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

I. INTRODUCTION

Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe"), respectfully submits the following brief in support of the Cross-Motion for Summary Judgment filed by the Federal Defendants on March 29, 2012 (Dkt. No. 56-1) ("Motion"), pursuant to this Court's Order, dated September 23, 2013 (Dkt. No. 81). Despite Plaintiffs' repeated attempts to mischaracterize and distort the issues – first before two administrative decision-making bodies (which acknowledged but rejected their efforts) and now before this Court – the facts and record surrounding this federally-recognized Indian tribe and its government to government relationship with the United States are clear and they are undisputed.

On August 31, 2011, the Assistant Secretary – Indian Affairs, rendered a carefully-deliberated and detailed final agency action ("August 2011 Decision"), which he issued after providing the Tribe and the Plaintiffs with even further opportunity to submit detailed and exhaustive briefs on the issues that are now before this Court. In rendering his decision, the Assistant-Secretary recognized what this Court must similarly acknowledge – that even with his broad authority over Indian affairs under 25 U.S.C. § 2, the Secretary *cannot* forcibly expand the membership and alter the governmental structure of an Indian tribe with an existing, defined, and established citizenship and form of government. ***For the Secretary (and now this Court) to do so by entertaining the Plaintiffs' claims would expressly violate federal law and policy.*** *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Consequently, this Court is required to adhere to the well-reasoned determination of the United States not only pursuant to the high standard of deference afforded in such instances, but also based upon the fundamental tenants of federal Indian law and policy.

Plaintiffs' grievances are not new to Indian Country. Nor are they more compelling because this particular Tribe is comprised of a small quantity of citizens.[1] Plaintiffs seek to

[1] Plaintiffs repeatedly attempt to characterize both the quantity and quality of the Tribe's only recognized five member citizenship by arguing that the Plaintiffs are direct lineal descendants of the Tribe – a claim that is wholly

become enrolled as members in an Indian tribe.[2] Their similar efforts having failed elsewhere.[3] Plaintiffs very recently[4] have identified and pursued an opportunity for membership with this Tribe. The difficulty that Plaintiffs have faced in the past, and continue to face in the instant action, is the fact that this Tribe has – upon its own initiative and with the blessing of the Bureau of Indian Affairs ("BIA") – established its form of government and determined its membership over a decade ago. This does not mean that the Tribe's citizenship will not expand in the future. Nor does it mean that Plaintiffs cannot still seek membership and even become enrolled as citizens of this Tribe.

What an established form of government and a recognized citizenship (no matter the quantity) does mean under existing federal policy and legal precedent, however, is that the Plaintiffs (with the exception of Yakima Dixie) and similarly situated individuals seeking membership ***are required to*** work within the parameters of Tribal law and governance in order to pursue their claims. Over 8 years of time has been wasted and hardships suffered simply because the Plaintiffs dislike the established and recognized options available to them for

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unsupported by the administrative record. Such a claim, even if true, would have no bearing on the Plaintiffs' claims to membership. The U.S. Supreme Court addressed this very issue in the seminal case of *Santa Clara Pueblo* 436 U.S. 49, wherein a female member of the tribe brought an action against the Tribe, challenging a tribal law that denied tribal membership to the children of female members who marry outside the tribe, but not to similarly situated male members of the tribe. *Id.* at 51. The Court dismissed the plaintiff's claims – despite clear and overwhelming evidence of direct lineal decent (which Plaintiffs lack in this case), holding that Indian tribes are "distinct independent political communities retaining their natural rights" in matters of self-government, and that tribes remained a "separate people, with the power of regulating their internal and social relations." *Id.* at 55 (internal citations omitted.). Thus, the Court recognized that *it is the tribe and the tribe alone* that can make determinations with regard to the criteria for its citizenship. In 1998, this Tribe established the composition of its citizenship, which was recognized by the United States. From that point on, absent seeking recourse directly to the Tribe, as the Assistant Secretary appropriately acknowledged, the Plaintiffs are barred pursuant to federal Indian law and policy from seeking to overturn this established membership – be it through action of the Department or this Court.

[2] *See* Plaintiffs' Opposition to Motion, Dkt. 65, p. 5 ("The lineal descendants were deprived of their right to participate in the establishment of the Tribal government.")

