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

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, Plaintiffs, v. SALLY JEWELL, in her 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-BJR Hon. Barbara Jacobs Rothstein

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION FOR RECONSIDERATION

INTRODUCTION

In denying Intervenor-Defendant's (hereafter the "Burley Faction") motion to dismiss Plaintiffs' claims[1], this Court correctly found that the United States did not recognize the Burley Faction as the government of the California Valley Miwok Tribe ("Tribe") prior to the Secretary's August 31, 2011 decision under review. September 6, 2013 memorandum opinion, ECF No. 76, pp. 10, 15 ("September Opinion"). In its motion for reconsideration (ECF No. 78), the Burley Faction challenges the Court's finding, arguing that the United States recognized a Tribal government controlled by the Burley Faction in 1998. This argument ignores the fact that the United States later denied recognition of the Burley Faction, in a series of decisions that began in 2004 and that remain in effect today. As a result, the Court did not err in its finding, and there is no basis for the Court to reconsider the conclusions in the September Opinion—namely, that the Burley Faction cannot exercise the Tribe's sovereign immunity to escape joinder or require dismissal of this case under FRCP 19(b), and that it cannot redefine the Tribe's membership to exclude Plaintiffs and deny them standing.

The Burley Faction also argues that the Court mistakenly found, in its September Opinion, that Plaintiffs are entitled to recognition as Tribal members. The Court made no such finding. Instead, the Court correctly assumed the truth of Plaintiffs' allegations that they are Tribal members based on lineal descent, as it was required to do in deciding the Burley Faction's motion to dismiss and in assessing standing.

Because the Burley Faction has not shown any error by the Court that could warrant a different ruling on the motion to dismiss, the Court should deny the motion for reconsideration.

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[1] Except as to Plaintiffs' Indian Civil Rights Act claim, which the Court dismissed.

ARGUMENT

Standard of Review

Under Federal Rule of Civil Procedure 54(b), the Court may reconsider an interlocutory decision "as justice requires." *In Defense of Animals v. National Institutes of Health*, 543 F.Supp.2d 70, 76 (D.D.D. 2008) (citation omitted). In deciding whether justice requires revision, the Court should weigh "concrete considerations," including whether the Court has "patently misunderstood a party" or has made an "error not of reasoning but of apprehension." An error of apprehension may include "a Court's failure to *consider* controlling decisions or data ... that might reasonably be expected to alter the conclusion reached by the court." *Singh v. George Washington University*, 383 F.Supp.2d 99, 101 (D.D.C. 2005) (emphasis added; internal quotation marks and citations omitted).

Because the Burley Faction seeks reconsideration of the Court's decision on a motion to dismiss under Federal Rule of Civil Procedure 12(b), the standard of review for that relief must continue to inform the Court's decision on reconsideration. In deciding a motion to dismiss, the Court "must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor, and presuming that general allegations embrace those specific facts that are necessary to support the claim." *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (internal quotation marks, brackets, and citations omitted).

The United States Did Not Recognize Any Tribal Government at the Time of the August 2011 Decision

The Court found in its September Opinion:

> Prior to the decision on review, the Secretary recognized no government of the Tribe, Nonrecognition Letter, A.R. at 611; the Secretary then changed course by recognizing, in the decision on review, the General Council as the government of the Tribe.

Sept. Op., p. 15. The Burley Faction argues that this finding constitutes a "fundamental error of apprehension" by the Court. Motion for Reconsideration, ECF No. 78, p. 4. According to the Burley Faction, the Tribe established a valid government in 1998 under tribal Resolution #GC-98-01, which the United States continues to recognize.[2] From this false premise, the Burley Faction reasons that the Court should allow it to exercise the Tribe's sovereign immunity, should deny Plaintiffs standing, and should defer to the Burleys' alleged Tribal government to resolve Plaintiffs' claims.

As a threshold matter, this is not a valid argument for reconsideration, because the Burley Faction "has accused the Court of an error of reasoning, not of apprehension." *Singh*, *supra*, 383 F.Supp.2d at 102. The Court did *consider* the factual information that the Burley Faction relies on in claiming to be the recognized government of the Tribe, including the 1998 Resolution and the Secretary's August 2011 Decision. *E.g.*, Sept. Op., pp. 4, 15. The Burley Faction simply does not like the *conclusion* the Court reached. In these circumstances, "[the Burley Faction's] attempt to re-litigate this issue will not be countenanced." *Singh*, *supra*, 383 F.Supp.2d at 102.

