed of, the (Area) Director shall hold an election on whether the distribution of rancheria or reservation assets shall be made." The Area Director sent this letter to the Non-Members ancestors explaining that they are not eligible for membership in 1966. *See* Exhibit B.

[8] "Congress and the BIA worked together to collect comprehensive data on the social and economic status of every Indian group or tribe under federal supervision. This quantifiable information was to be used in projecting policies aimed at the eventual discharge of the federal government's obligation—*legal and moral*—and the discontinuance of federal supervision and control at the earliest possible date compatible with the government's trusteeship responsibility." Cohen, *Handbook,* at 91. (emphasis added).

appeal or challenge their exclusion in the Tribe. It has gone undisputed, in fact, that the only identifiable Tribal Member(s) would be the heirs of Mabel Hodge Dixie. Equally important to the Assistant Secretary's question is the fact that the Assistant Secretary did not recognize an obligation to ensure any Non-Members of the Tribe had any rights or benefits with regard to Tribal Membership.

By looking at the historical context of the Tribe during the Indian Reorganization Era and the Termination Era, the Assistant Secretary can gain insight as to whether the Non-Members should be allowed to participate in the Tribe as Tribal Members. Indeed, the BIA used an arduous process to ensure that the proper Tribe was identified as exercising the political authority of the Tribe during the IRA, and the BIA identified only one single Tribal Member through this process. Clearly, the BIA was aware of the other 1915 Census Indians, yet those ancestral Indians did not pass muster for Tribal Membership in 1934, and any claimed heirs should not be enrolled by the Assistant Secretary today. Similarly in 1966, the BIA's entire purpose of acknowledging Mabel Hodge Dixie as the sole Tribal Member was to provide assurances to the United States that she was the only Indian that was owed a "legal and moral" obligation to participate in the governance of the Tribe. Again, the Non-Members and the 1915 Census Indians were not owed a legal or moral obligation or identified as being eligible for membership in the Tribe previously, and despite the opposition's insistence that the United State's ignore this history, they should not be enrolled by the Assistant Secretary today.

d. *The United States Did Not Recognize the Non-Members During the Self-Determination and Self-Governance Era in 1998.*

The modern-day era of policy over Indian affairs is often labeled that of "Self-Determination and Self-Governance."[9] "The self-determination era and the concept of self-governance are premised on the principle that Indian tribes, in the final analysis, are the primary or basic governmental unit of Indian policy." Cohen, *Handbook* at 98. This new policy was rooted in recognition of government-to-government relationships between the federal government and individual Indian tribes. This era has evolved in response to the demands of the Indian people and with the official support of every president since 1960.[10] In many ways, the era of self-governance provided the Tribe with an opportunity

[9] The foundation policies of self-determination and self-governance were articulated in speeches delivered by President Johnson and later, President Nixon. On March 6, 1968, President Johnson proposed "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination [as] a goal that erases old attitudes of paternalism and promotes partnership and self-help." Lyndon Johnson, Special Message to Congress, March 6, 1968, *in Public Papers of the President of the United States:* Lyndon Johnson, 1968-69, 1 Pub. Papers 336.

[10] *See* Vine Deloria, Jr., ed. *American Indian Policy in the Twentieth Century*, Univ. Okla. Press 1985. "A major task of the self-governance era has been to create new structures for decision-making and program administration at the Tribal level. The concept and

for its Tribal government to govern. Accordingly, once Yakima Dixie, as the General Council and governing body of the Tribe, adopted Rashel Reznor, Tristian Wallace, Silvia Burley, and Anjelica Paulk into the Tribe as Tribal Members, the well-defined policies of self-determination and self-governance were achieved.

Relying upon the then 83 years of United States history and dealings with the Tribe as referenced above, on September 8, 1998, BIA officials, including then Superintendent Dale Risling, met with Yakima Dixie and Silvia Burley for the purpose of "discuss[ing] the process of formally organizing the Tribe." *See* Exhibit C at p.1. On September 24, 1998, Superintendent Risling provided a letter summarizing the issues discussed at the September 8th meeting. *Id.* With respect to the Tribe's membership, the Superintendent stated that the BIA was properly "held to the Order [of Determination of Heirs] of the Administrative Law Judge," and this coupled, with Mr. Dixie's formal adoption of Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace, demonstrated that these five individuals were the enrolled members of the Tribe who "possess[ed] the right to participate in the initial organization of the Tribe." *Id.*.at 5. The letter further stated that the enrollment criteria later established for "*future prospective members"* would "eventually…be included in the Tribe's Constitution." *Id.* (emphasis added). The action of the BIA to recognize these five Tribal Members was not appealed by the Non-Members, and thus became a final agency action of the United States. Again, the Assistant Secretary did not recognize an obligation to the Non-Members or to the 1915 Census Indians to become Tribal Members that they never belonged to in the first place.

With respect to the issue of governance, the Superintendent explained two options for the Tribe to consider regarding "how they [would] govern themselves until such time as the Tribe adopts a Constitution through a Secretarial Election." *Id.* The option recommended by the BIA to the Tribe was to "operate as a General Council," to which the BIA enclosed a draft General Council resolution for the Tribe's consideration, "specifying the general powers of the General Council and rules for governing the Tribe." *Id.* at 3. As elaborated further below, the Tribe reviewed, considered and even modified the BIA-drafted resolution, and, in doing so, on November 5, 1998, it established its governing body and resolution-form-of-government with the enactment of Resolution # GC-98-01.

Notably, the Assistant Secretary has underlined the term "initial organization" in his inquiry as to whether he owes an obligation to the Non-Members. However, it is important that statements in the September 24, 1998 letter

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operation of a self-determination and self-government policy runs counter to many of the long established bureaucratic ways of the Department of Interior, Bureau of Indian Affairs, and tribal governments as well." Cohen, *Handbook* at 103.

regarding the "initial organization" of the Tribe be placed in the appropriate context. First, because the Superintendent's letter predates the Tribe's enactment of Resolution #GC-98-01, the characterization of the Tribe's first formal action as a governing body as an "initial organization" was accurate in that the Tribe had never previously taken steps to organize itself. *See California Valley Miwok Tribe,* 51 IBIA 106. Second, even assuming that the Superintendent envisioned that the Tribe would later operate pursuant to an IRA Constitution, for reasons explained further below, this, in no way, negates the action of the Tribe to formally organize pursuant to its resolution-form-of-government.

e. *The California Valley Miwok Tribe's History with the United States Is Distinguishable from Other Miwok Tribes in the State of California.*

The Non-Members attempt to confuse issues by pointing to the reorganization of other Miwok tribes in the State of California such as Shingle Springs, Tuolumne, Ione, and more recently the Wilton Rancheria, as examples of how the BIA has organized other Miwok Tribes and assisted in determining "putative members" and membership roles. However, such examples are inapplicable to the situation at hand. Each of the above-referenced tribes were once recognized by the federal government but then became "terminated" by the United States by virtue of the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958). Termination of United States' recognition means that these tribes did not maintain their federally recognized existence, and the special relationship between those tribes and the federal government ended in virtually all respects. Such tribes were eventually "restored" to recognition and requested assistance from the Assistant Secretary to become "reorganized". *See e.g. Wilton Miwok Rancheria v. Salazar*, Case No, C-07-02681 (N.D. Cal. 2009) (Order dated June 5, 2009). Consistent with United States policy to end the termination era for these specific tribes, the Assistant Secretary has a specific and narrowly defined role in the identification of non-member Indians, or putative members, to allow each respective terminated Miwok tribe to restore their membership.