[3] Records demonstrate that many of the Plaintiffs and/or their relatives sought membership in other neighboring Indian tribes but were denied.

[4] With the exception of two individuals (Yakima Dixie and Velma Whitebear), none of the "hundreds" of Plaintiffs ever appeared in earlier administrative proceedings, including the action before the IBIA. *See California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs*, 51 IBIA 103 (January 28, 2010) ("IBIA Decision"). Rather, Plaintiffs' arguments and allegations have morphed over time for purposes of strengthening their position and perception. This is evident with their group-identification which has transformed from "interested party" to "putative member" to "lineal descendent" and now "tribal member." Surely, such inconsistent and shifting positions are not by coincidence and should not go unnoticed by this Court.

resolving such internal tribal issues. The United States federal government is not in the business of selecting the citizenship of Indian nations The Assistant Secretary appropriately recognized this crucial principle of federal Indian law in the August 2011 Decision. Because the U.S. Supreme Court has made definitively clear that federal courts similarly lack a role in opining as to issues of tribal membership – be it in the form of an APA action or otherwise – and for the reasons set forth below, this Court must provide the requisite deference to the Department of the Interior ("Department") and grant the Federal Defendants' pending Motion.

II. STANDARD OF REVIEW

The Administrative Procedures Act ("APA") instructs federal courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. *State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). This highly deferential standard presumes the validity of agency action and permits reversal "only if the agency's decision is not supported by substantial evidence or the agency has made a clear error in judgment. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005); *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000). Indeed, this circuit looks to reverse an agency decision "only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 704 (D.C. Cir. 2009). Here, no reasonable factfinder could reach any other conclusion than that reached by the Assistant Secretary in his 2011 Decisions. Moreover, "agency determinations based upon highly complex and technical matters are entitled to great deference." *Muwekama Ohlone Tribe v. Salazar*, 708 F.3d 209, 220 (D.C. Cir. 2013). Agency interpretations of tribal law and political procedures are upheld if they "effect as little disruption as possible of tribal sovereignty and self-determination." *See Ransom v. Babbitt*, 69 F. Supp. 2d 141, 151-52 (D.D.C. 1999).

III. ARGUMENT

The Assistant Secretary's Decision Was Well-Reasoned, Sound and Consistent with the Over 100 Year History of the United States' Relationship with the Tribe

In their challenge to the August 2011 Decision, Plaintiffs seek to have this Court ignore the United States' documented history of dealings with this Tribe since 1915. Indeed, Plaintiffs' make no reference to this history anywhere in their briefs because this history and the undisputed facts upon which the Assistant Secretary relied in making his determination ***directly undermine and – in fact contradict – the assertions that the Plaintiffs have made in the instant action.*** Despite Plaintiffs' contentions, in rendering the August 2011 Decision, the Assistant Secretary did not make new or independent determinations (or "limitations" *See* Opposition at 20) concerning the Tribe's membership or form of government. To the contrary, the August 2011 Decision was based upon an intensive and exhaustive review of the record – considered on not one but ***two*** occasions by the Assistant Secretary (which included review of voluminous briefs by both parties) – subsequent to an almost three (3) year deliberation by the Interior Board of Indian Appeals ("IBIA"). *See* IBIA Decision. In light of the actual facts, this final agency action could never be properly characterized as "arbitrary, capricious and unlawful." (Opposition at 6). The August 2011 Decision was issued after careful and comprehensive deliberation, with full knowledge of the arguments that Plaintiffs would raise based upon their challenge to the similar decision issued by the Department on December 20, 2010 ("December 2010 Decision"). To be clear and as elaborated below, the August 2011 Decision was entirely consistent and in accord with (1) the history of the United States and the Tribe, dating from 1915 (2) prior BIA correspondences pertaining to the Tribe, (3) prior federal litigation in this circuit involving the Tribe, and (4) federal Indian law and policy, including the Indian Reorganization Act. The August 2011 Decision is as far from "arbitrary, capricious and unlawful" as a decision could possibly be. Accordingly, this well-reasoned United States agency determination must be upheld.

