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

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

IGNACIA S. MORENO
Assistant Attorney General
U.S. Department of Justice, Environment & Natural Resources Division

KENNETH D. ROONEY
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section

OF COUNSEL
James W. Porter
Attorney-Advisor
Branch of General Indian Legal Activities
Division of Indian Affairs
Office of the Solicitor, Department of the Interior

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INTRODUCTION

Congress has entrusted the Secretary of the Interior with the authority to supervise and manage all Indian affairs. The Secretary has delegated that responsibility to the Assistant Secretary – Indian Affairs. Included within that expansive congressional directive is the responsibility to ensure that funds appropriated by Congress for Indians are being expended for the purposes for which they were appropriated. The Assistant Secretary, however, is faced with the difficult task of faithfully discharging those responsibilities in a manner that avoids any unnecessary intrusion on the prerogatives of a tribe to define the terms of the membership; those terms are the very heart of a tribe's identity and establish the political relationship between the tribe and its members.

The current lawsuit is another chapter in the unfortunate and ongoing saga between Mr. Dixie and Ms. Burley. What was once a leadership dispute has now developed into a contest between two factions, with each side resisting the efforts of the federal government to resolve the dispute. The federal government's efforts, based on the informed judgments and expertise of the agency, establish two points on the spectrum of the Assistant Secretary's expansive authority. While the August Decision reflects the Assistant Secretary's decision to exercise his authority in manner that departs from prior decisions, both the actions taken previously and the actions taken now were lawful exercises of that discretion.

In 1998, the Tribe passed a resolution establishing a General Council form of government. The Department then worked with Mr. Dixie and Ms. Burley to craft a tribal Constitution. What followed, however, was a series of intractable tribal disputes that thwarted all efforts to establish a constitution. Thus, in 2010, confronted with five individuals – all considered citizens of the Tribe – unyielding in their respective positions, the Assistant Secretary

changed his approach, instead choosing to defer to the Tribe's sovereign self-determination. *See* August 2011 Decision, AR002049-57. One facet of that sovereign authority will be to decide whether or not to reorganize under the IRA, 25 U.S.C. § 476(a), or organize pursuant to a method of the Tribe's own choosing, § 476(h).[1]

A necessary corollary to the Assistant Secretary's decision is the necessity of knowing which individuals are members of the Tribe. The August Decision does not represent, as Plaintiffs would have it, a decision by the Department to impose membership criteria. That is the province of the Tribe. Instead, the Decision merely identifies the *current* membership of this tribe, first expanded by Mr. Dixie with the adoption of the Burley family, which occurred in August of 1998, three months before the Tribe passed the General Council Resolution. The August Decision reasonably concluded that those individuals long-identified as "potential members" do not possess any inchoate membership rights. Indeed, Plaintiffs provide no authority to the contrary and instead choose to blur the distinction between potential members and actual members. Those terms are not synonymous.

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[1] From 1934, following passage of the IRA, and until 2004, with the passage of the Native American Technical Corrections Act, which added Section 476(h), "organized" referenced the historic manner in which tribes organized tribal governments under the IRA by calling Secretarial Elections. *See* Section 476(a). However, with the passage of 476(h), Congress recognized that "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section . . . ." Thus, when referenced in this brief, "organized" does not refer to the pre-Section 476(h) manner of "organization," but is instead referenced in the sense that a tribe can take a number of actions, if the *tribe* so desires, to enact additional governing documents, further define membership criteria, or even enact wholesale constitutional reform. But it is the Tribe's choice as to the manner in which any future "organization" will occur. "Unorganized," on the other hand, is used only in reference to the pre-Section 476(h) IRA definition and process. In other words, while this Tribe remains "unorganized," ie. not organized pursuant to the Secretarial Election procedures set forth in 476(a), that does not mean that the tribe cannot operate as a government under its current governing document, the 1998 Resolution.

Nor does the August Decision determine, as Plaintiffs contend, that the Tribe officially organized pursuant to the 1998 Resolution that established the General Council. While the Assistant Secretary concluded that the agency would resume government to government relations with that entity, the August decision expressly stated that "the General Council form of government does not render CVMT an 'organized' tribe under the Indian Reorganization Act," AR002050, and "unless asked by the CVMT General Council, the Department will make no further efforts to assist the Tribe to organize and define its citizenship." AR002055. Plaintiffs' allegation that the August Decision held that the Tribe was officially organized is flatly contrary to the language of the Decision.

While the August Decision reflects a change in policy with regard to this Tribe, it is the product of reasoned decisionmaking, it is in accordance with the law, and it is supported by the record. These complex determinations are guided by the expertise of the Department and within the expansive authority delegated by Congress. For these reasons, Federal Defendants respectfully request this Court deny Plaintiffs' motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

I. THE ASSISTANT SECRETARY SUPPLIED A RATIONAL CONNECTION BETWEEN THE FACTS FOUND AND DECISION MADE IN THE AUGUST DECISION.

A. As in *Miwok I* and *Miwok II*, the August Decision is due deference because it provides the agency's interpretation of both the IRA and the Assistant Secretary's authority under 25 U.S.C. §§ 2, 9.

Plaintiffs contend that *Chevron* deference is inappropriate in the present lawsuit, because the August Decision does not depend on any statutory interpretation, arguing that "*Chevron* applies only '[w]hen a court reviews an agency's *construction of the statute* which it administers." Pls.' Combined Reply in Supp. of their Mot. for Summ. J. and Opp'n. to Fed.