A similar obligation by the Assistant Secretary does not exist in this case because the federal *recognition* of the California Valley Miwok Tribe has never terminated or ceased throughout history and the Tribe's legal existence as a distinct political society must be maintained.[11] Indeed, Congress actually discussed the broad legal and political

[11] Assuming *arguendo* that the California Valley Miwok Tribe was terminated (which it was not), the Non-Members would still not be entitled to enrollment as "putative members" of the Tribe. For example, with the Wilton Rancheria, which was a Miwok Tribe in California restored to federal recognition in 2010, the BIA identified the "putative members" as the *distributees* of the former Wilton allotment and did *not* use a California Indian Census as advocated by many of those ancestral area Indians. Similar methodology applied to the California Valley Miwok Tribe would mean that the heirs of Mable Hodge Dixie, the sole *distributee*, and *not* the 1915 Census Indians would have been the "putative members" of the California Valley Miwok Tribe. Accordingly, even if history were "rewritten" and the California Valley Miwok Tribe were successfully terminated, the existing five Tribal Members would still be the only legitimate and recognized Members of the Tribe.

implications of what it means for the Tribe to be "recognized," stating that the term "is more than a simple adjective; it is a legal term of art." *See* Cohen, Handbook at 138 *citing* H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994). Congress further stated that recognition is "a formal political act, it *permanently establishes a government-to-government relationship between the United States and the recognized tribe* as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its *members*." *Id.* (emphasis added). Therefore, while the Assistant Secretary had an obligation to become involved with the Miwok tribes of Shingle Springs, Tuolumne, Ione, or Wilton Rancheria, as those Miwok tribes were terminated and needed their enrollment reorganized and reestablished, the same obligation is non-existent in the California Valley Miwok because the Tribe has a permanently established "recognition" whereby the United States only owes a fiduciary relationship to the Tribe and the Tribal Members.

f. *The Non-Member's Purpose for Ignoring the Tribe's Prior History Is to Seek a Modern Day Casino By Creating as Much Confusion as Possible*.

The Assistant Secretary may query—particularly given the clear history of the Tribe and its Tribal Members—as to why there has been such confusion created by the Non-Members to make such far-fetched claims that there is an obligation of the Assistant Secretary to enroll them as Tribal Members. Indeed, such confusion did not occur by happenstance, but rather, was part of a coordinated and calculated effort by Chadd Everone ("Everone") to hijack the Tribe in order to pursue the development of a casino. For further discussion and history behind this issue, see Exhibit L. Tragically the entire effort by the Non-Members to rewrite the Tribe's history was motivated by the greed to develop a casino. The entire faction was created in order to create confusion to question the Tribe's leadership and ultimately the Tribe's existence. The Assistant Secretary Decision was able to discern through the confusion and focus on the issues as referred by the IBIA, which was simply identifying who the legitimate Tribal Members are.

2. <u>An Understanding of the Tribe and Tribal Member's History Demonstrates the Assistant Secretary Has No Obligation to Allow Non-Members to Participate in Tribal Activities.</u>

When having a full understanding of the Tribe and Tribal Member's history, and in looking at whether the Assistant Secretary should enroll Non-Members into the Tribe, the Supreme Court has made itself definitively clear on the issue by holding, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence." *See, e.g. Santa Clara Pueblo* at 72 n. 32 ("[T]he judiciary should not rush to create causes of action that would intrude on these delicate matters"); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Smith v. Babbitt,* 875 F. Supp. 1353, 1360

(D. Minn. 1995) (noting that "[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues"); *cf*. *Rice v. Cayetano,* 528 U.S. 495, 518-523 (2000), in which the Supreme Court indicated that tribal voting eligibility provisions would receive more relaxed constitutional scrutiny than those propounded by states or the federal government.

In this case, the Tribe's Membership has never been disrupted or even eliminated; indeed, the Tribe's existence and sovereign power has remained intact through its entire United States history. The Superintendant's Decision to enroll the Non-Members and the resulting *Ledger Dispatch* Public Notice is nothing more than an attempt to enroll the heirs of the 1915 Indian Census as well as Non-Members who asserted claims to Tribal Membership in 1966. Consistent with Supreme Court precedent, the Assistant Secretary did not find an obligation to enroll these Non-Members into the Tribe as demonstrated in the final agency actions taken in1934, 1966, 1971, 1993, or 1998. Indeed, following the Tribe's enactment of its governing document and its organization into a cohesive governing body, the identification of "enrollment criteria [to] be applied to future prospective members" is the very decision that was and remains within the exclusive authority of the Tribe's identified governing body to determine and is a right within the exclusive province of Indian tribes as sovereign nations to exercise. *See Santa Clara, supra,* 436 U.S. at 54 (holding that "to abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good reasons,' is to destroy cultural identity under the guise of saving it." (quoting *Santa Clara v. Martinez*, 402 F.Supp at 18-19).

The United States' recognition of one single Tribal member in 1934 and one single Tribal Member in 1966, and the reaffirmation of the Tribe's history from the Administrative law judge in 1971 and 1993, were repeatedly reaffirmed and acknowledged by the United States, Administrative Law Judges and federal courts, and all of these final agency actions cannot be discarded. To be clear, in the entire United States history of dealings with the Tribe, there has been no question or challenge to the numerous final agency actions which confirmed the appropriate Members of the Tribe, and rejected the claims of membership from other individuals, including the current Non-Members that the BIA now inexplicably desires to enroll. *Id.*

Indeed, it was not until the BIA's publishing of the *Ledger Dispatch* Public Notice in April 2007 seeking to identify the "putative members of the Tribe," (which the IBIA acknowledged was premature and done in an "undefined capacity")[12], and its November 2006 decision to proceed with the Tribe's reorganization that consideration of the very

[12] *California Valley Miwok Tribe v. Pacific Regional Director BIA,* 51 IBIA 121-22 (2010).

individuals (including the descendants of both the 1915 census Indians and those non-members identified in 1966) that had previously been reviewed and subsequently rejected by the government as members of the Tribe, was initiated and membership of these individuals was imposed upon the Tribe.[13] While previous BIA letters (namely the 2004 and 2005 BIA letters that are relied upon by the Non-Member and upon which are further elaborated below), provided the Tribe with offers of technical assistance and encouragement in the identification of additional Tribal members, such letters never made the decision to intrude upon the delicate area of internal Tribal affairs and Membership, recognizing that to do so would be inconsistent with well-established federal Indian law and United States policy. *See* Exhibits G and H; *See Santa Clara Pueblo* at 72.

