UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, et al., Plaintiffs, v. KEN SALAZAR, et al., Defendants, and, CALIFORNIA VALLEY MIWOK TRIBE, Intervenor-Defendant.	Case No. 1:11-CV-00160-BJR

INTERVENOR-DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER, DATED SEPTEMBER 6, 2013, GRANTING IN PART AND DENYING IN PART ITS MOTION TO DISMISS

I. INTRODUCTION

Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe"), respectfully moves for reconsideration of this Court's order, dated September 6, 2013 ("Order"). In its Order, the Court summarily rejects all of the Tribe's grounds for dismissal (with the exception of Plaintiffs' ICRA claim) based upon two findings that are both unsupported by the applicable record and inconsistent with determinations made by this very Court: (1) that the Tribe lacks an "organized" government and was never previously recognized by the United States as having one, and, consequently, (2) that Plaintiffs must be accepted as lineal descendants of the Tribe (and thus, as Tribal members). In addition the Court's findings exceed the scope of the administrative record.

The Court then mistakenly concludes that the Tribe is stripped of all of its attributes of sovereignty – including immunity and the ability to define its membership – simply because it does not have an IRA Constitution approved by the United States. This conclusion flatly ignores decades of well-established federal Indian law, as set forth in extensive briefing in the administrative record. This conclusion is also grossly inconsistent with the applicable evidentiary record, which evidences almost ***ten (10) years*** of government-to-government dealings between the Tribe and the United States, including the administration of federal grants. Moreover, neither the dicta cited by this Court in the cases involving the Tribe in this Circuit, nor the prior BIA letters, spoke to or analyzed the issue of "organization" outside the framework of an IRA Constitution process.

II. STANDARD

An interlocutory order such as this Court's partial dismissal "may be revised at any time before the entry of judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). "[R]elief upon reconsideration of an interlocutory decision pursuant to Rule 54(b) is available "'as justice requires.'" *Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 772 F. Supp.2d 218, 223 (D.D.C. 2011) (citations omitted). *See also, Lemmons v.*

Georgetown Univ. Hosp., 241 F.R.D. 15, 21 (D.D.C. 2007); *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005). The "as justice requires" standard is a "flexible" one, vesting this Court with broad discretion in the reconsideration of an interlocutory order. *Lemmons*, 241 F.R.D. at 22 (citation omitted). Among other grounds, "justice may require" revision when the Court has "patently misunderstood a party," or "made an error not of reasoning but of apprehension." *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). "Errors of apprehension include a Court's failure to consider controlling decisions or data that might reasonably be expected to alter the conclusion reached by the court." *Id.* (citation omitted). These considerations leave great room for the Court's discretion, and, accordingly, the "as justice requires" standard amounts to determining "whether [relief upon] reconsideration is necessary under the relevant circumstances." *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004).

Additionally, because the Court has broad discretion to revise interlocutory orders, "even if the appropriate legal standard does not indicate that reconsideration is warranted, the Court may nevertheless elect to grant a motion for reconsideration if there are other good reasons for doing so." *Cobell*, 355 F. Supp. 2d at 540. "One such reason might be that the Court, in dicta, drew incorrect inferences from evidence in the record." *Id.*

III. ARGUMENT

Reconsideration of this Court's Order is necessary and warranted under Fed. R. Civ. P. 54(b) and this Circuit's standard because: (1) the Court has committed a fundamental error of apprehension in finding that the Tribal government was non-functioning and ceased to exist prior to issuance of the August 2011 Decision at issue based upon a misunderstanding and/or application of the administrative record, the Amended Complaint, the parties, and the nature of the dispute involving the California Valley Miwok Tribe; and (2) as a result, justice requires reconsideration. Alternatively, the Court should grant the motion for reconsideration even if solely for the purposes of correcting misleading dicta resulting from its misreading of the Amended Complaint and its misunderstanding of the administrative record.

A. The Court Committed An Error Of Apprehension By Broadly Presuming That the Tribe Lacked a Functioning Government.

In its Order, the Court renders several findings and factual conclusions that are, among other things, inconsistent with and beyond the scope of the administrative record. That is problematic given that the Court is bound by the facts as supported by the administrative record in making determinations in an APA action.[1] Absent supplementation of the record,[2] this Court cannot make independent factual determinations. To so do would result in fundamental errors, mandating reconsideration in the interests of justice. Further, while a court may draw inferences in the Plaintiff's favor from the administrative record for purposes of a motion to dismiss, they must be reasonable inferences. *See LaRoque v. Holder*, 650 F.3d 777, 785 (D.C.C. 2011).