Defs.' Cross-Mot. for Summ. J. Resp., ECF. No. 61, 22 ("Pls.' Resp.") (emphasis in the original). Plaintiffs' objections are curious given the Assistant Secretary's explicit statement that he "reject[s] as contrary to § 476(h) the notions that a tribe can be compelled to 'organize' under the IRA and that a tribe not so organized can have 'significant benefits' withheld from it. Either would be a violation of 25 U.S.C. § 476(f)." August 2011 Decision, AR002054.[2] Indeed, it is entirely anomalous that Plaintiffs in one paragraph contend "the Department has not even offered an interpretation of a federal statute for this Court to review," Pls.' Resp. 23, then on the very next page attack the Secretary's interpretation of Section 476(a) and 476(h). Pls.' Resp. 23-24.[3]

In *California Valley Miwok Tribe v. United States* ("*Miwok II*"), the D.C. Circuit concluded that "*Chevron* – rather than *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) – provides 'the appropriate legal lens through which to view the legality of the Agency interpretation,'" notwithstanding the absence of formal notice-and-comment rulemaking or a formal adjudication. 515 F.3d 1262, 1267 (D.C. Cir. 2008) (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)). Likewise, this decision was issued pursuant to an informal adjudication, and *Chevron* deference is appropriate once again in light of "the related expertise of the Agency," the importance of the question to the Department's administration of the IRA, and "the complexity of that administration." *Barnhart*, 535 U.S. at 222; *Cf. Quantum Entm't., Ltd. V. U.S. Dep't of Interior,*

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[2] The August Decision also observed that it would be inappropriate to invoke the Secretary's "broad authority to 'manage all Indian affairs and [] all matters arising out of Indian relations,'" 25 U.S.C. § 2, or any other broad-based authority, to justify interfering with CVMT's internal governance." August Decision, AR002050.

[3] It is also incongruous that Plaintiffs take issue with the Defendant's characterization of the previous agency's action as an attempt to "compel organization in the absence of tribal consent," Pls.' Resp. 22, when in the very next sentence Plaintiffs themselves characterize the agency's actions as a proposal "to facilitate a meeting of the Tribe's members, at which the Tribe itself could choose whether and how to organize itself." *Id.* Under either characterization, the Department concluded that it would no longer assist the tribe's organizational process except at the request of the tribe. That action necessarily implicates the agency's authority under the IRA.

Bureau of Indian Affairs, 597 F. Supp. 2d 146, 151 (D.D.C. 2009) (observing that "the Supreme Court has long accorded considerable weight to an executive department's construction of the statutory scheme it is entrusted to administer whenever decisions as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.") (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).[4]

B. The Assistant Secretary appropriately recognized the governing body, the General Council first established in 1998, as representative of the current tribal membership.

Much like their motion for summary judgment, Plaintiffs' response and reply operates on a fundamentally flawed proposition: Plaintiffs' contention that the Tribe's membership is not limited to the five identified individuals merges the status of those individuals the Assistant Secretary has long recognized as actual members with those that have *never* been recognized as actual members. In 1998, these individuals passed the 1998 Resolution that established the General Council. While the dispute between Mr. Dixie and Ms. Burley continued throughout the years and, at various points, impaired the government to government relations between the Tribe and the United States, the Assistant Secretary's decision to resume those relations are within his broad discretion, and that decision is owed deference. *Timbisha Shoshone Tribe, et al. v.*

[4] While an agency interpretation of a relevant provision that conflicts with the agency's earlier interpretation is "entitled to considerably less deference than a consistently held agency view," *INS v. Cardoza–Fonseca*, 480 U.S. 421, 446, n. 30 (1987), "where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction," and courts "should be especially reluctant to reject the agency's current view which . . . so closely fits 'the design of the statute as a whole and [] its object and policy." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 418 (1993) (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990).

Salazar, Civ. No. 1:10-cv-00968, *7 (D.C. Cir. May 15, 2012) (citing *Miwok II*, 515 F.3d at 1267).

i. The Assistant Secretary reasonably concluded that the General Council consists of the five citizens that the Department has long recognized, and Plaintiffs' attempts to resurrect the specter of termination-era policies are without merit.

Plaintiffs challenge the Assistant Secretary's membership determination on the basis that there is "undisputed evidence in the record" that this Tribe's membership is not limited to the five identified individuals and that there exists a greater tribal community. *See* Pls.' Resp. 9-11. As Federal Defendants explained, Plaintiffs conflate the status of those *potential* members with those *actual* members whom the Assistant Secretary has acknowledged for the past decade. Fed. Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Fed. Defs.' Cross-Mot., ECF No. 56-1, 25-27 ("Defs.' Mem."); *see also* 2007 Notice, AR001501.

As the Assistant Secretary observed, the Federal Government's trust responsibility to tribes is rooted in specific rights-creating and duty-imposing statutes and regulations. *See* AR002053-54 (citing *United States v. Jicarillia Apache Nation*, 131 S. Ct. 2313, 2323 (2011); *see also United States v. Navajo Nation*, 556 U.S. 287, 290-91 (2009). Thus, in the absence of any federal statute, treaty, or regulation that establishes those individuals' tribal membership, the United States bears no fiduciary responsibility to protect political rights that those individuals were never entitled to in the first instance. *See Nero v. Cherokee Nation of Okla*., 892 F.2d 1457, 1465 (10th Cir. 1989); *Wheeler v. United States Dep't of the Interior*, 811 F.2d 549 (10th Cir. 1987) (Cherokee election dispute involved no trust corpus); *see also Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002) (finding that the Department appropriately declined to recognize a tribal election where tribal members were excluded from the tribe in contravention of the Act of 1970 and the Treaty of 1866.). In other words, these individuals do not possess

"inchoate citizenship rights" that the Secretary has a duty to protect. August 2011 Decision, AR002051.