Therefore, the United States government has a well-established history with the Tribe that is very specific to recognizing the Tribes membership from 1915 to 2011 - spanning 96 years – of properly recognizing that, consistent with federal Indian law and policy, it did not and presently does not owe a trust obligation to Non-Members of this Tribe. As is evidenced by the *Ledger Dispatch* Public Notice, the Non-Members seeking to have the BIA enroll them into the Tribe, are the same people that the BIA did not recognize as Tribal Members in the 1935 Final Agency Action, the 1966 Final Agency Action, the 1971 and 1993 Final Agency Actions and the 1998 Final Agency Action. For the United States to now take a contrary position and acknowledge an obligation to Non-Members of the Tribe would not only run in direct contravention with decades of well-established federal Indian law and policy, but such action would also serve to eradicate the decades of Untied States history and dealings with the Tribe, in essence terminating the Tribe's very existence.[14] Indeed, given this 96 year history of final agency actions, the BIA would have to act arbitrary and capricious to now delve into Tribal governance decisions and enroll Non-Members of the Tribe when there is such a clear record that the Non-Members have always been considered, but deemed as non-members of the Tribe by the BIA.

[13] The claimed descendants of these very individuals, who have never been recognized by the United States or the Tribe as being Tribal members nor having any interest in the Tribe, are intertwined in a casino development venture, which, curiously, was initiated and proposed to Yakima Dixie during the same time that the "leadership dispute" arose within the Tribe and efforts to reorganize the Tribe to include these individuals were accelerated. *See* Exhibit L. Indeed, these very individuals, who previously and fraudulently brought suit in the name of the Tribe in an attempt to retrieve Tribal records, were dismissed for lack of standing in the United States District Court for the Eastern District of California, and were sanctioned by the same Court for initiating this suit. *See* Exhibit L.

[14] It has been argued that "tribal sovereignty manifests in three core components of Indian tribes' sovereign existence: tribal cultural, commercial, and governmental functions." Angela R. Riley. *(Tribal) Sovereignty and Illiberalism.* 95 Cal. L. Rev. 799, 830 (2007). To undermine and eliminate this Tribe's history, therefore, would serve to cease the functioning of the Tribe's political, territorial and cultural sovereignty, all of which "are intimately linked and mutually reinforcing." *Id.* at 832.

3. The Assistant Secretary's Lack of Obligation to Enroll Non-Members Into a Tribe Is Consistent with United States Policy Governing Indian Affairs.

The Assistant Secretary's lack of obligation to the Non-Members is a microcosm of the manner in which the United States deals with every other non-member and Indian tribe within its borders. As the Assistant Secretary is well aware, there are literally hundreds of non-members that assert claims to membership of the over 560 federally recognized Indian tribes every year. The Assistant Secretary should not, and both legally and practically could not, determine membership issues because membership in any given community is a function of each distinct system of social organization with divergent languages, rituals, social systems, and methods of subsistence. Each tribal government presents diverse approaches to the art of governance and membership, both historically and currently. These social systems all have different world views and can vary from being small units of native communities, or based on matrilineal or patrilineal systems, or may have emphasis on descent. The Assistant Secretary must recognize that tribal governments and membership issues are extremely fluid and vary widely. Indeed, the Assistant Secretary wisely chooses to not get involved in internal tribal issues and, consistent with United States policy and Supreme Court precedent, allows tribes to handle enrollment issues internally. This ensures the United States does not unwittingly create the slippery slope of becoming involved in opening up tribal membership of over 560 federally recognized tribes. Instead, the Supreme Court policy of *Santa Clara Pueblo* must be upheld under all circumstances. Once an Assistant Secretary breaches this policy, this will create dangerous new precedent and become the basis of dealing with thousands of intra-tribal disputes.

At the most general level, the Assistant Secretary only has an obligation to the Tribal Members if they are recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes. *See Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 59 (2d Cir. 1994). Indeed, while "[t]here may be other substantive limits to the executive power to recognize in extreme instances; the government would *not* be permitted to confer tribal status arbitrarily on some group that had never displayed the characteristics of a distinctly Indian community." Canby, *Nutshell* at 6, *citing United States v. Sandoval,* 231 U.S. 28, 46 (1913). While the five undisputed Tribal Members have maintained a continuous political connection to the Tribe, as is evidenced in the Tribe's well-established history, the Non-Members have not, asserting claims to Tribal Membership at the encouragement of casino developers around the year 2000.

Moreover, the Indian Self-Determination and Education Act of 1975 ("ISDEA") provides clear guidance to the Assistant Secretary when determining whether the Assistant Secretary has an obligation to the Non-Members, or to people

with Indian ancestry generally. 25 U.S.C. 450 et. seq. Indeed, the ISDEA is the preeminent federal law that establishes United States' modern day policy of tribal self-determination and self-governance and rebuked the policy of termination and assimilation. *See* Camby, *Nutshell* at 29-31. The ISDEA clearly defines who the United States owes an obligation, and it specifically defines an *Indian* as "a person who is *member* of an Indian tribe." 25 U.S.C. Sec. 450(b)(d) (emphasis added). As you know, Indian tribes under the ISDEA are limited to those tribes "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. §450(b)(e). Again, in order to become the beneficiary of the United States' trust responsibility pursuant to the ISDEA, a person must maintain the "status" as an "Indian," which clearly requires membership in the Tribe. Simply put, the Non-Members are not Members of the Tribe and, therefore, the Assistant Secretary has no obligation to them, statutory or otherwise.

B. It is undisputed that the Tribe is federally-recognized, being included on the Department's list of recognized tribes. The Tribal Resolution of November 5, 1998, signed by Ms. Burley and Mr. Dixie, said: "The Tribe, on June 12, 1935, voted to accept the terms of the Indian Reorganization Act. . . but never formally organized pursuant to federal statute, and now desires to pursue the formal organization of the Tribe." Please explain your position regarding the status of the Tribe's organization and the Federal Governments' duty to assist the Tribe in organizing.

1. The Indian Reorganization Act and United States Policy On Tribal Organization Reaffirm the Validity and Authority of Resolution #GC-98-01

The federal government's role with respect to the internal governmental affairs of Indian tribes has been reinforced by decades of U.S. Supreme Court precedent, U.S. policy and congressional legislation, as one of deference to tribal self-determination and self-government.[15] Riley, *supra* note 15 at 826. With the enactment of the IRA in 1934, Congress set forth a federal policy in favor of tribal self-government,[16] stating that a tribe "shall have the right to organize for its common welfare, and ***may adopt*** an appropriate constitution and bylaws…" 25 U.S.C. § 476 (emphasis added). The use of the word "may" denotes that the adoption of a constitution in the manner authorized by the IRA was never

[15] *See McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973) (emphasizing that the sovereignty of Indian Nations "long predates that of our own government."); *Williams v. Lee,* 358 U.S. 217, 220 (1959) (denying state jurisdiction over a suit brought by a non-Indian against tribal members concerning transactions which occurred on tribal lands.)