A. <u>The Federal Government's Reaffirmation of the Composition of the Tribe's Membership Is Entirely Consistent with the Evidence in the Record</u>

The Department's decision to reaffirm recognition of the Tribe's five-member citizenship (on not one but two occasions) was not an independent determination of the Assistant-Secretary that was made based upon a whim, as Plaintiffs would have this Court believe. ***Rather, it is undisputed – and Plaintiffs cannot demonstrate otherwise – that the Tribe's five citizen membership is the only membership that the United States has ever acknowledged and stems from a historical record with the Tribe dating back to 1915***. The Department appropriately recognized, pursuant to fundamental principles of federal Indian law and policy, that once an Indian tribe has an established membership and form of government, it is not within the province of the United States government to second-guess, expand or alter the membership composition.[5] Such actions would explicitly contravene and intrude upon a sovereign nation's rights to self-determination and self-governance.[6]

The Department's reaffirmation of the Tribe's citizenship was based upon careful review of an extensive and well-documented historical record involving this Tribe. In 1915, a federal Indian Agent forwarded to the Commissioner of Indian Affairs a census comprised of a cluster of twelve Indians living on 160 acres in or near the city of Sheep Ranch, California. *See California Valley Miwok Tribe v. U.S., et al.*, 424 F. Supp. 2d 197 (2006) ("*CVMT I*"). After the 1915 Indian Census took place, a marked change in attitude toward Indian policy occurred through adoption of the Wheeler-Howard Act (Indian Reorganization Act or "IRA"), 48 Stat. 984-988 (1934) (codified and amended at 25 U.S.C. §461 et seq.), away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture. *See* F. Cohen, *Handbook of Federal Indian Law,* 84 (1942) ("*Handbook*"). Significantly, at the time that

[5] *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Smith v. Babbitt,* 875 F. Supp. 1353, 1360 (D. Minn. 1995)

[6] It is legally undisputable that such right exists ***irrespective*** of a tribe's quantity of citizens – such unique sovereign attributes are not confined by such criteria. *See, e.g., Williams v. Gover,* 490 F.3d 785 (9th. Cir. 2007).

Congress enacted the IRA in 1934, the Tribe's membership dwindled to only one individual, Jeff Davis, who was identified by the United States as the Tribe's sole eligible IRA voter.[7] *See AR* 2322-2351, Exhibit A thereto.

Consistent with the United States' decision to only recognize a single Tribal member in 1934, was its decision in 1966 to also only recognize a single Tribal Member. (*See* Administrative Record ("AR") at 48-51). In preparation for termination of the federal government's relationship with various Indian tribes in California pursuant to the Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), in 1966, the BIA prepared a distribution plan to distribute the Tribe's assets, which named Mabel Hodge Dixie as the only recognized Tribal member ().

Although the Tribe was never actually terminated by the United States, the BIA's painstaking identification of the Tribe's membership at that time was consistent with United States' policy, and, significantly, was never challenged by a single one of the Plaintiffs.[8] The BIA took great care in identifying a sole land distributee and Tribal member because it wanted to ensure that it did not owe a legal or moral obligation to any other Indians in the area.[9] Indeed,

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[7] It is important to note that, with the exception of Jeff Davis, the BIA did not include any of the 1915 Census Indians as eligible voters during the Tribe's adoption of the IRA in 1934.

[8] Plaintiffs' lengthy recitation of "termination-era" policies (*See* Opposition, pp.11-18) is inaccurate as a matter of federal Indian law. Although steps were taken to terminate the United States' relationship with the Tribe, no one has ever disputed, and Plaintiffs agree, that formal termination of the Tribe's federally-recognized status never took place. This does not, by any means, suggest that the United States' manner of identifying tribal membership during that time – specifically by identifying those residing on the tribes' land and distributing tribal assets to such individuals – was, in anyway, negated. Indeed, similar steps of identifying membership were taken by the U.S. for other California Rancheria tribes that were not formally terminated – and the establishment of those tribes through distribution of tribal assets was proper and never overturned. As a matter of law and policy, such steps cannot now be challenged by the Plaintiffs. *See* e.g., the Lower Lake Rancheria (aka the Koi Nation) - http://koination.com/. Plaintiffs cannot undue the past and erase history through recitation of irrelevant and cherry-picked portions of U.S. statutes and legislative history in order to piecemeal an account of federal Indian law that suits their purposes. The IBIA and the Department saw past these misguided efforts. This Court must do the same.