For this same reason, Plaintiffs cannot succeed with the argument that "[t]he exclusion of the Tribe's members from citizenship, voting and other rights of membership is a clear violation of constitutional rights guaranteed by Congress under ICRA." Pls.' Resp. 29. Plaintiffs' argument assumes that those individuals are, in fact, members. Never having been identified as a member, they cannot be deprived of that to which they were never entitled. *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 887 F. Supp. at 1174 (N.D. Ind. 1995) (finding, in the federal acknowledgement context but with regard to what constitutes a legitimate claim of entitlement protected by the due process clause of the Fourteenth Amendment, that "the Supreme Court has never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement.") (internal quotation marks and citation omitted).[5]

Yet Plaintiffs fail to address the distinction between actual and potential members, choosing instead to resurrect the specter of termination in a misguided attempt to analogize this Decision with the policies of a bygone era. Plaintiffs' efforts fail for a number of reasons, the first of which is that their theory relies on the false notion that the "Department is seeking, as a matter of policy, to create a rule that limits the membership of this Tribe to the distributees named under the 1967 Sheep Ranch Distribution Plan and their lineal descendants." Pls.' Resp. 7.[6] The decision does not, as Plaintiffs contend, impose any manner of membership criteria that

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[5] Plaintiffs' claim fails for an additional reason: 25 U.S.C. 1302(8), which Plaintiffs rely on, Pls.' Resp. 29, is a claim against the Tribe, not the federal government. *Id.* ("*No Indian tribe* in exercising powers of self-government shall . . . .") (emphasis added).

[6] Plaintiffs also challenge Mr. Dixie's adoption of the Burleys in 1998, *see* Pls.' Resp. 38-39, but this argument perfectly encapsulates Plaintiffs' efforts to cherry-pick from the record those portions that support their position, while disregarding the wealth of evidence that is to the

forever restricts the membership of this tribe to the five identified members and their descendants. Plaintiffs mistake identifying who comprises the *current membership* of the Tribe with the establishment of *membership criteria*. While the former is a governmental function made necessary by the Assistant Secretary's exercise of his fiduciary duties, the latter is and remains within the exclusive province of the tribe. Defs.' Mem. 21; *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978).

Far from the intrusion into the affairs of this tribe that Plaintiffs envision, the Decision accomplishes exactly the opposite. The Assistant Secretary identified the five current members, and defers, once again, to the General Council to refine or expand the membership criteria as necessary. *See* August Decision, AR002056 ("Only upon request form the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents."); *see also* 1998 Resolution.[7]

In light of the Assistant Secretary's deference to the Tribe's General Council to adopt if, the Tribe so desires, organic documents setting forth membership criteria – which could encompass Plaintiffs – it is entirely without basis to contend that the Decision constitutes a "*de facto*" termination of the Tribe. *See* Pls.' Resp. 4. *See* Pls.' Resp. 4. During briefing on

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contrary. For example, Plaintiffs rely on the 2004 Decision in furtherance of a number of arguments, Pls.' Resp. 1-2, 9-10, 30, 31, 37, 39, but that Decision expressly recognized the Burleys as members. *See* 2004 Decision, AR000499 (identifying Ms. Burley as a person of authority).

[7] Plaintiffs conveniently ignore the express language of the 1998 Resolution: "[T]his membership may change in the future consistent with the Tribe's ratified constitution and any duly enacted Tribal membership statutes." AR000177-178. It is also for good reason that Plaintiffs fail to identify any language in the August Decision that could be construed as any such limitation on membership. As the Assistant Secretary reiterated in closing, "the factual record is clear: there are only five citizens of CVMT . . . Those potential citizens [including Plaintiffs], if they so desire, should take up their cause with the CVMT General Council directly." August 2011 Decision 7, AR002055.

reconsideration, Plaintiffs invoked the *Alan-Wilson* IBIA cases to support the proposition that the Secretary has a duty to ensure that the potential members are involved in the organization of an unorganized but federally recognized tribe. Dixie Brief on Reconsideration, AR002151. As explained in the decision and further articulated in briefing,[8] however, *Alan-Wilson* works directly against Mr. Dixie's position. The Cloverdale Rancheria, having been terminated under the Rancheria Act and restored pursuant to the *Tillie Hardwick* litigation and settlement, was an "unorganized" but federally recognized tribe, exactly as this Tribe is today. Mr. Jefferey Alan-

[8] Plaintiffs argue that Federal Defendants elaboration of the August Decision's explicit reference to *Alan-Wilson* "constitutes an impermissible *post hoc* argument of agency counsel." Pls.' Resp. 3, 11-13. Federal Defendants discussion of the law governing Rancherias, however, is a legal argument, and is not precluded as an impermissible post-hoc rationalization. Plaintiffs seem to believe that an agency may, in briefing, not advance a legal argument that supports the agency's determination if the agency does not reference that argument specifically in its determination. That is not and never has been a proper formulation of what constitutes a post-hoc rationalization. As *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) shows, the key element in a post hoc rationalization is lack of reliance on the administrative record, as demonstrated by the use of litigation affidavits, not whether a legal argument may be made in briefing that supports the rationale of the agency as set forth in the record. *Overton Park* was a Section 4(f), Department of Transportation Act of 1966 case, brought pursuant to the APA, involving the question of whether there was no prudent and feasible alternative to running an expressway through a park. 401 U.S. at 406. The Secretary of Transportation had made no formal findings to support his conclusion, and the administrative record had not been filed with the district court. Rather, the agency sought to rely on "litigation affidavits" prepared for the lawsuit that explained the basis for the Secretary's decision. 406 U.S. at 409. The Supreme Court held that the affidavits were post hoc rationalizations, and could not be used in place of the administrative record. 401 U.S. at 419. Here, in contrast, there is an administrative record and there is no effort to ignore it, nor is there any effort to supplant, or even bolster, the record with litigation affidavits. As Supreme Court precedent and the law of this Circuit establish, the agency's interpretations advanced during litigation are clearly entitled to deference. *Overton Park; Auer v. Robbins*, 519 U.S. 452, 462 (1997) (agency interpretation offered in litigation accorded deference); *Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1130 (D.C. Cir. 1997) (stating, "deference to an interpretation offered in the course of litigation is still proper as long as it reflects the 'agency's fair and considered judgment on the matter.'") (quoting *Auer*, 519 U.S. at 462); *see also Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6-7 (D.C. Cir. 2006) ("The policy of the post hoc rationalization rule does not prohibit [an agency] from submitting an amplified articulation of the distinction it sees . . . .") (quoting *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)).