[16] While the BIA is injected into tribal legislation indirectly by making IRA Constitutions, if adopted, approvable by the BIA, Indian tribes did not relinquish any power or authority to the BIA to govern themselves. Unless surrendered by the Tribe, or abrogated by Congress, tribes possess inherent and exclusive power over matters of internal tribal governance. *See Nero v. Cherokee Nation,* 892 F.2d 1457, 1463 (10th Cir, 1989); *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987); *Wheeler v. U. S. Dept. of Int.,* 811 F.2d 549, 550-552 (10th Cir. 1987); *Goodface v. Grassrope,* 708 F.2d 335 (8th Cir. 1983) (commending the BIA for its reluctance to intervene in tribal election dispute).

considered to be the only effective means of tribal organization.[17] In addition to authorizing Indian tribes to adopt constitutions requiring approval from the Secretary, the IRA also acknowledged that tribes possessed "all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C.A § 476(e). Therefore, the decision of tribes to reject the IRA "had little or no effect upon the substantive powers of tribal self-government vested in [those] tribes." F. Cohen, *Handbook of Federal Indian Law,*129-130 & n.62 (1942). More importantly, a tribe's acceptance of the IRA did not obligate that tribe to adopt a written constitution at all, and many did not do so.[18] *E.g.,* Zuni Pueblo; *see* T. Hass, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* 18, 30 (1947). G.Fay, ed., *Charters, Constitutions, and Bylaws of the Indian Tribes of North America* (1967), pt. IV p.112. Furthermore, legislation enacted subsequent to the IRA reaffirmed Congressional support for tribal self-government in terms that do not distinguish between IRA and non-IRA tribes**.** (*See* Indian Self-Determination Act of 1975 and the Indian Financing Act of 1974, which apply to all tribes, regardless of their form of organization). Therefore, the Tribe's decision to vote in favor of the IRA in 1934, in no way precluded the tribe from later organizing pursuant to a non-IRA model.

Moreover, with respect to the issue of formal organization, there is no authority, federal or otherwise, which holds that a tribe can formally organize itself exclusively through a governmental structure established by the IRA constitutional model. *See* Tsosie *supra* note 19 at 526. It has been said that "the first element of sovereignty" is "the power of the tribe to determine and define its own form of government." Powers of Indian Tribes**,** 55 I.D. 14, 30 (1934); Cohen, at 126. Moreover, "[n]o federal law, including the IRA itself, requires tribes to adopt any particular kind of constitution. The decision whether to have an IRA constitution, or any written constitution at all, is a matter of tribal sovereignty and tribal initiative." Cohen at 277.

The simple fact that a tribe does not adopt an IRA Constitution, or that the BIA has rejected the submission of such a Constitution, has little bearing as to the impact of whether a Tribe can continue to govern itself under a resolution-form of government. Indeed, the United States government has defined "formally organized" to mean "the adoption by all members of the tribe of a formal governing document which describes the full manner in which the tribe governs itself and includes a full definition of who its members are." *See* Exhibit K. For example, although all the Pueblos except

[17] Congress specifically recognized that Indian tribes could, and had, organized outside the framework of any federal statute, stating in the debates over the bill that some tribes, particularly in the western states, still retained a government. 78 Cong.Rec. 11739 (1934).

[18] *E.g.* While the Pueblo de Acoma in New Mexico voted to accept the IRA, pursuant to 25 U.S.C. § 478 (1982), the Pueblo has not adopted a written constitution or by-laws, preferring instead to continue "to organize for its common welfare" in the ancient forms.

Jemez accepted the IRA, only four of the Pueblos have adopted constitutions pursuant to the provisions of the Act, meaning that fourteen Pueblos adopted the IRA, but never adopted the "boilerplate" BIA constitution. Simply because these Pueblos did not adopt the IRA constitution did not mean they ceased to exist as sovereign nations. Just the opposite, the Pueblos continue to govern themselves by making elections and membership decisions free from BIA interference. Similarly, just because the Tribe does not have a BIA-approved constitution, does not mean that it somehow lost its sovereign powers. Indeed, the Supreme Court appreciates this notion that adoption of a tribal constitution does not diminish an Indian nation's inherent sovereign powers, because a tribe's constitution is not the source of its sovereign powers. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 149 n.14 (1982). Moreover, even those tribes that have adopted constitutions and organized pursuant to the IRA "have further modified their governments to meet their needs," demonstrating once again the sovereign right of Indian tribes to organize and operate their governments in the best manner they see fit. *See* Tsosie *supra* note 19 at 526[19]

2. The Tribe's Enactment of Resolution #GC-98-01 Constituted Formal Organization of the Tribe.

On November 5, 1998, the Tribe's General Council – specifically - the three adult Tribal members explicitly recognized by the BIA as having the right to participate in the tribe's governmental organization, for the first time, convened, deliberated and made the decision operate the Tribe's government pursuant to the specific provisions and enumerated powers delineated to its General Council in Resolution #GC-98-01. The body of Resolution #GC-98-01, (titled "Establishing a General Council to Serve as the Governing Body of the Sheep Ranch Band of Me-Wuk Indians"), is comprised of numerous "Whereas" statements, which provide the intent and purpose behind the governing resolution, as well as "Resolved" statements, which set forth the specific governmental actions of the Tribe's governing body. *See* Exhibit D. The final of eight "Whereas" statements of intent in the Resolution, as well as the first "Resolved" statement, provide, in their entirety:

> "WHEREAS, The Tribe, on June 12, 1935, voted to accept the terms of the Indian Reorganization Act (P.L. 73-383; 48 Stat. 984) but never formally organized pursuant to federal statute and now desires to pursue the formal organization of the Tribe; now, therefore, be it

[19] Although this "unique tribal status, which some have referred to as 'extra-constitutional," seems perplexing, if not unsettling, to many people…[i]t should not. The concept of tribal governments as separate sovereigns within the United States, however strange to the uninformed citizen, is a fundamental part of federal Indian law." Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 Ariz. St. L.J. 495, 501, 507 (1994).

> RESOLVED, That Yakima Dixie, Silvia Fawn Burley, and Rashel Kawehilani Reznor, as a majority of the adult members of the Tribe, hereby establishes a General Council to serve as the governing body of the Tribe."
>
> *Id.*

It is evident from these provisions and from the entire document, that with this resolution, the group of individuals specifically identified by the BIA as possessing the right to participate in the organization of the Tribe, intended to create a governing body with enumerated powers and authorities, and they indeed carried out this objective with the enactment of Resolution #GC-98-01.