[9] "Congress and the BIA worked together to collect comprehensive data on the social and economic status of every Indian group or tribe under federal supervision. This quantifiable information was to be used in projecting policies aimed at the eventual discharge of the federal government's obligation—*legal and moral*—and the discontinuance of

the whole purpose of the United States' recognition of the single Tribal Member was prefaced on ensuring that there was no *legal or moral* obligation owed to any other ancestral Indian that may be in the area, including the 1915 Census Indians.

Relying upon the then 83 years of United States' history and dealings with the Tribe as referenced above, on September 8, 1998, BIA officials, met with Yakima Dixie and Silvia Burley for the purpose of "discuss[ing] the process of formally organizing the Tribe." (AR at 115-171). On September 24, 1998, the BIA provided a letter summarizing the issues discussed at the September 8th meeting. (AR at 172-176). With respect to the Tribe's membership, the Superintendent stated that the BIA was properly "held to the Order [of Determination of Heirs] of the Administrative Law Judge," and this coupled, with Mr. Dixie's formal adoption of Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace, demonstrated that these five individuals were the enrolled members of the Tribe who "possess[ed] the right to participate in the initial organization of the Tribe." *Id.* at 175. The letter further stated that the enrollment criteria later established for "future prospective members" would "eventually…be included in the Tribe's Constitution." *Id.* (emphasis added). The action of the BIA to recognize these five Tribal members was never appealed by the Plaintiffs, and thus became a final agency action of the United States.[10] Plaintiffs' current challenge to the August 2011 Decision must be seen by this Court for truly what it is – a belated and time-barred challenge to a final agency actions issued over 15 years ago. (*See* Amended Complaint, ¶¶ 4-7; AR at 240-246 & 249-254). Efforts

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federal supervision and control at the earliest possible date compatible with the government's trusteeship responsibility." *Handbook* at 91. (emphasis added).

[10] While previous BIA letters (elaborated in *infra,* Section 3(C)), provided the Tribe with offers of technical assistance and encouragement in the identification of additional Tribal members, such letters never made the decision to intrude upon the delicate area of internal Tribal affairs and Membership, recognizing that to do so would be inconsistent with well-established federal Indian law and United States policy. *See Santa Clara Pueblo,* 436 U.S. at 72.

to do an end-run around such final agency actions do not even approach, let alone meet, the applicable standard requiring a showing of arbitrary and capricious agency decision-making.

B. The Assistant Secretary's Recognition of the Tribe's General Council Form of Government Is Lawful and Wholly Consistent with the Scope and Purpose of the IRA

Similar to the Department's reaffirmation of the Tribe's membership, it's confirmation of the Tribe's governing body (established pursuant to Resolution #GC-98-10) was lawful, consistent with federal Indian law and policy, and in turn, a reasonable exercise of the Assistant Secretary's decision-making authority.

The federal government's role with respect to the internal governmental affairs of Indian tribes has been reinforced by decades of U.S. Supreme Court precedent, U.S. policy and Congressional legislation, as one consistently of deference to tribal self-determination and self-government.[11] With the enactment of the IRA in 1934, Congress set forth a federal policy in favor of tribal self-government, stating that a tribe "shall have the right to organize for its common welfare, and ***may adopt*** an appropriate constitution and bylaws…" 25 U.S.C. § 476 (emphasis added).[12] The use of the word "may" denotes that the adoption of a constitution in the manner authorized by the IRA was never considered to be the *only* effective means of tribal organization.[13] In addition to affirming Indian tribes' rights to adopt constitutions requiring approval from the Secretary, the IRA also acknowledged that tribes possessed "all powers vested

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

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

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

in any Indian tribe or tribal council by existing law." 25 U.S.C.A § 476(e). Therefore, the decision of tribes to reject the IRA "had little or no effect upon the substantive powers of tribal self-government vested in [those] tribes." *Handbook* at 129-130 & n.62. More importantly, a tribe's acceptance of the IRA did not obligate that tribe to adopt a written constitution at all, and many did not do so.[14] Furthermore, legislation enacted subsequent to the IRA reaffirmed Congressional support for tribal self-government in terms that do not distinguish between IRA and non-IRA tribes.[15] Therefore, the Tribe's decision to vote in favor of the IRA in 1934, in no way precluded the tribe from later organizing pursuant to a non-IRA model.