Wilson was descended from individuals affiliated with the Rancheria, but not from anyone on the distribution list prepared as part of the termination of the Rancheria. Thus Mr. Wilson was in precisely the same situation as the persons classified as "potential members" of this Tribe. With BIA's permission, Jefferey Alan-Wilson organized a tribal government, and was recognized by the BIA as Chairman. When a person who was a distributee under the distribution plan objected, however, the BIA corrected its position and discontinued recognizing Mr. Alan-Wilson as a member of the tribal government. In a clear statement of the law, applicable to the case at hand, the IBIA quoted the Regional Director:

> [the BIA] recognizes the right of the distributees, dependent members, and lineal descendants to formally organize the Cloverdale Rancheria pursuant to the IRA and *Tillie Hardwick* judgment. It shall be the responsibility of the reorganized government to establish subsequent tribal membership criteria and rolls.

Alan-Wilson v. Sacramento Area Dir., BIA, 30 IBIA 241, 248. Thus, the history of this matter, as well as the law respecting membership in unorganized Rancherias, compels the conclusion set out in the August Decision: that the five acknowledged members are the only current members of the Tribe and the only people who can exercise the authority of the Tribe's General Council.[9]

[9] Plaintiffs advance two new arguments – never briefed, not included within the complaint, and not raised with the Assistant Secretary – that the August Decision somehow violates subsections 476(f) and (g), Pls.' Resp. 18, and the Federally Recognized Indian Tribe List Act of 1994, Pls.' Resp. 20. Both arguments stem from the same flawed characterization that the August Decision imposes membership limitations. *See* Pls.' Resp. 20. As explained, the identification of actual members is not synonymous with a tribe's imposition of membership criteria. Both arguments are without merit, and Plaintiffs provide no caselaw to support these novel claims. Moreover, this Court need not address Plaintiffs' new claims because they were not properly alleged in the complaint, *Gonzalez v. Holder*, 763 F. Supp. 2d 145, 149 n.1 (D.D.C. 2011) (declining to address claims not included in complaint and introduced for first time in summary judgment briefing); *see also Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 411 (D.D.C. 2008) (observing that "traditional practice of this Court has been to disregard "claim[s] asserted for the first time in a memorandum of law" because those claims "[were] not made in the [plaintiff's] original complaint or advanced in a motion to amend," and that the Court maintains an interest in "maintaining some semblance of order in the procession of

ii. The federal government's recognition of the Tribe's government is an issue that is entirely distinct from a tribe's organization under the IRA or pursuant to 476(h).

This case implicates, among other things, the propriety of the Assistant Secretary's decision to resume government to government relations with the Tribe through the General Council. While the Tribe remains "unorganized,"[10] that does not mean that the Tribe cannot operate as a government under its current governing document, the 1998 Resolution. It also bears emphasis that this Tribe is not required to "organize" any further; that is, nothing in the law requires this Tribe to make any additional changes to its governing documents or membership criteria. In an attempt to align this case with *Miwok I* and *Miwok II*, however, Plaintiffs contend that "the 1998 Resolution plainly falls within the catch-all category of other 'governing documents' covered by § 476(h)." Pls.' Resp. 24.[11] However, it likewise bears emphasis that the *federal government's* recognition of a tribe's governing body is entirely distinct from a *tribe's* efforts to organize. The former does not establish the latter, as Plaintiffs would have this Court infer.

Indeed, Plaintiffs entirely ignore that the Decision expressly rejects the notion that the Tribe is reorganized under the IRA, 25 U.S.C. § 476(a) or organized pursuant to the procedures of their choosing, 25 U.S.C. § 476(h). *See* August Decision, AR002055 ("Accordingly, unless asked by the CVMT General Council, the Department will make no further efforts to assist the

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the [case before it.]"), and the new claims were not raised during the administrative process, *see Vt. Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 553 (1978); *Nevada v. Dep't. of Energy*, 457 F.3d 78, 88 (D.C. Cir. 2006) (declining to reach the merits of plaintiff's claims, find the arguments were waived by failing to raise them at the administrative level).

[10] As that term is used in reference to the pre-Section 476(h) IRA definition and processes.

[11] It is entirely inconsistent that on the one hand Plaintiffs contend the August Decision constitutes an organization of this tribe, but then on the other concede that "this is not a dispute over tribal governance or membership within an already organized tribe that has an established governing body." Pls.' Resp. 27.