In addition to the explicit text of the document, an examination of the provisions which the Tribe chose to insert in the resolution when compared to the draft resolution provided by the BIA offers great insight into the intent of the Tribe in passing Resolution #GC-98-01. A significant provision of intent absent from the BIA draft resolution and specifically included by the Tribe states:

> "WHEREAS, The membership of the Tribe currently consists of at least the following individuals; Yakima Dixie, Silvia Fawn Burley, Rashel Kawehilani Reznor, Anjelica Josett Paulk, and Tristian Shawnee Wallace; this membership may change in the future ***consistent with the Tribe's ratified constitution and any duly enacted Tribal membership statutes.***" (Emphasis added).
>
> *Id.*

. This provision explicitly demonstrates that the Tribe not only intended for this resolution to serve as the governing document for the Tribe, but also, that only those individuals specifically referenced in the resolution would have the authority to make governmental decisions for the Tribe, including any decisions to modify the Tribe's membership, further affirming the finality and import of this governing resolution. An additional provision in the resolution which, when read in conjunction with the September 24, 1998 BIA letter, even more compellingly demonstrates the Tribe's decision to formally organize pursuant to a resolution-form-of-government. The Resolution states as follows:

> "RESOLVED, That the General Council shall have the following specific powers to exercise in the best interest of the Tribe and its members:
>
> . . .
>
> (h) To purchase real property and put such real property into trust with the United States government for the benefit of the Tribe."
>
> *Id.*

In providing context behind the draft resolution, which was attached to the September 24, 1998 letter, the Superintendent states: "A number of the provisions of the draft resolution may be changed by the Tribe to reflect the manner in which it desires to conduct business . . . There is no mention [in the draft resolution] of other powers, such as the power to purchase land, since such power . . . would be used after the Tribe organizes, and would be included in the Tribe's Constitution." Exhibit D, at 3. With this statement, the Superintendent reinforces the BIA's role of making recommendations and providing technical support but leaving governance decisions to the Tribe.

The Tribe's decision, following review of the Superintendent's letter, to deliberately and explicitly include the authority for the General Council to purchase land as one of its enumerated powers, unequivocally demonstrates that it understood the implications of including such a power, and that it did so with the intention for the resolution to serve as the Tribe's definitive governing document "until a Constitution is formally adopted by the Tribe…,[and] unless th[e] resolution is rescinded through subsequent resolution of the General Council." *Id.* Because Tribe has not since adopted a constitution (which remains within its sovereign right to decline to pursue), and has not rescinded Resolution #GC-98-01, this resolution continues to serve as the Tribe's governing document, and, as explained below, its initial vote to pursue an IRA constitution, in no way negates this definitive Tribal decision.

3. The United States Has Repeatedly Recognized the Tribe's Organization

In the September 24, 1998 letter, the BIA identified and appropriately recognized its "role in providing technical assistance to Tribes in the process of organizing the Tribe." Exhibit C. In doing so, the BIA identified the five members of the Tribe, pursuant to the Tribe's actions, acknowledged these members as possessing the right to participate in the organization of the Tribe and provided draft resolutions for the Tribe's consideration. *Id.* Subsequent to the Tribe's action to formally organize with the enactment of Resolution #GC-98-01, the BIA's stated role of "technical assistance," was thereby fulfilled.

Evidence of the BIA's minimal role in the Tribe's internal governmental affairs, subsequent to November 5, 1998, is demonstrated by two BIA letters from the Superintendent, dated February 4, 2000 and March 7, 2000.

a. The BIA Recognized the Legitimacy of Resolution # GC-98-01 in a Final Agency Action Dated February 4, 2000.

On February 4, 2000, responding to Yakima Dixie's concerns as to a Tribal leadership dispute, the Superintendent again acknowledged the five Tribal members and reaffirmed that such individuals "enjoy[ed] all benefits, privileges, rights, and responsibilities of Tribal membership." *See* Exhibit E. The letter then recounted the BIA's "recommendation"

that the Tribe "consider eliciting the participation of those persons listed on the [1915] Census;" but acknowledged "[a]t this time, we do not know whether the group has formally considered this *recommendation*." *Id.* at 2; (emphasis added). Indeed, the BIA understands existing United States law and policy to *not* become involved in intra-tribal disputes, especially where a clear 96 year-old record of final agency actions exist that demonstrate that the persons listed on the 1915 Census are non-members of the Tribe. The Non-Members are asking the Assistant Secretary to completely ignore this history.

The BIA then acknowledged that "[o]n November 5, 1998, the majority of the adult members of the Tribe, adopted Resolution #GC-98-01, thus establishing a General Council to serve as the governing body of the Tribe." *Id.* With respect to the allegations regarding Tribal leadership, the letter went on to state the position of the BIA that "the appointment of Tribal leadership and the conduct of Tribal elections are internal matters." *Id.* at 4. This federal acknowledgement of the Tribe's governing body and resolution-form-of-government, as well as the BIA's acknowledgement of "recommendations" offered to the Tribe, which the Tribe was free to reject, solidifies the Tribe's status as an organized Tribe as of November 5, 1998. The letter also demonstrates the BIA's reluctance to act inconsistent with United States policy of deference to tribal self-determination of governance, and to intrude upon the delicate internal affairs of an organized tribe. Without question, the BIA recognized the legitimacy of Resolution #GC-98-01 and the fact the Tribe was organized pursuant to this document.

b. The BIA Recognized the Legitimacy of Resolution #GC-98-01 in a Final Agency Action Dated March 7, 2000.

Additional correspondence regarding Yakima Dixie's concerns was provided by the BIA to Silvia Burley, on March 7, 2000. *See* Exhibit F. In this letter, the BIA Superintendent again reaffirms the authority of the Tribe's General Council and its resolution-form-of government, stating that, in accordance with Resolution #GC-98-01 "only the Tribe, acting at a duly noticed, called, and convened meeting at which a quorum is present, is the proper body to consider and effect [a new member's] enrollment in the Tribe." *Id.* at 4. The Superintendent also, once again, defers to the Tribe regarding the issues of leadership and membership of the Tribe, stating that such issues "are internal matters to be resolved within the appropriate Tribal forum." Therefore, this letter also clearly recognizes the Tribe is organized pursuant to a Resolution-form of government with an identifiable and recognized Tribal Membership.