The Department appropriately recognized these legal issues in recognizing the well-documented actions taken by the Tribe which formally established its resolution form of government. On November 5, 1998, the Tribe's General Council (at that time, the three adult members explicitly recognized by the BIA as having the right to participate in the Tribe's governmental organization) convened, deliberated and made the decision to organize the Tribe's government pursuant to the specific provisions and enumerated powers delineated in Resolution #GC-98-01.

The Tribe's resolution form of government was not suddenly recognized for the first time by way of the August 2011 Decision as Plaintiffs' would have this Court believe.[16] Rather, the BIA explicitly recognized both the Tribe's established membership and form of government ***more than a decade before the August 2011 Decision***, through two final agency actions, dated

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

[15] *See* Indian Self-Determination Act of 1975 and the Indian Financing Act of 1974, which apply to all tribes, regardless of their form of organization.

[16] For example, Plaintiffs repeatedly argue that "[p]rior to the [August] 2011 Decision, the Department did not recognize any Tribal government." Opposition at 28. Such a statement is simply unsupported by the record which demonstrates administration of federal grant monies to the very government established pursuant to Resolution #GC-98-01.

February 4, 2000 and March 7, 2000 (which Plaintiffs have never challenged).The Tribe's governance was also acknowledged by this circuit in *CVMT I*. ***To be clear, the United States has recognized no government but the one that Plaintiffs now seek to eradicate through this action.*** The Department reasonably and appropriately acknowledged the existence of the only government that this Tribe has ever known, and this Court must do likewise in upholding the August 2011 Decision.

C. The August 2011 Decision Easily Withstands Plaintiffs' Challenges As To Judicial Estoppel and Collateral Estoppel as The Decision Involves Different Issues, Different Parties and Different Legal and Policy Arguments

In a last-ditch attempt to somehow find arbitrary and capricious action on the part of the Department, Plaintiffs urge this Court to reverse the August 2011 Decision based on prior court rulings made in this circuit involving different parties, different issues and different decisions. In *CVMT I*, the Tribe challenged the BIA's rejection of its proposed IRA Constitution. The Court acknowledged the subsequent "confusion that surrounded the Tribe" following its internal leadership dispute, recognizing that the BIA's activity "multiplied the confusion." *Id.* at 199.

Adhering to the scope of the issue before it as well as the scope of review of the BIA's actions pursuant to the APA, the Court examined the statutory language of subsection 476(h) and dismissed the Tribe's claim for failure to state a claim for which relief could be granted. *Id.* at 203. The Court did not find that the BIA was obligated to enroll additional members into the Tribe. Indeed, the Court did not even examine the issue of who comprised the Tribe's membership. For the Non-Members to argue otherwise is a desperate attempt to conflate issues. Rather, the Court examined the Tribe's attempt to submit a constitution, and the BIA's authority to reject such a constitution under an APA scope of review, ***exclusively*** pursuant to the terms of the IRA. In no way does the Court's holding as to the BIA's authority pursuant to the APA, or

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

In *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) ("*CVMT II*") this circuit affirmed the District Court's dismissal of the Tribe's complaint, concluding that "the Secretary lawfully refused to approve the proposed constitution." *Id* at 1263. In doing so, the Court characterized the "central issue in this case" as "the extent of the Secretary's power to approve a constitution under [Section 476(h) of the IRA]. *Id.* at 1265. Examining the statutory text of 25 U.S.C. § 476(h) as well the Secretary's role delineated in 25 U.S.C. § 2,[17] the Court held that the BIA acted permissibly and in accordance with the APA in rejecting the Tribe's proposed IRA constitution. *Id.* at 1268. Again, similar to the District Court, the Circuit Court examined the Tribe's organization as well as the Secretary's authority to assist in such organization, ***exclusively pursuant to the IRA*** and under an APA scope of review. The Court did not and indeed could not examine facts as to the Tribe's existing membership and established form of government or the BIA's previous relationship with the Tribe pursuant to either the APA or federal Indian law, because "there ha[d] been no fact development" in the case (*Id.* at 1268), nor was the Tribe's membership and enrollment within the scope of the issue to be decided by the Court. Once again, it is critical to emphasize that the BIA's 2006 Decision and subsequent publishing of the *Ledger Dispatch* Public Notice was ***not*** the decision at issue before the Court. Even if the issues of Tribal membership and enrollment had been before the Court for