Tribe to organize and define its citizenship."). The 1998 Resolution similarly delays organization until a future date, *see* 1998 Resolution, AR000178 ("The Tribe, on June 12, 1935, voted to accept the terms of the [] but never formally organized pursuant to a federal statute, and now desires to pursue the formal organization of the Tribe . . . ."), whereupon the Tribe may ratify a constitution and enact Tribal membership statutes. *See id.* at AR000177-78 ("this membership may change in the future consistent with the Tribe's ratified constitution and any duly enacted Tribal membership statutes."). *Id.* at AR000178.

iii. The Assistant Secretary's recognition of the Tribe's General Council is reasonable.

The Assistant Secretary must carefully balance his responsibility to ensure that the United States deals only with a tribal government that is representative of its members, *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C.2002), while balancing principles of tribal self governance, *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150 (D.D.C. 1999). The passage of the 1998 Resolution that established the General Council is in and of itself an act of self-governance that the Secretary has respected and acknowledged in the past. *See* Defs.' Mem. 28-29 (citing correspondence between the Assistant Secretary's office and the General Council); *id* (citing ten different federal contracts entered into with the General Council).

But when confronted with the wealth of support for the Assistant Secretary's recognition of the General Council, Plaintiffs merely counter that "the Department can point to no prior agency action that makes the determinations found in the 2011 Decision," Pls.' Resp. 31, and that they "do not believe that any of the documents the Department cites were intended as official action 'recognizing' any governing body of the Tribe"," *id.* at 30 n.9. Yet it is entirely unclear under Plaintiffs' theory what more could constitute the ongoing administration of

government to government relations between the United States and a tribe if not the approval and funding of a 638 contract. *See generally* Indian Self-Determination and Education Assistance Act, codified at 25 U.S.C. §§ 450-458ddd-2; *see also* 25 U.S.C. § 450b(j) (a "self-determination contract" is a contract entered into between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services . . . ."); § 450b(l) (a "'tribal organization' means the recognized governing body of any Indian tribe."). More importantly, just as the decision to *discontinue* government to government relations is within the broad discretion of the Assistant Secretary, so too is the *resumption* of that relationship between the Tribe and the United States. The Assistant Secretary's deference to this Tribe's chosen form of government is within that expansive authority and it is in accord with the law. *See Goodface*, 708 F.2d at 339; *Wheeler*, 811 F.2d at 551; *Ransom*, 69 F. Supp. 2d at 150.

Likewise, it strains credulity to accept Plaintiffs' contention that the General Council is "void *ab initio*" because "at least 83 of the current members were over the age of 18 in 1998," and that these individuals were "excluded from the process of adopting the 1998 Resolution." Pls.' Resp. 25. [12] Given that the question of whether those individuals identified as "potential members" are, in fact, members of the Tribe is fundamental to this dispute, Plaintiffs' argument fails because it "assumes the correctness of the very question at issue in this case." *Timbisha Shoshone Tribe v. Dept. of Interior*, No. 2:11-cv-00995, 2011 WL 1883862, at *12 (E.D. Ca.

[12] Plaintiffs also rely on a post-decisional affidavit. This affidavit was not a part of the administrative record and Federal Defendants opposed Plaintiffs motion to supplement the record with this litigation affidavit. *See* ECF No. 57. To the extent this Court concludes that supplementation or the review of extra-record evidence is not warranted, Federal Defendants move pursuant to Fed. R. Civ. P. 12(f) to strike any and all reference to this document.

May 16, 2011). Plaintiffs also fail to account for the fact *their lead plaintiff*, Mr. Dixie, considered himself the lone member up until his adoption of the Burleys. Defs.' Mem. 20-22.[13]

Plaintiffs also rely on *Ransom*, for the proposition that the Department acted arbitrarily and capriciously in "deferring" to the General Council, but *Ransom* further supports Federal Defendants' recognition of the General Council. In *Ransom*, the Saint Regis Mohawk Tribe attempted to exchange their three chief system of government, in existence for almost 200 years, with a constitutional form of government composed of three separate branches. While close, the vote fell short, suggesting that the exchange had failed, yet despite this failure, the BIA recognized the constitutional form of government. Relevant here, the Court overturned the BIA's recognition, concluding that while the BIA must interpret tribal law if doing so affects federal-tribal relations, that interpretation "must effect as little disruption as possible of tribal sovereignty and self-determination." 69 F. Supp. 2d at 151; *see also Milam v. U.S. Dep't of the Interior*, 10 Indian L. Rep. 3013, 3015 (D.D.C. Dec. 23, 1982) ("measures taken by the BIA to ensure Indian compliance with constitution must be narrowly tailored so as to be the least

[13] Plaintiffs continue to advance the argument that because only Mr. Dixie and Ms. Burley signed the Resolution that this did not constitute a majority and the Resolution should be set aside. Pls.' Resp. 26. In fact, Mr. Dixie and Ms. Burley were a majority of the available adults at that time. Plaintiffs fail to explain how Melvin Dixie, whose whereabouts were unknown at the time even to Mr. Dixie, AR000082, could have participated in the passage of the Resolution. The General Council Resolution has been in place for more than a decade. Contrary to Plaintiffs' arguments, *see* Pls.' Resp. 29-32, the federal government and the Tribe have taken countless actions in good-faith reliance on the validity of that document. *See* Defs.' Mem. 28-29. To whatever extent that document or the government's recognition of that document, *see* Defs.' Mem. (citing February 4, 2000 letter to Mr. Dixie, AR000240-46), could have given rise to a cause of action for the potential members, that cause of action accrued well outside of the six-year time bar for suits against the government. *See generally*, 28 U.S.C. § 2401; *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (stating that "[a] cause of action against an administrative agency 'first accrues,' within the meaning of § 2401(a), as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court.").

disruptive of tribal sovereignty and self-determination, yet fulfill the trust responsibility of protecting the integrity of the Indian political process.").