The most fundamental mistaken finding, since it is the crux of the Order, is that "[p]rior to the decision on review, there was no functioning tribal government."[3] *See* Order at 10. This finding is unsupported by the administrative record, and, in fact, in contravention to it.

The record in this case is abundantly clear and does not reasonably permit an inference that the Tribe lacked a functioning and recognized Tribal government prior to the issuance of the August 2011 Decision. Specifically, the administrative record ("AR") plainly illustrates that on November 5, 1998, the Tribe formally organized its governmental structure pursuant to Resolution #GC-98-01, which established the Tribe's governing body and resolution form-of-government (citations) (AR at 236). The characterization of the Tribe's first formal action as an

[1] *See Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision. . . To review more than the information before the Secretary at the time she made her decision risks our requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations."); *see also Amfac Resorts, L.L.C. v. Dep't of Interior*, 143 F. Supp. 2d 7, 10-11 (D.D.C. 2001) (citing, among other cases, *Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)*).

[2] Plaintiffs sought to supplement the administrative record by motion, on March 2, 2012 (Dkt. 50), which was vigorously opposed by Federal Defendants (Dkt 57). The Court has never ruled on this Motion. To the extent that it elects to do so, the Tribe requests leave to file a brief in opposition to its Motion, prior to a ruling being issued.

[3] The Court makes this determination based upon a fundamental misunderstanding of the administrative record, including the very administrative agency decision at issue in this action – the August 2011 Decision. For example, the Court states in its Order that "[p]rior to the decision on review, the federal government recognized a tribal government only if the tribe was "organized" pursuant to Section 476 of the Indian Reorganization Act." (Order at 3). This statement is simply incorrect. Nowhere does the August 2011 Decision make such a statement or finding. Moreover, the letter from Michael D. Olsen, (which this Court incorrectly labels a "Nonrecognition Letter" and used as support for the notion that the Tribe lacked a functioning government), was actually a dismissal of an appeal filed by Yakima Dixie, challenging the BIA's recognition of the Tribe's membership. (See fn. 8)

"initial organization" was accurate in that the Tribe had never previously taken steps to organize itself (*See* California Valley Miwok Tribe, 51 IBIA 106). While the BIA made "recommendations" for the Tribe to later operate pursuant to an IRA Constitution, these recommendations, in no way, negated the action of the Tribe to formally organize pursuant to its resolution form of government. Nor did these recommendations result in an absence of either an organized or recognized Tribal government (*See, e.g.* AR at 257).

Notwithstanding this Court's repeated assertions otherwise, applicable law demonstrates that neither a tribe's lack of an IRA constitution, nor the BIA's rejection of proposed IRA constitutions has any bearing on whether a Tribe may: (1) govern itself under a resolution form of government (*i.e.*, whether it is organized); and (2) maintain a government to government relationship with the United States under this governance structure (*i.e.* whether it is recognized). (AR at 2322-2351).

Both the administrative record and the two previous cases in this Circuit involving the Tribe illustrate the reality that organization and recognition are not only possible but actually occurred, even in the absence of a BIA-approved IRA constitution.[4] Following the United States' acknowledgement of the Tribe's five (5) members and its form of government in ***1998***, the Tribe commenced its government to government relationship with the United States and began receiving federal grant monies ***in 1999*** under the Indian Self-Determination and Education Assistant Act (ISDEAA) (25 U.S.C. §450, *et seq.*) (*See* Dkt. 72-3; Dkt. 58-1). The long-standing government to government relationship between the Tribe and the United States (in addition to fundamental principles of federal law and policy), served as the basis for the United States Department of Interior's ***reaffirmation*** of the Tribe's membership and governing body, in the

[4] The Court cites to CVMT I and CVMT II (as defined in the Order), as the basis for its improper factual conclusion that the Tribe lacks a functioning, organized form of government. Neither of these cases support this contention and the dicta cited in the Court's Order is misleading. In CVMT I, the Tribe challenged the BIA's rejection of its proposed IRA constitution. The court dismissed the Tribe's complaint for failure to state a claim, which was appealed by the Tribe and affirmed in CVMT II. In both cases, the courts examined the Tribe's attempt to submit a constitution and the Secretary's authority to reject such a constitution under an APA scope of review, ***exclusively pursuant to the terms of the IRA***. In no way did these holdings translate to a determination that the Tribe's government was not organized ***outside of the IRA***, pursuant to federal Indian law. Such a determination fundamental mischaracterizes these cases.

first instance. To clarify– the August 2011 Decision did not vest upon Tribe and its citizens ***new*** rights and authorities upon which the Tribe has relied for purposes of its Motion to Dismiss or its claims to entitlement of federal statutory benefits. Instead, it is the Tribe and the Tribe alone that has been authorized to receive these federal benefits as the Tribe since 1998. Of course, the Tribe's receipt of such benefits would not have been possible in the absence of either organization or recognition of the Tribe. The August 2011 Decision only ***reaffirmed*** that which had long-since been established.