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

its review, similar to the IBIA, it would have been outside of its jurisdiction, consistent with the long-standing principle that "[j]urisdiction to resolve internal tribal disputes…and issue tribal membership determinations lies with Indian tribes and not in the district courts."[18] Therefore, the August 2011 Decision's recognition of the existing Tribal Members and Resolution #GC-98-01 as the Tribe's governing document is completely consistent with this circuit's prior decisions.

1. Judicial Estoppel Does Not Threaten the Soundness of the August 2011 Decision

The doctrine of judicial estoppel is an "equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).[19] For judicial estoppel to apply, however, a party's later position must be "clearly inconsistent" with its earlier position. *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010).

Plaintiffs allege that the Department's recognition of the Tribal government formed pursuant to the 1998 Resolution is so inconsistent with its arguments made in *CVMT I* and *CVMT II* that the doctrine of judicial estoppel should apply. Plaintiffs are mistaken and have failed to demonstrate that the Department's positions in the instant action are "clearly inconsistent" with those taken in prior litigation. The Department's prior views as reflected in *CVMT I* were that there were up to 250 *possible* members, whom (according to the Department's policy at the time) should be included in the constitution-drafting process. However, the Department ***never once*** actually recognized the Tribe as being comprised of 250 citizens or even took the step of recognizing a single one of these potential "members." Indeed, encouraging

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

[19] The doctrine provides that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.* at 749.

participation of a larger tribal community in the adoption of an IRA constitution does not equate to a position that (1) the non-IRA government ceased to exist and (2) that the larger tribal community constituted Tribal members that were eligible to participate in the Tribe's governance.

2. Collateral Estoppel Does Not Undermine the August 2011 Decision

The Plaintiffs' attempt to demonstrate issue preclusion resulting from prior Court actions must similarly fail, as they have failed to demonstrate, at a minimum, that *CVMT I* or *CVMT II* involve the same issues raised for judicial determination or that that same issue was actually and necessarily determined.. *See, e.g. Martin v. DOJ*, 488 F.3d 446, 454 (D.C. Cir. 2007) (listing the required factors)

Plaintiffs plainly fail to meet the applicable standard. In their Opposition, Plaintiffs claim that the August 2011 Decision is barred because prior litigation involves the same "narrow, fact specific question of whether [the Tribe] established a valid Tribal government under the 1998 Resolution." Opposition at 34. Such contentions are inaccurate and unsupported by the record. As explained above, neither *CVMT I* or *CVMT II* examined Resolution #GC-98-01, its validity, or the Tribe's ability to govern pursuant to the provisions contained therein. This is because these issues were never before the Court for its consideration. ***Despite Plaintiffs' attempts to conflate the issues, the validity of a tribes' resolution form of government is an entirely different issue and form of analysis than the Secretary's authority to reject a proposed Constitution, pursuant to the IRA***.[20] Thus, a reversal of the August 2011 Decision based on collateral estoppel grounds is tenuous and must fail.

[20] Plaintiffs also comically assert that issue preclusion should apply in this instance because "the Tribe was a named party in Miwok I and Miwok II and is a named Plaintiff here." Opposition at 32. Such an assertion ignores the fact that the Intervenor-Defendant – the legitimate Tribe and Tribal government – is completely different and distinct from Plaintiffs' group of never-recognized non-tribal members. Indeed, with the exception of Yakima Dixie, none

3. The August 2011 Decision is Wholly Consistent with Prior Department Decisions and the Plaintiffs Have Failed to Demonstrate Otherwise.