The Tribe's enactment of Resolution #GC-98-01, as demonstrated by the explicit text of the resolution and subsequent actions taken by the Tribe, was clearly intended to operate as the Tribe's organizing document. As explained

above, the decision of this Tribe as well as those of numerous Indian tribes, to vote in favor of the IRA, in no way confined them to organizing exclusively pursuant to IRA provisions. Just as this Tribe and others voted in favor of the IRA but never organized pursuant to IRA provisions, other Tribes voted against the IRA but later reorganized pursuant to a constitutional model. Moreover, the BIA's subsequent recognition of the Tribe's government, which is evidenced by numerous final agency actions,[20] is further substantiation of Resolution #GC-98-01's validity. For the United States to now question the organization of the Tribe based on unsubstantiated concerns raised by Non-Members and casino developers, would not only be reversing decades of the federal government's dealings with the Tribe and recognitions of the Tribal government's validity, but would also undermine the United States' well-established policy of respect for and deference to the self-determination and self-government of Indian tribes.

C. It is undisputed that the position taken in the December 22 decision represented a change in direction regarding the Bureau's relations with the Tribe. Courts have found the BIA's past actions to be permissible under the APA, but did not state that those actions were mandatory under federal Indian law. Some statements in court opinions, however, must be read as statements of law with which my decisions must comply. In particular, the D.C. Circuit stated that (paraphrased for clarity): "It cannot be that the Secretary has no role in determining whether a tribe has properly organized itself to qualify for the federal benefits provided in the [Indian Reorganization] Act and elsewhere." 515 F.3d 1262, 1267 (D.C. Cir. 2008). Please brief your views on what the Secretary's role is in "determining whether a tribe has properly organized itself."

1. <u>All Previous BIA Actions Are Consistent with the United States Role in Determining Whether a Tribe Has Properly Organized Itself.</u>

In the Assistant Secretary's question set forth above, he presupposes and asserts as an undisputed fact that the Decision "represented a change in direction regarding the Bureau's relations with the Tribe." However, a closer examination of the BIA's previous relations and dealings with the Tribe proves otherwise. Specifically, the very BIA letters[21] that are heavily cited by representatives of the Non-Members as conclusive authority for their illegal position, can be used to demonstrate that such BIA actions were not only consistent with the entire United States history of dealings with the Tribe dating back to 1915, but also, that the BIA's actions were consistent with its role under the IRA to provide recommendations and technical advice with regard to proposed constitutions. Indeed, it was Superintendent Burdick's Decision and subsequent publishing of the *Ledger Dispatch* Public Notice to reorganize the Tribe as well as enroll Non-

[20] Yet another example of the federal government's acknowledgement of the Tribe's organization and its validity is the recognition of the Tribe's official governmental action to change the Tribe's name from Sheep Ranch Rancheria to the California Valley Miwok Tribe, and the subsequent publication of this change on the Federal Registrar.

[21] The two letters that are consistently taken out of context by the Non-Members are the March 26, 2004 Superintendant Risling letter, and the February 11, 2005 Assistant Secretary Olsen letter. Both letters will be analyzed in much greater depth herein.

Members that represented the true departure and change in direction from both the BIA's previous relationship with the Tribe as well as the scope of the D.C. federal court holdings.

On March 26, 2004, Superintendent Risling issued a letter to the Tribe, which stated that the BIA would not accept a Constitution previously submitted by the Tribe as evidence that the Tribe was organized pursuant to the IRA *See* Exhibit G. In the letter, the BIA reiterated *recommendations* made to the Tribe, similar to those made in previous letters, for the Tribe to consider in identifying the membership and enrollment criteria to be included in the Tribe's proposed IRA constitution. *See* Exhibit G. Specifically, in the letter, the BIA makes the following statements:

> "Although the Tribe has not requested any assistance or comments from this office in response to your document, we provide the following ***observations for your consideration***.
>
> . . .
>
> The BIA remains available, ***upon your request***, to assist you in identifying the members of the local Indian community, to assist in disseminating both individual and public notices, facilitating meetings, and otherwise providing logistical support.
>
> . . .
>
> We reiterate our continued availability and willingness ***to assist*** you in this process and that via PL 93-638 contracts…we have already extended assistance."
>
> (emphasis added) (*Id.* at 1-3).

The Non-Members, however, continue to misquote this letter to propose that the BIA shall enroll Non-Members into the Tribe. However, as demonstrated above, with this letter, the BIA once again recognized its delicate and minimal role with respect to internal Tribal affairs, making only *observations* and *recommendations* for *facilitation* and *technical assistance* with respect to identifying other individuals potentially eligible for membership in the Tribe. These recommendations were made despite a very clear record that the Non-Members, tying their right to membership through Indian ancestry to the 1915 Indian Census, were clearly not eligible for membership into the Tribe.

On February 11, 2005, the Acting Assistant Secretary for Indian Affairs, Michael Olsen, dismissed an appeal filed by Yakima Dixie challenging the BIA's recognition of the Tribe's Membership. In rejecting Mr. Dixie's appeal, Mr. Olsen reaffirmed the well-established Membership of the Tribe and "encourage[d]" Mr. Dixie to work with the ***other tribal members*** and organize the Tribe pursuant to an IRA constitution and along the lines outlined in the March 26, 2004 letter. *See* Exhibit H. In this letter, the BIA once again offered its "*guidance or assistance"* in identifying membership criteria for inclusion in the Tribe's constitution. *Id.* In offering such *recommendations and offers for technical assistance*

with respect to identification of tribal enrollment and membership criteria, the BIA recognized that for it to overstep its boundaries and intrude upon internal Tribal affairs by actively reorganizing a Tribe with a well-established Membership and form of government, it would be acting in direct contravention with well-established federal Indian law and United States policy with respect to sovereign Indian Nations. Indeed, it was not until the Superintendant's Decision and subsequent publishing of the *Ledger Dispatch* Public Notice to forcibly enroll the Non-Members into the Tribe that the BIA overtly exceeded its role, going well "beyond what was decided or confirmed" in the 2004 and 2005 BIA letters and beyond the scope of holdings in the Federal Court litigation. *California Valley Miwok Tribe*, 51 IBIA 105. The Assistant Secretary's Decision to recognize the Tribe's Membership and Resolution #GC-98-01 is consistent with both the letters frequently mischaracterized by the Non-Members when analyzing Assistant Secretary's role pursuant to federal Indian law.

2. Previous Federal Litigation Did Not Hold that the BIA Shall Enroll the Non-Members Into the Tribe.

In *California Valley Miwok Tribe v. United States,* 424 F.Supp.2d 197 (D.D.C. 2006), the Tribe challenged the BIA's rejection of its proposed IRA Constitution in the 2004 and 2005 BIA letters,[22] citing to provisions in the IRA designed to give tribes more procedural flexibility in the adoption of an IRA constitution. *See* 25 U.S.C. §476(h). In its opinion, the District Court provided a thorough account of the Tribe's history and dealings with the United States, including recognition of Resolution #GC-98-01 and the BIA's recommended "general council form of government." *California Valley Miwok Tribe,* 424 F. Supp. at 198. The Court then acknowledged the subsequent "confusion that surrounded the Tribe" following its internal leadership dispute, recognizing that the BIA's activity "multiplied the confusion." *Id.* at 199.