1. Since There Was a Functioning and Recognized Tribal Government, Justice Requires Reconsideration of the Court's Order.

Since the core of the Order is the Court's mistaken finding that the United States did not recognize a functioning Tribal government prior to the August 2011 Decision, justice requires reconsideration. That mistaken finding undermines the Court's analysis regarding jurisdictional defects of standing, the intratribal nature of the dispute, failure to state a claim, and the Tribe's inability to be joined in the instant action due to its sovereign status, pursuant to Rule 19.

a. The Court Committed An Error of Apprehension and Patently Misunderstood the Parties in its Order By Finding that Plaintiffs had Standing to Pursue the Instant Action.

In direct reliance on the unsupported conclusion that the Tribe did not have a functioning Tribal government, the Court rejected the Tribe's claim that it lacked subject matter jurisdiction due to lack of Plaintiffs' standing to bring the action. (Order at 10). In finding that the Plaintiffs demonstrated injury for purposes of constitutional standing, the Court states that "injury was caused by the Secretary's determination" with regard to the five member citizenship and governmental structure of the Tribe. (Order at 9). The Court further asserted that "[v]acating the Secretary's decision would redress the injury by restoring the possibility, if not the certainty, that the excluded plaintiffs could participate in any renewed efforts to organize the Tribe." *Id*. Such a notion is unsupported by the administrative record, including any references reasonably drawn therefrom.

First, as detailed above, the administrative record contains no evidence supporting this

Court's finding that "[p]rior to the decision on review, there was no functioning tribal government to determine membership." Indeed, the administrative record supports the exact opposite: there is only one government and membership that the United States has ever recognized in its entire history of dealings with this Tribe and that is the five (5) member Tribe and General Council form of government established pursuant to #GC-98-01. The 2011 Decision independently recognized and reaffirmed this fact.[5] (AR 172-176; 234-239; 249-254)

Consequently, once it is acknowledged that there was, in fact, a legitimate functioning government in place, this Court is barred from intruding upon the "delicate area of membership," which is one of the most sacred aspects of a Tribe's sovereignty. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978) ("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.") (citation omitted)). Further, and again once it is acknowledged that there was in fact a legitimate, functioning government in place operating pursuant to Resolution #CG-98-01, ***Tribal membership cannot be inferred from lineal descent***, even if only for the limited purposes of standing. To do so would run directly contrary to binding case precedent cited in the Tribe's Motion to Dismiss (and not addressed by the Court's Order)(*See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *U.S. v. Wheeler*, 435 U.S. 313 (1978); *Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995)).

Similarly, justice further requires reconsideration of the Court's Order as it relates to its

[5] In its analysis of constitutional standing, the Court also places great weight on supposed genealogical data purportedly submitted to the BIA by various individuals (not confirmed as the Plaintiffs), stating "[t]he Bureau's emphasis upon genealogy implies it would regard a lineal descendant of a historical member of the Tribe a "putative" member eligible to participate in efforts to organize the Tribe." (Order at 10). The Court reasons that it must therefore assume that if Plaintiffs "are granted an order vacating the Secretary's decision, then they will likely be eligible to participate in any renewed efforts to organize the Tribe." *Id*. Such conclusions defy applicable law and draw unreasonable inferences. For one, the BIA's 2007 newspaper notice simply encouraged individuals ***who believed*** they were lineal descendants of the Tribe to submit information to the BIA. (AR 1501). At no time did the BIA make any conclusion that these individuals were, in fact, lineal descendants of the Tribe. As the BIA never made this determination, this Court is certainly in no position to be making such far-stretched conclusions in this APA action. More fundamentally, however, if the Assistant Secretary had concluded that it would be proper for the federal government to re-open the membership of a federally-recognized Indian tribe (which it declined to do), it would be the BIA's job – and only the BIA – to consider the genealogical determinations in the first instance, not this Court's. *See Marsh v. Oregon v. Natural Resources Council,* 490 U.S. 360, 377 (1989).

