

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE CALIFORNIA VALLEY MIWOK
TRIBE, et al.,

Plaintiffs,

v.

SECRETARY OF THE INTERIOR,
S.M.R. JEWELL, in her official capacity, et al.,

Defendants,

and,

CALIFORNIA VALLEY MIWOK TRIBE

Intervenor-Defendant.

Civil Action No. 1:11-cv-00160 (BJR)
Hon. Barbara J. Rothstein

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

Although Intervenor-Defendant (hereinafter "the Burley Faction") captions its motion as one seeking reconsideration of this Court's September 6, 2013, Memorandum Opinion ("September Opinion") [ECF No. 76], its motion confirms the obvious: The Burley Faction is displeased with this Court's conclusions and seeks to breathe new life into arguments that this Court previously addressed and already rejected. *See* Mot. for Reconsideration ("Burley Mot.") [ECF No. 78]. The courts in this Circuit have admonished litigants time and time again, however: A motion to reconsider is "subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to

battle for it again.” *Ludlam v. U.S. Peace Corps*, No. 11-1570-EGS, 2013 WL 5273918, at *1 (D.D.C. Sept. 19, 2013) (quoting *In Def. of Animals v. Nat’l Insts. Of Health*, 543 F. Supp. 2d 70, 76 (D.D.C. 2008)). Because the Burley Faction has not identified “controlling decisions or data that the court overlooked—matters, in other words, that might *reasonably be expected to alter the conclusion reached by the court*,” *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005) (emphasis in original) (citation omitted), Federal Defendants’¹ response is limited to a brief discussion of this Court’s conclusion that dismissal pursuant to Fed. R. Civ. P. 19 was not warranted, Sept. Op., 14-16.

ARGUMENT

While the Secretary remains confident that the August 2011 Decision will withstand this Court’s scrutiny, neither the Secretary nor the Burley Faction are entitled to shield the decision from review under the Administrative Procedure Act (“APA”) by relying on the correctness of the very decision this Court has been asked to review. *See* Sept. Op. at 12 (citing *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (“[T]he Final Decision . . . cannot itself be used to block review”)). As this Court correctly held:

The Burley faction’s authority to represent the Tribe therefore rests upon its control of the General Council, and, ultimately, the very decision on review. “Because reliance cannot be placed on the [Secretary’s] recognition” of the General Council, *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997), the Court cannot regard the Burley faction as the Tribe or accept its invocation of sovereign immunity.

Sept. Op., 15.

¹ The current Secretary of the Department of the Interior, Sally Jewell, and the current Assistant Secretary – Indian Affairs, Kevin Washburn, are automatically substituted as defendants pursuant to Fed. R. Civ. P. 25(d).

The Burley Faction's motion for reconsiderations rests on a flawed characterization of this Court's order. The Burley Faction contends that this Court's Opinion was based on a "fundamental error of apprehension;" to wit, that 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." Burley Mot., 3, 9. But there has never been any question that the California Valley Miwok Tribe ("Tribe") is federally recognized. *See* Sept. Op., 2 ("This is the latest volley in a long and bitter contest for control over the [Tribe], a federally recognized tribe.") (citing Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26,384, 26,385 (May 6, 2013)). Indeed, this Tribe has been listed without interruption on the lists of recognized tribes published by the Secretary of the Interior including, as is most relevant here, the last list published prior to the Assistant Secretary—Indian Affairs' ("AS-IA") August 2011 Decision letter in this case. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810 (Oct. 1, 2010).

The Burley Faction's critique misses the broader point. This case has nothing to do with federal recognition of a tribe, and instead revolves around the United States' recognition of a tribal government. This Court's September Opinion was premised on the ample evidence in the administrative record showing that the final agency actions challenged in this lawsuit vested federal recognition on a tribal government—the General Council—that was not previously recognized as the tribal government immediately prior to the issuance of that very decision. Put differently, the AS-IA's August 2011 Decision marked the resumption of government-to-government relations with a tribal government, not Mr. Dixie's faction nor Ms. Burley's faction, but the General Council. *See* August 2011 Decision, AR002055 ("I accept the Resolution #GC-

98-01 as the interim governing document of the Tribe, and as the basis for resuming government-to-government relations between the United States and the Tribe.”).

As this Court recognized, and as is plain from the text of the August 2011 Decision, it was that very decision that established federal recognition of the General Council as the tribal government capable of asserting the Tribe’s undisputed sovereign immunity. And, as this Court correctly held, sovereign immunity vested by the August 2011 Decision does not shield the decision itself from judicial review under the APA. Sept. Op., 15.

CONCLUSION

Federal Defendants respectfully request that this Court deny the Burley Faction’s motion to reconsider the September Opinion.

Respectfully submitted this 1st day of October, 2013,

Robert G. Dreher
Acting Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ Kenneth D. Rooney
KENNETH D. ROONEY
Trial Attorney
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

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such to all parties.

/s/ Kenneth D. Rooney
Kenneth D. Rooney