Adhering to the scope of the issue before it as well as the scope of review of the BIA's actions pursuant to the Administrative Procedures Act ("APA"), the District Court examined the statutory language of subsection 476(h) and dismissed the Tribe's claim for failure to state a claim for which relief could be granted. *Id.* at 203. The Court did not find that the BIA shall enroll the Non-Members into the Tribe. Nor did the Court examine the issue of the individuals who comprised the Membership of the Tribe. For the Non-Members to argue otherwise is a desperate attempt to conflate issues. Rather, the District Court examined the Tribe's attempt to submit a constitution, and the BIA's authority to reject such a constitution under an APA scope of review, ***exclusively*** pursuant to the terms of the IRA. In no way does the

[22] Which the Court accepted as final agency actions, "for the purpose of [its] opinion only." *Id.* at 201.

Court's holding as to the BIA's authority pursuant to the APA or its analysis of such authority pursuant to the IRA equivalent to a determination that the Tribe's government was not organized ***outside of the IRA***, pursuant to federal Indian law. Such a determination was never made as this issue was never before the District Court.

In *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) the U.S Court of Appeals for the District of Columbia Circuit affirmed the District Court's dismissal of the Tribe's complaint, concluding that "the Secretary lawfully refused to approve the proposed constitution." *Id* at 1263. In doing so, the Court characterized the "central issue in this case" as "the extent of the Secretary's power to approve a constitution under [Section 476(h) of the IRA]. *Id.* at 1265. Examining the statutory text of 25 U.S.C. § 476(h) as well the Secretary's role delineated in 25 U.S.C. § 2,[23] the Court held that the BIA acted permissibly and in accordance with the APA in rejecting the Tribe's proposed IRA constitution. *Id.* at 1268. Again, similar to the District Court, the Court examined the Tribe's organization as well as the Secretary's authority to assist in such organization, ***exclusively pursuant to the IRA*** and under an APA scope of review. The Court did not and indeed could not examine facts as to the Tribe's existing Membership and established form of government or the BIA's previous relationship with the Tribe pursuant to either the APA or federal Indian law, because "there ha[d] been no fact development" in the case, nor was the Tribe's Membership and enrollment within the scope of the issue to be decided by the Court. Once again, it is critical to emphasize that the Superintendant's Decision and subsequent publishing of the *Ledger Dispatch* Public Notice to reorganize the Tribe and enroll the Non-Members was ***not*** the decision at issue before the Court. Even if the issues of Tribal Membership and enrollment had been before the Court for its review, similar to the IBIA, it would have been outside of its jurisdiction, consistent with the long-standing principle that "[j]urisdiction to resolve internal tribal disputes…and issue tribal membership determinations lies with Indian tribes and not in the district courts."[24] *In re Sac & Fox Tribe of Mississippi in Iowa/Meskawaki Casino Litigation,*

[23] "As we know, in the area of Indian law, a statute or treaty seldom supplies a specific answer to a case. The relevant statute or treaty was typically adopted against the background of certain premises and understandings that, you can be fairly sure, were on the mind of the legislators or the treaty drafts at the time, but they didn't put it in writing. Because [federal courts] want to find the answers in text…there is often less to go on for a tribe." *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb.L.Rev.121, 124 (2006) (quoting Edwin Kneeler, *Indian Law in the Law Thirty Years: How Cases Get to the Supreme Court and How They are Briefed*. 28 Am.Indian L. Rev. 274, 278(2003)

[24] *See United States v. Wheeler,* 435 U.S. 313, 323-36, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)(noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory"); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir.1985)(holding that the district court lacked jurisdiction to resolve "disputes involving questions of interpretation of tribal constitution and tribal law"); and *Smith v. Babbit*, 100 F.3d 556, 559 (8th Cir.1996)(holding that the district court lacked jurisdiction to hear what, in effect, was an appeal by individuals from an adverse tribal membership determination by a tribe).

340 F.3d 749, 763 (8th Cir.2003). Therefore, the Assistant Secretary's Decision to recognize the existing Tribal Members and Resolution #GC-98-01 as the Tribe's governing document is completely consistent with the DC District Court and Appellate Court decisions.

3. Any Subsequent Decision Issued By the Assistant Secretary Should Conform to Federal Indian Law and Not be Modified Based Upon Threatened Actions Pursuant to the APA.

The trust doctrine may enlarge obligations of the BIA beyond what would be required by an administrative law analysis. As succinctly put by Cohen, "[a]ctions that might well be considered within an agency's discretion because not 'arbitrary and capricious' as stated in the APA, may nevertheless be held to violate the Secretary of the Interior's trust responsibility to tribes." Cohen at 437. Indeed, an administrative law analysis should not be considered without understanding what role, if any, the Secretary's fiduciary duty should play. In attempting to delineate whether, and if so to what extent, the trust doctrine imposes some limits on federal administrative power, one must determine the extent to which the general law of trusts is applicable to narrow the otherwise wide amount of discretion usually enjoyed by agencies in implementing programs and policies pursuant to federal statutory authority. In making the delineation, the BIA should evaluate and consider the Tribe's interests.

In looking at purely Tribal interests and the Tribe's history, the theory and practice of interpretation in federal Indian law differs from that of other legal fields. For example, what is permissible for one federal actor pursuant to the APA may be completely different than how the Assistant Secretary can analyze and decide an issue pursuant to the APA and in the context of federal Indian law. In fact, the Supreme Court has stated: "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). For example, any person unfamiliar with federal Indian law might suggest that judicial solicitude for Indians should turn on considerations similar to those that might motivate judicial solicitude for other politically powerless "discreet and insular" minorities.[25] However, "[a] better understanding of the trust relationship is that it is based on internal structures of sovereignty in the American system, not on the particular characteristics of Indians as racial or political minorities." *See* Cohen at 122. Indeed, the trust relationship is rooted in Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831), in which the Court declared the Tribe to be a "domestic dependant

[25] *See United States v. Carolene Prods. Co*., 304 U.S. 144, 148 n.4 (1938); *cf.* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Univ. Press 1980) (contending that judicial review is designed in part to protect discrete and insular minorities from being disadvantaged by intentional discrimination).

nation," a term demonstrating that tribes are not simply minority ethnic groups, but are sovereign possessing a government-to-government relationship with the United States. Moreover, in the second *Cherokee* case, *Worcester v. Georgia*, 31 U.S. 515, 552-553 (1832), Chief Justice Marshall grounded the Indian law canons in the values of structural sovereignty, not judicial solicitude for powerless minorities." Cohen at 123. Therefore, when the Assistant Secretary implements federal Indian law and policy into his decision-making, he must not make such decisions based on the ebb and flow of judicial solicitude for powerless minorities, but instead he must look through the lens of federal Indian law, which protects important structural features of Indian tribal self-governance and sovereignty.