It cannot be ignored that at one point in time, the BIA concluded it "does not recognize any tribal government . . . ." *See* 2005 Decision, AR000611; *see also Cal. Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 201 (D.D.C. 2006). However, when presented on the one hand with Mr. Dixie's faction that refuses to acknowledge the unequivocal adoption of the Burleys, going so far as to exclude her from their membership, and confronted with another faction that has consistently refused the Department's proffered assistance, the Assistant Secretary lawfully exercised his discretionary authority to resume government to government relations with the General Council, established by the tribal membership in 1998 with the passage of the Resolution. This decision is lawful, and it is within the discretionary authority of the Department. *See Timbisha Shoshone Tribe*, Civ. No. 1:10-cv-00968, at *7.

II. PLAINTIFFS' REMAINING ARGUMENTS THAT CHALLENGE THE SCOPE OF THE AUGUST DECISION AND ALLUDE TO VARIOUS IMPROPRIETIES ARE WITHOUT MERIT.

Plaintiffs present a number of arguments regarding the "reconsideration of settled adjudications," Pls.' Resp. 39-41, the scope of the August Decision, *id.* at 41-43,[14] and mootness

[14] Plaintiffs challenge the Decision on the basis that it "unlawfully exceeded the scope of the issues raises by the Burley's appeal." Pls.' Resp. 41-42. As framed in Plaintiffs' response and reply, this argument is simply a tautology of Plaintiffs' contention that the Assistant Secretary cannot "reopen final agency actions," and federal defendants have already explained the failings of Plaintiffs' argument. *See* Defs.' Mem. 16-17; *see also, infra* Section IV. As originally articulated by Plaintiffs, the Assistant Secretary "lacked jurisdiction" to decide any issues not specifically addressed in IBIA's referral. Pls.' Mem. 43-44. This argument is without merit, *see* Defs.' Mem. at 14-16, and in reply, Plaintiffs again fail to articulate how the cited regulations bar the Assistant Secretary from a broader inquiry or from addressing issues that may not be referenced in the referral but that the Assistant Secretary concludes are necessary to the resolution of the dispute.

and ex parte contacts, *id.* at 43-44,[15] but each are without merit. First, while the August Decision reverses the Department's approach to this Tribe, embodied in the 2004 Decision, Plaintiffs' challenge to that reversal, Pls.' Resp. 39, operates on a flawed factual foundation.[16] Plaintiffs skew the language and effect of the 2004 Decision and misconstrue the determinations reached in the August Decision.[17] The 2004 Decision was issued in response to Ms. Burley's submission of a constitution that limited membership to Ms. Burley and her two daughters, "in an attempt to demonstrate that it [was] an 'organized' tribe." AR00499. The Assistant Secretary disagreed that the submitted constitution rendered the tribe "organized," observed that the first step towards organization is the identification of putative members, and the Assistant Secretary once again recognized Ms. Burley "as a person of authority within the California Valley Miwok Tribe." *Id.*

The 2011 Decision does not, as Plaintiffs argue, revisit the agency's prior conclusion that Ms. Burley's constitution is insufficient to render this tribe "organized." Nor does the 2011

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[15] Plaintiffs argue that because the Department did not address these arguments in its cross-motion for summary judgment, that it has waived any right to reply. Plaintiffs fail to articulate how the *rebuttal* of Plaintiffs' arguments, made in their response and reply, is analogous to the introduction of entirely new arguments, *New York v. EPA.*, 413 F.3d 3, 20 (D.C. Cir. 2005), or the development of issues vaguely alluded to in an opening brief, *Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996). The application of principles governing waiver is not warranted.

[16] Plaintiffs posit that the 2004 and 2005 Decisions "found that the Department did not recognize any government for the Tribe, and could not do so until the full Tribal community was involved in the creation of a representative government." While the court's decisions were based on the Department's previous assertion that the "potential members" possessed actual membership rights, Plaintiffs' argument is flawed at an even more basic level: The Department routinely carries on relations with a tribal government before the "tribal community" ratifies a constitution. *See, e.g., Alan-Wilson*.

[17] Plaintiff contends that the 2011 Decision overturns the 2005 Decision, but Plaintiff similarly neglects referencing what the 2005 decision accomplished, only describing both decisions in unison. In 2003, Mr. Dixie "challenged the [BIA's] recognition of Sylvia Burley as tribal chairman and sought to 'nullify' her admission, and the admission of her daughter and granddaughters into [the] Tribe." AR000610. The Assistant Secretary dismissed Mr. Dixie's challenge as procedurally defective, untimely, and rendered moot by the 2004 Decision.

Decision conclude that the 1998 Resolution "organizes" the tribe. And the 2011 Decision does not "reopen" the prior determination that the identification of putative members is the first step a *tribe* must take in organization. Rather, the 2011 Decision,

> clears away the misconception that these individuals [the putative group] have inchoate citizenship rights that the Secretary has a duty to protect. They do not. The Tribe is not comprised of both citizens and potential citizens. Rather, the five acknowledged citizens are the only citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine citizenship criteria for the Tribe.

AR002051. Thus, the Decision defers to the five long-acknowledged members, represented by the General Council, to: 1) identify putative members; and 2) determine whether or not to take steps towards "organization," however the Tribe may choose to define that term and that process. While the August Decision places a greater emphasis on this tribe's sovereign authority and right to self-governance than the 2004 decision, that change in emphasis is a policy choice within the discretion Congress accords the agency.