Despite Plaintiffs' contentions, the findings of the August 2011 Decision were completely consistent with the BIA's earlier correspondences which provided recommendations and technical advice with regard to proposed constitutions.[21]

On March 26, 2004, the BIA issued a letter to the Tribe, stating that it would not accept a previously submitted Constitution as evidence that the Tribe was organized pursuant to the IRA.[22] (AR 499-502). In the letter, the BIA reiterated *recommendations* made to the Tribe, similar to those made in previous letters, for the Tribe to consider in identifying the membership and enrollment criteria to be included in the Tribe's proposed IRA constitution. Specifically, in the letter, the BIA states that it merely provides "the following ***observations for [] consideration;***" that it remains available, ***upon [] request***, to assist [] in identifying the members of the local Indian community; and that it continues to be willing" ***to assist*** [] in this process." (emphasis added) (*Id.* at 1-3).

The Plaintiffs, however, pervert this letter, claiming it establishes that the BIA is authorized to enroll non-members into the Tribe. However, as demonstrated above, the BIA once again recognized its delicate and minimal role with respect to internal Tribal affairs, making only *observations* and *recommendations* for *facilitation* and *technical assistance* with

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of the Plaintiffs ever appeared in prior litigation and they can certainly not make the representation that they were the same party as the Intervenor-Defendant in this action simply because they falsely brought this case in the name of the Tribe.

[21] Indeed, it was Superintendent Burdick's Decision and subsequent publishing of the *Ledger Dispatch* Public Notice to reorganize the Tribe as well as enroll Non-Members that represented the true departure and change in direction from both the BIA's previous relationship with the Tribe as well as the scope of the D.C. federal court holdings.

[22] In so stating, the BIA was not questioning, invalidating, or even speaking in any manner as to the Tribe's organization pursuant to other acceptable forms, such as its resolution form of organization.

respect to identifying other individuals potentially eligible for membership in the Tribe, and only then at the Tribe's *request*.

On February 11, 2005, the Acting Assistant Secretary for Indian Affairs, Michael Olsen, dismissed an appeal filed by Yakima Dixie challenging the BIA's recognition of the Tribe's Membership. (AR 609-611). In rejecting Mr. Dixie's appeal, Mr. Olsen reaffirmed the well-established Membership of the Tribe and "encourage[d]" Mr. Dixie to work with the ***other tribal members*** and organize the Tribe pursuant to an IRA constitution and along the lines outlined in the March 26, 2004 letter. (AR 499-502). In this letter, the BIA once again offered its "guidance or assistance" in identifying membership criteria for inclusion in the Tribe's constitution. *Id.* In offering such *recommendations and offers for technical assistance* with respect to identification of tribal enrollment and membership criteria, the BIA recognized that if it took any further action toward active reorganization of the Tribe and its already-established membership and form of government, it would be overstepping its boundaries and intruding upon internal Tribal affairs. Indeed, it was not until the BIA's 2006 Decision and subsequent publishing of the Public Notice that the BIA overtly exceeded its role, going well "beyond what was decided or confirmed" in the 2004 and 2005 BIA letters and beyond the scope of holdings in the prior litigation. *See* IBIA Decision at 105. Thus, the Department's reaffirmation of the Tribe's membership and organization under Resolution #GC-98-01 is consistent with both the letters frequently mischaracterized by the Plaintiffs and must be upheld as a reasonable exercise of agency action.

IV. CONCLUSION

For the foregoing reasons, the Intervenor Defendant respectfully requests that the Federal Defendant's Motion for Summary Judgment be granted.

Dated: October 4, 2013

Respectfully submitted,

By: */s/ Robert A. Rosette*

Robert A. Rosette (D.C. Bar No. 457756)
Saba Bazzazieh (pro hac vice)
ROSETTE, LLP
565 W. Chandler Boulevard, Suite 212
Chandler, Arizona 85225
Tel: (480) 889-8990
Attorneys for Intervenor-Defendant

CERTIFICATE OF SERVICE

I certify that on October 4, 2013, I caused a true and correct copy of the foregoing **INTERVENOR-DEFENDANT'S BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**, to be served on the following counsel via electronic filing:

Kenneth D. Rooney
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
Counsel for Defendants

M. Roy Goldberg
Christopher M. Loveland
Sheppard Mullin Richter & Hampton LLP
1300 I Street, N.W., 11th Floor East
Washington, DC 20005-3314
Counsel for Plaintiffs

Robert J. Uram
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
(Pro Hac Vice)
Counsel for Plaintiffs

/s/ Robert A. Rosette