When considering federal Indian law and the trust responsibility, the issue that was before the D.C. District Court and Appellate Court on whether the BIA can reject the Tribe's proposed constitution, and the issue of whether the BIA is required to enroll Non-Members into the Tribe are two completely different issues. While the BIA may have the broad authority to reject constitutions submitted pursuant to the IRA, this does not mean that the Assistant Secretary can subject a tribe to enrollment criteria and mandate membership of Non-Members into the Tribe. Indeed, the Assistant Secretary is governed by an entire body of Indian law that individual rights that protect the liberties of the people, or persons, or citizens from governmental infringement have important implications for Indian people. *See* Cohen at 915. First, most of these rights are not binding on tribal governments. *Santa Clara Pueblo* at 55-58; *Talton v. Mayes*, 163 U.S. 376 (1896). Second, most of these rights offer a form of protection that is too individually focused to capture most constitutional claims associated with tribal cultural practices and collective interests.[26] Indeed, the Assistant Secretary is obligated to follow Supreme Court precedent that holds Indian nations exercise of governmental powers are not bound by federal constitutional limitations protecting individual rights against federal infringement. *See Id.*

The policy of the Assistant Secretary is to truly recognize the inherent sovereign right of tribes to govern themselves as well as the fact that each tribe governs themselves differently. Tribes establish their own systems of classification within tribal law, sometimes privileging tribal members over all others, at other times distinguishing all Indians from all others. *See* Cohen at 920. An illustration of the former is a tribal employment rights ordinance, which

[26] For an excellent discussion of the relationship between individual and collective rights of Indian people, see Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 Ariz. St. L.J.495 (1994).

[27] *See* Grand Traverse Band of Ottawa and Chippewa Indians Const., Art. II, Sec. 1(b)(3)(a). Some tribes grant membership to the spouses of tribal members, provided they have a minimum quantum of blood from any tribe. *See e.g.,* Ft. McDermitt Paiute and Shoshone Tribe Const. & Bylaws, Art. II. Sec. 2(b).

institutes a tribally specific preference for all employment on tribal projects. 15 Navajo Nation Code Sec. 604 (1995). An illustration of the latter is a membership law that restricts the possibility of membership by adoption to individuals who are Indian, regardless of the specific tribe.[27] Since the 1970's, all of these types of tribal laws providing distinctive legal arrangements for tribes and their members have encountered legal challenges based on federal constitutional or statutory guarantees of equal protection of the laws, and the tribe's distinct sovereign ability to make these distinctions have been consistently upheld.[28]

While the Assistant Secretary is prohibited by United States' law and policy from enrolling Non-Members into a Tribe, this does not mean that the Non-Members are left without a remedy. The proper forum for the Non-Members to seek enrollment with the Tribe is not through a federal court, the IBIA, or the Assistant Secretary. Rather, the proper forum for the Non-Members to become enrolled citizens of the Tribe is to work through the Tribe's processes as established by the Tribe's governing body, its General Council. *See e.g. Santa Clara Pueblo*. Importantly, the Assistant Secretary must recognize that even though he may have such broad authority to reject the Tribe's constitution, that authority must be checked by the understanding that, "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *See Santa Clara Pueblo* at 56.

As appropriately recognized in the Assistant Secretary's framing of the issue at hand, the Court's finding that the BIA's actions and Secretary's authority to reject the Tribe's proposed IRA constitution was permissible as a matter of law, in no way validates the BIA's attempt to enroll Non-Members into an Indian tribe pursuant to federal Indian law. Nor should the Court's holding regarding rejection of an IRA constitution have any bearing on the narrowly defined issue of Tribal enrollment and membership, which was the issue referred to the Assistant Secretary's office by the IBIA. Indeed, the issues of the Tribe's membership or enrollment and validity of the Tribe's resolution form of government were never before the federal courts. As acknowledged by the Court itself, the lack of fact development in the case precluded the Court from making any determinations that were outside its jurisdiction and its scope of review. *Id.* at 1268. Moreover, it is critical to note that the BIA's November 2006 decision to forcibly reorganize the Tribe and expand its membership

[28] For scholarly treatment of these issues, see Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law,* 110 Harv. L. Rev. 1754 (1997); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. Rev. 169, (1991).

came well after the District Court's opinion, and the appropriateness and legality of such a decision was never before the District Court or the Court of Appeals.

The Secretary's role in determining whether a tribe has properly organized itself pursuant to the IRA may permissibly involve the rejection of a tribe's proposed IRA constitution. Outside the context of review of an IRA constitution, this role may also involve logistic and technical support and facilitation in a tribe's initial organization process, a role which was appropriately acknowledged and fulfilled by the BIA in assisting the Tribe with the establishment of its resolution form of government. What is not permissible, however, is for the Secretary's role to exceed legally permissibly boundaries established by decades of well-established federal Indian law and United States policy by intruding upon the internal tribal affairs of a Tribe with an established membership and governing body and negating that Tribe's previously conducted and recognized governmental activities. To allow for the Secretary to "take this type of activist role in judging tribal policies… would undermine the Indian nations' autonomy over self government," and, in doing so, would be the very definition of arbitrary and capricious agency action. *See* Tsosie, supra note 19 at 528.

IV. CONCLUSION

The United States' policy of "self-determination" for Indian nations was established based upon recognition of "the unique historical and legal status of Indian nations." *Id.* at 529. The BIA's continued recognition of this fact is evidenced by the entity to which the BIA looks, as a matter of federal Indian policy, to define a tribal community, government, and form of governmental organization and that is and always will be the tribe itself. Such facts are established by the tribe through its internal history as well its history of relations with the United States. The BIA thoroughly examined these facts in 1915, 1935, 1971, 1993, 1998, and once again in 2011 during the Assistant Secretary's initial determination of the matter at hand, and definitively concluded that this Tribe is comprised of a membership of five individuals who enacted a government and governing document, and any future membership and other internal Tribal issues must be adhered to, given the United States policy of respect and deference to the sovereignty of Indian nations. For the United States to ignore such facts or otherwise attempt to rewrite history would set dangerous precedent for the 560 federally-recognized tribes located throughout the United States, all of whom rely upon their unique legal and political status as sovereign nations and their ability to make and enforce decisions regarding internal self-government, without second guessing from the United States. For the United States to now question the organization of the Tribe

based on unsubstantiated concerns raised by Non-Members and casino developers, would not only be reversing decades of the federal government's dealings with the Tribe and recognitions of the Tribal government's validity, but would also undermine the United States' well-established policy of respect for and deference to the self-determination and self-government of Indian tribes. A decision from the Assistant Secretary upholding the self-governance and sovereignty of the Tribe pursuant to its established Membership and resolution form of government, would not only be consistent with all of the United States' history with this Tribe, including previous federal court litigation, but, more importantly, would reaffirm this Administration's commitment to adhering to an of era self-determination for all tribes throughout the country.

Respectfully submitted this 3rd day of May, 2011.

By: */s/ Robert A. Rosette*

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