Plaintiffs also posit that the August Decision was procedurally flawed because the reconsideration occurred more than "six and a half years after the 2004 Decision was made." Pls.' Resp. 41. However, this argument ignores that the August Decision was not a reconsideration of the 2004 Decision but a reconsideration of the December 22, 2010 Decision. On December 22, 2010, the Assistant Secretary issued his decision – a decision based on Ms. Burley's appeal of the Superintendent 2006 Decision – then, on April 1, 2011, the Assistant Secretary withdrew the December Decision, AR001998-99, shortly thereafter requested briefing on reconsideration, AR002004-06, with Plaintiff's participation, *see* Dixie Brief on Reconsideration, AR (Supp.) 002121-2321, then issued the decision on August 31, 2011, AR002049-57. The Assistant Secretary initiated reconsideration within three and half months,

while the entirety of the process spanned eight months. The Assistant Secretary had the authority to reconsider his own decision, and he did so within a reasonable time, even under Plaintiffs' own case. *See Belville-Mining, Co. v. United States*, 999 F.2d 989, 1000 (6th Cir. 1993) (finding that eight months was not an unreasonable amount of time to initiate reconsideration).[18]

Finally, Plaintiffs argue that reconsideration was improper because they have relied on the 2004 and 2005 Decisions by continuing efforts to organize their particular faction. Pls.' Resp. 41. While it is true that an agency must provide a more detailed justification "when its prior policy has engendered serious reliance interests," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), the Assistant Secretary's decision not to recognize Plaintiffs' faction is reasonable given that their faction continued to organize without the participation of the Burley family, individuals that the 2004 Decision recognized as members. *See* 2004 Decision (recognizing the Burley family as members). In short, Plaintiffs' purported reliance is based only on those portions of the 2004 Decision that they agree with, while disregarding those provisions that they find fault with. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (stating that "the mere fact that an agency interpretation contradicts a prior agency position is not fatal," so long as the agency takes into account a party's "*legitimate reliance*" on the prior interpretation.) (emphasis added).

[18] As a corollary, Plaintiffs' contention that the subsequent efforts of their faction have somehow mooted Ms. Burley's appeal assumes the impropriety of the very question before this Court; namely, whether or not the Assistant Secretary appropriately recognized the General Council, which Plaintiffs have made clear they are not a part of. Plaintiffs' bald assertion fails to articulate how a faction the Assistant Secretary has never recognized could moot agency actions that relate to the faction the Assistant Secretary does recognize.

Finally, Plaintiffs' reliance on *ex parte* contacts is unavailing for a number of reasons. First, *ex parte* communications are not barred in informal adjudications. *See United States v. Navajo Nation*, 537 U.S. 488, 513 (2003) (concluding that the proscription on *ex parte* communications would be triggered by formal adjudication before the IBIA, but because the communication arose during an "administrative appeal process largely unconstrained by formal requirements," much like the one here, no such proscription governed); *see also Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1540 (9th Cir. 1993) (finding that the ex parte communications prohibition applies when there is an adjudication "on the record"); *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 798, 798 n.4 (5th Cir. 2000) (concluding that the agency action involved an informal adjudication because it interpreted the rights of a small number of parties properly before it, and that the APA ban on ex parte contacts does not apply to informal adjudications).

And even assuming *arguendo* that *ex parte* contacts with the Assistant Secretary's two subordinates were prohibited, Plaintiffs' allegation that a "secret communication" formed the basis for the Assistant Secretary's decision and therefore violated notions of procedural due process is belied by the facts. *See Press Broad., Inc. v. FCC*, 59 F.3d 1365, 1370 (D.C. Cir. 1995) (holding that the ex parte contacts did not irrevocably taint the adjudication in a manner that rendered the ultimate judgment unfair "in the absence of a nexus" between the party's attempt to influence and the final decisionmakers). For example, in the challenged letter, Ms. Burley urged the Assistant Secretary to reach the determination that the Tribe was formally organized, but as discussed, Defs.' Mem. 31-32; *supra* Section I.B.ii., the August 2011 decision plainly disclaims that the tribe is organized. Similarly, Ms. Burley's assertion that the tribe consists of five members is not novel; the membership of five has long been acknowledged. *See*

Defs.' Mem. 21-27. Nothing in the August Decision suggests that Ms. Burley's letter had any effect on the outcome.

Thus, beyond mere innuendo and speculation, Plaintiffs fail to introduce any evidence that could overcome the presumption of regularity accorded actions undertaken by the government. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10, (2001) ("[A] presumption of regularity attaches to the actions of Government agencies . . . ."); *Overton Park*, 401 U.S. at 415; *see also Estate of Landers v. Leavitt*, 545 F.3d 98, 113 (2d Cir. 2008) (explaining the court's unwillingness to ascribe "nefarious motives to agency action as a general matter").

III. PLAINTIFFS CANNOT DEMONSTRATE THAT THERE IS AN IDENTITY OF ISSUES BETWEEN THE NOVEL QUESTIONS OF LAW IN THE PRESENT LAWSUIT AND THOSE ISSUES DECIDED IN MIWOK I AND MIWOK II.

Both parties agree that for issue preclusion, a party must satisfy three conditions before a party can be stopped from relitigating an identical issue previously decided.

> (1) [T]he issue must have been actually litigated, that is contested by the parties and submitted for determination by the court.
>
> (2) [T]he issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial.
>
> (3) [P]reclusion in the second trial must not work an unfairness.