Even if the Burley Faction's argument for reconsideration were proper, it would fail because the United States disavowed the Burley Faction's Tribal government in 2004 and has not recognized it, or any Tribal government, since then. As Plaintiffs explained in their motion for summary judgment, the BIA recognized an "interim tribal government" [AR 000770] in 1998 for the limited purpose of identifying the Tribe's members and completing the organization process. Motion for Summary Judgment, ECF No. 49, pp. 7-8. When it became clear that the

[2] The Burley Faction also argues, implicitly, that it constitutes that Tribal government. Plaintiffs' position is that, even if the Tribe were governed by a General Council under Resolution #GC-98-01, which it is not, the membership of that Council would include individual Plaintiffs and all other Tribal members by lineal descent.

Burley Faction had no intention of involving the Tribe's membership in that process, the BIA withdrew its recognition of the Burley Faction and issued decisions in 2004 and 2005 stating that it would only recognize a Tribal government that was formed with the participation and consent of the entire Tribal community. 2004 Decision, AR 000499; 2005 Decision, AR 000610-000611. The District Court and Court of Appeals for this Circuit upheld those decisions. *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. 2006), *affirmed*, 515 F.3d 1262. Subsequently, the Burley Faction challenged the BIA's efforts to help the Tribe organize itself with the participation of the whole Tribal community. The BIA Area Director upheld the BIA's action in a decision stating that "the BIA does not recognize a tribal government." 2007 Decision, AR 001494.

Under those 2004, 2005 and 2007 decisions, the United States does not recognize the Burley Faction as the government of the Tribe. The August 2011 Decision did not rescind those decisions [AR 002056], and they remain in effect. Nor can the Burley Faction rely on the August 2011 Decision itself to establish recognition by the United States—first, because the Decision is stayed by its own terms pending the outcome of this case [AR 002056], and second, because the Burley Faction cannot rely on the decision being challenged to prevent judicial review of that very decision, Sept. Op., p. 15 (citing *Cherokee Nation of Okla v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997)).

The Burley Faction's argument that the Tribe can exercise its sovereign powers without adopting a Tribal constitution under the Indian Reorganization Act of 1934 misses the point. The issue is not whether the Tribe continues to have the "attributes of sovereignty," such as sovereign immunity and the ability to define its own membership. Motion for Reconsideration, p. 1. The *Tribe* inarguably does possess the same sovereign powers as other

federally recognized Indian tribes. The issue is whether the *Burley Faction* has the right to exercise the Tribe's sovereign immunity and define the Tribe's membership. The Court correctly found that it does not. Sept. Op., p. 15.

The Court Did Not Find that Plaintiffs Are Tribal Members

The Burley Faction also argues that the Court incorrectly found that Plaintiffs are members of the Tribe and therefore that they have standing. But the Court did not make any determinations about Tribal membership. The September Opinion states that the Court *assumes* the truth of Plaintiffs' allegations that they are Tribal members based on lineal descent, for purposes of assessing Plaintiffs' standing. Sept. Op., pp. 9, 10. In ruling on a motion to dismiss, the Court must accept Plaintiffs' allegations as true, and it properly did so.[3] *See LaRoque v. Holder*, *supra*, 650 F.3d at 785. The Court's acceptance of Plaintiffs' allegations, for the purpose of evaluating standing and deciding a motion to dismiss, does not constitute a factual finding of any kind, let alone one an erroneous finding that would warrant reconsideration.

CONCLUSION

The Burley Faction has not identified any error of apprehension by the Court, or any other reason that would warrant reconsideration of its motion to dismiss. Plaintiffs respectfully request that the Court deny the motion for reconsideration.

[3] As the Court points out, there is also no recognized Tribal government that could establish additional membership requirements that might conflict with Plaintiffs' claims to membership based on lineal descent. Sept. Op., p. 10. Thus, there is no basis for the Burley Faction's claim that the Court wrongly inferred Tribal membership from lineal descent. *See* Motion for Reconsideration, p. 6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 4, 2013, I caused a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION FOR RECONSIDERATION** to be served on the following counsel via electronic filing:

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