analysis of prudential standing.[6] The Court has neither provided any analysis nor distinguished the detailed statutory text and legislative history of § 476 of the IRA provided in the Tribe's Reply brief in support of its Motion to Dismiss (Dkt. 64). The Court does, however, cite an inopposite case (*Feezor v. Babbit*) and concludes Plaintiffs' interests (although they are non-Tribal members) are "well-within the zone of interests protected by the [IRA]." (Order at 11). As explained in the Tribe's Reply Brief (and apparently not considered by the Court), the statutory language and the legislative history of the IRA lack anything supporting the proposition that it was designed to protect purported Indians that have never been recognized as Tribal members. As such, justice requires that this error of apprehension be reconsidered by this Court.

b. <u>This Is An Intratribal Dispute, Beyond This Court's Jurisdiction.</u>

The Court's finding that there is no functioning or recognized Tribal Government is the foundation for yet another fundamental component of the Order: the Court's finding that it does have jurisdiction as this is not an intratribal membership matter. (*See* Order at 11-12). In rejecting this jurisdictional basis for dismissal, the Court states that Plaintiffs' complaint is not that "it has been denied tribal membership by a tribal government" but rather, that the federal government has recognized a "rogue" tribal government. (*Id.* at 11). For one, as explained above, the administrative record in no way supports the notion that the Intervenor-Defendant is a "rogue" faction. Indeed, the record clearly demonstrates that ***Intervenor-Defendant is the only government and membership that the United States has ever recognized***. That same administrative record further demonstrates that, after almost a decade of consistent relations, Plaintiffs are now using a federal court as a forum to resolve their internal enrollment grievances.

[6] The Tribe finds it important to address yet another incorrect assertion made on page 9, fn 3 of the Order. The Court states that the Tribe "addressed prudential standing for the first time in the reply." This is not accurate. The Tribe discussed the "zone of interest" concept in its Motion to Dismiss. (*See* Motion to Dismiss, Dkt. 58, pp. 5-6; 13-14). However, even if the Tribe did not analyze the issue of prudential standing, this Court has an independent duty to do so. *See Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994) ("Prudential standing is of course, like Article III standing, a jurisdictional concept."). *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded.").

This Court is barred by binding authority to entertain such claims. *See Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995).

Moreover, the Court's factual conclusion that this is not an intratribal dispute conflicts with the relief sought on the face of Plaintiffs' Amended Complaint, which asks the Court to direct "the [Assistant Secretary] and the BIA [to] establish government-to-government relations only with a Tribal government" that includes Plaintiffs. (Amended Complaint ¶ F, p. 30).

The Court's conclusion also conflicts with factual and jurisdictional determinations contained in the administrative record. In light of the very facts and claims at issue in this action, the Interior Board of Indian Appeals[7] ("IBIA") properly held that it "lack[ed] jurisdiction to adjudicate tribal enrollment disputes." *California Valley Miwok Tribe v. Pacific Regional Director*, BIA, 51 IBIA 103, 122 (January 28, 2010) (A.R. 1767-1796). The IBIA reasoned: "[u]understood 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***." (emphasis added). *Id*. Such a significant jurisdictional conclusion, which was not even acknowledged in the Court's Order, cannot be altered simply because Plaintiffs now choose to air their enrollment grievances in a federal forum in the guise of an APA action. *See Smith v. Babbit*, 100 F.3d 556, 559 (8th Cir. 1996). Justice requires reconsideration of the Order to allow for a closer and more accurate review of the administrative record to be conducted and to ensure that the rights of the parties are not jeopardize if the Court proceeds in review of the action on the merits.

c. Justice Requires Reconsideration of the Court's Order Finding That it Retained Authority to Provide the Relief that Plaintiffs Seek.

In its Order, the Court concludes in three sentences that it is able to provide the Plaintiffs'

[7] Although the Order contains non-binding dicta from the previous unrelated federal court cases, it provides only a passing reference to the IBIA appeal and it does so in a manner that, perhaps inadvertently, casts the Tribe in a negative light. *See* Order at 6. Unlike CVMT I and CVMT II which, as stated in *supra* fn. 4, did not examine the issues of the Tribe's established membership and organization pursuant to #GC-98-01, (these issues were never before this Circuit), the IBIA examined the very issues currently before the Court and properly classified them to be enrollment issues (i.e., internal matters beyond its jurisdiction).

requested relief – relief which was expressly recognized by another forum as an "enrollment dispute" – simply because the Plaintiffs have alleged violations of federal law. Plaintiffs' modified version of furthering their membership grievances in the form of an APA action cannot mask the true nature of this dispute. (*See Id.*).

d. The Court's Error of Apprehension Regarding a Functioning and Recognized Tribal Government Invalidates Its Findings As to Sovereignty and Sovereign Immunity.