Milton S. Kronheim & Co., v. Dist. of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (citation omitted); *see also* Pls.' Mem. 36 (citing *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) for the same proposition). But Plaintiffs' argument that collateral estoppel "precludes" the new agency decision at issue, Pls.' Mem. 38; Pls.' Resp. 32-37, cannot even clear the first hurdle, a "fundamental requisite" of collateral estoppel. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079 (D.C. Cir. 1987). Indeed, it is telling that out

of the five pages of Plaintiffs' brief that discusses collateral estoppel, they devote merely one conclusory sentence to the threshold condition of identity of issues. *See* Pls.' Resp. 34.

Plaintiffs' contention that collateral estoppel precludes the agency from defending the merits of the 2011 Decision, measured against the APA standard,[19] labors under the flawed reasoning that the 2011 Decision and the prior litigation involve the same "narrow, fact specific question of whether the Burleys established a valid Tribal government under the 1998 Resolution despite failing to involve the Tribe's members." Pls.' Resp. 34. But there is good reason that Plaintiffs cite to no document for that characterization: The validity of the 1998 Resolution that established the General Council was never before the Court. In 2004, the Assistant Secretary rejected Ms. Burley's attempt to organize the Tribe pursuant to her constitution; that document is no longer at issue. The issues presented in the present lawsuit are novel, and Plaintiffs' vague reference to "documents adopted prior to 2004," Pls.' Resp. 31, only represents a strained effort to manufacture an identity of issues, when there exists two court opinions that are devoid of any analysis as it pertains to the 1998 Resolution.

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[19] Plaintiffs' initially contended that the August Decision not only violated the APA, but, in addition, that the decision *itself* was "precluded" by *Miwok I* and *II*, Pls.' Mem. 31 ("In addition to violating the APA, the 2011 Decision is precluded by the final decisions of this Court and the Court of Appeals in *CVMT I* and *CVMT II*"). Pls.' Resp. 37. As Federal Defendants explained, this really amounts to an argument that the decision is "not in accordance with law." 5 § 706(2)(A). Defs.' Mem. 33-36. Plaintiffs' reliance on *Town of Deerfield* only underscores this broader point. *Town of Deerfield* involved one man's attempt to install a satellite dish, in violation of the town's zoning ordinance. After the conclusion of criminal proceedings, which found the man in violation of the ordinance, he subsequently brought suit in state court, challenging the ordinance on the grounds that it was preempted by FCC regulations. The state supreme court, the state court of appeals, and a subsequent federal district court decided against him. This did not deter the plaintiff, however, and he successfully persuaded the FCC to release an order, finding the ordinance was preempted. Evaluating the Town's challenge to the FCC order against the backdrop of the APA, 992 F.2d 420, 427 (2d Cir. 1993), the Second Circuit overturned the FCC order, but did not conclude that the order itself was precluded, but that the FCC's refusal to recognize the conclusive effect of the court proceedings rendered it "impermissible as a matter of law." *Id.* at 430.

The 2011 Decision constitutes a new final agency action that involves novel questions of law that have not been actually and necessarily decided by a court of competent jurisdiction. This is not an attempt by the Department to overturn the law of this Circuit by administrative fiat. *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948) ("[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned *or refused faith and credit* by another Department of Government."). To the contrary, the Assistant Secretary's August Decision is consistent with *Miwok I* and *Miwok II*, which recognized the Department's broad discretion in dealing with issues affecting the government to government relationship with tribes.[20] It is fully within the rights and prerogatives of the Department to place a greater emphasis on this Tribe's autonomy, particularly where the tribe has refused the agency's offer of assistance.

CONCLUSION

The 2011 Decision embodies the Assistant Secretary's reasonable determination that this tribe consists of five individuals, long identified as actual members, that those individuals are all members of the General Council, and that it is the province of this tribal entity, not the federal government, to take on the important decisions associated with the ratification of governing

[20] For this same reason, judicial estoppel does not apply. *See* Defs.' Mem. 31-32; *see also New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted) (Judicial estoppel is appropriate only when "a party's position [is] 'clearly inconsistent' with its earlier position."). Plaintiffs largely ignore the overarching argument that there can be no "clear inconsistency," *id.*, where the subject of the dispute, while related, is entirely distinct; instead, Plaintiffs choose to repeat their arguments that the identification of the greater tribal community as "potential members" is somehow contrary to briefing in *Miwok II*. It is not. *See* D.C. Circuit Brief, AR002073 (referring to the group of 250 as "potential members"); 2074 (same); 2082 (same); 2084 (same); 2087 (same); 2097 (same) 2099 (same); *see also Miwok* II, 515 F.3d at 1265 (the Tribe "has a potential membership of 250"). Nor does this Decision ratify Ms. Burley's organizational efforts, represented by her own constitution that the Assistant Secretary rejected, as Plaintiffs suggest. *See* Defs.' Mem. 31-32; *supra* Section II.B.ii.

documents that will outline the contours of this tribe for generations to come. The August Decision is well-reasoned, guided by the considerable expertise of the agency, and it is in accordance with the law. Based upon the foregoing, Federal Defendants respectfully request that its motion for summary judgment be granted.

Respectfully submitted this 18th day of April, 2012,

IGNACIA S. MORENO
Assistant Attorney General

/s/ Kenneth D. Rooney
KENNETH D. ROONEY
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
Phone: (202) 514-9269
Fax: (202) 305-0506
E-mail: kenneth.rooney@usdoj.gov

OF COUNSEL
James W. Porter
Attorney-Advisor
Branch of General Indian Legal Activities
Division of Indian Affairs
Office of the Solicitor, Department of the Interior
1849 C Street, N.W. Washington, D.C. 20240
Mail stop 6518