In rejecting the Tribe's basis of dismissal under Fed. R. Civ. P. 19, the Court once again does so based upon the fundamentally flawed proposition that "[p]rior to the decision on review, the Secretary recognized no government of the Tribe." (Order at 15). The Court appears to conclude that, simply because the Tribe lacks an IRA approved constitution, it ceased to exist as a federally-recognized Indian tribe, possessing all privileges and rights associates therewith, including immunity from suit. As explained above, this conclusion is unsupported by, and conflicts with, the administrative record. Moreover, the Tribe has never relied upon the holdings of the August 2011 Decision as the basis for asserting its inherent sovereign rights. The Tribe's existence and sovereign power has remained intact through its entire United States history. Indeed, the ***inherent sovereign status*** of the Tribe never ceased by virtue of BIA attempts to forcibly expand its membership, nor was it restored by the federal government's declination to proceed with such intrusive actions. (*Cherokee Nation of Okahoma v. Babbit*, 117 F.3d 1489, 1502 (D.C.C. 1997)(tribal sovereignty survives even the dissolution of government). Thus, as the Court has patently misunderstood the Tribe in this case, reconsideration is warranted in the interests of justice.

B. There is Other Good Reason for the Court to Reconsider and Grant the Motion.

In *Cobell v. Norton*, this Court recognized that when an incorrect inference is drawn, the Court has good reason to reconsider its written opinion, even if just for the purpose of correcting misleading dicta. 355 F. Supp. 2d 531, 540 (D.D.C. 2005). Based on the issues described above, reconsideration is justified here, even if for the sole purpose of making sure that the Order

presents "as accurate a representation of the factual background as possible."[8]

IV. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court grant reconsideration of its Motion to Dismiss Plaintiffs' Amended Complaint, in order to ensure that it does not preside over a matter in which it lacks jurisdiction.

CERTIFICATION OF CONFERRAL

On September 16, 2013, counsel for Intervenor-Defendant discussed the relief sought herein with counsel for Plaintiffs and counsel for Federal Defendants. Counsel for Plaintiffs stated that Plaintiffs would oppose the relief sought by Intervenor-Defendant. Counsel for Federal Defendants stated that they take no position on the relief sought by Intervenor-Defendant.

Dated: September 18, 2013

Respectfully submitted,

By: */s/ Robert A. Rosette*

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[8] The Court, in concluding Plaintiffs' challenges are timely, disregarded the September 24, 1998 BIA letter, *i.e.,* the first final agency action recognizing the Tribe's citizenship and its authority to establish a Tribal government. Further, the Court omits any discussion of this agency decision despite the fact that the Plaintiffs' Amended Complaint states that such decision "was and is incorrect." (Amended Complaint ¶¶4-7). The Order is similarly void of discussion of the BIA's final agency action, dated March 7, 2000, which reaffirmed the authority of the Tribe's General Council and its resolution form of government. In the only discussion of any BIA final agency action (that dated, February 4, 2000) the Court relies on semantics, stating that even though this letter indicated the Secretary's view with regard to the five-person citizenship of the Tribe, it did not contain the word ***"solely"*** as did the August 2011 Decision. Such a play on words runs contrary to the fundamental findings of these critical final agency actions. Moreover, the Court misreads the BIA's subsequent February 2005 letter in stating that it would have "mooted" any of Plaintiffs' challenges to prior final agency actions recognizing the Tribe's government and membership. (Order at 13). As discussed above, the letter issued by the BIA on February 11, 2005, was not a letter of "nonrecognition." Indeed, this letter dismissed an appeal filed by Yakima Dixie, challenging the BIA's recognition of the Tribe's membership, and "encourage[d]" Mr. Dixie to work other the "***other tribal members"*** in the enactment of an IRA Constitution (AR 610-611) (emphasis added). Moreover, this letter refers Mr. Dixie to the very BIA letter issued in February 2000 that the Court claims to have been "mooted" by its issuance.

CERTIFICATE OF SERVICE

I certify that on September 20, 2013, I caused a true and correct copy of the foregoing **INTERVENOR-DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER, DATED SEPTEMBER 6, 2013, GRANTING IN PART AND DENYING IN PART ITS MOTION TO DISMISS**, and a proposed Order to be served on the following counsel via electronic filing:

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