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 REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S ORDER, DATED SEPTEMBER 6, 2013 (REPLY TO DKT. NOS 78 AND 82)

I. INTRODUCTION

Intervenor-Defendant, the California Valley Miwok Tribe ("Tribe"), respectfully submits the following reply in support of its Motion for Reconsideration ("Motion") of this Court's order dated September 6, 2013 ("Order"), and to respond to the entirely noncompelling – and factually inaccurate – assertions contained in the Plaintiffs' Opposition to the Motion filed on October 4, 2013 ("Opposition") (Dkt. 82). Plaintiffs' Opposition does not dispute – and in fact readily admits – two of the fundamental bases upon which the Tribe seeks reconsideration in its Motion: (a) that the Tribe has had in place *only one functioning government* that was recognized by the United States and with which it maintained relations, and (b) that, in its *entire history*, the Tribe *only had five recognized members*, which, save Yakima Dixie, did not include *any* of the Plaintiffs.[1] As such, and as further detailed below, such admissions compel this Court to grant the Tribe's Motion and reconsider the Order.

II. ARGUMENT

A. Plaintiffs Do Not Dispute That Only One Tribal Government Has Ever Been Recognized By The United States and Maintained Relations With the United States' Government for Over a Decade – A Government Which, Save Yakima Dixie, Does Not Include Any Other Plaintiff

In their Opposition, Plaintiffs acknowledge that the "BIA recognized an 'interim tribal government' in 1998 which was then "disavowed in 2004." Opposition at 3. Yet despite this acknowledgement that the Tribe had in place a functioning government that maintained relations with the United States for almost a decade, Plaintiffs currently seek to blur this fundamental fact

[1] In addition, Plaintiffs' Opposition does not address the crucial fact that they never challenged the BIA's September 24, 1998 letter or its validity; as such, they effectively concede that reconsideration is warranted, as the unchallenged letter establishes that the Tribe consisted of five members authorized to organize the Tribal Government (*See* AR 172-176).

by characterizing two BIA letters[2] offering "guidance" and "technical assistance" for purposes of enacting an IRA Constitution as conclusive evidence that the Tribe's resolution form of government –established in 1998 –ceased to exist as of 2004. (AR[3] 499-502; AR 609-611) The 2004 and 2005 BIA letters did no such thing. To the contrary, these letters initiated the very "fact development" that this circuit recognized was missing due to "confusion caused by the BIA." (*See CVMT II,* at 1268). To be clear – prior to the administrative review conducted by the IBIA and the Assistant Secretary, which began in 2007, there had been no examination of the validity of the Tribe's existing form of government under Resolution #GC-98-01 and its established membership under this government.[4] After conducting such review,[5] the IBIA properly recognized the scope of this case for what it was – an enrollment dispute over which it lacked jurisdiction. ("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***.") (*Id.*, emphasis added) (citing *Vedolla v. Acting Pacific Regional Director*, 43 IBIA at 155; *Walsh v. Acting Eastern Area Director*, 30 IBIA 180, (1997)). In his August 2011 Decision, the Assistant Secretary similarly concluded that it lacked the authority to intrude into these delicate matters, finding that "any further effort by the Department to do so would result in an unwarranted intrusion into the internal affairs of the Tribe." (AR 2049-2057).

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[2] A critical fact that Plaintiffs always fail to identify with the 2005 BIA letter, to which Plaintiffs always point to support their position that the Tribe's government ceased to be recognized, is that this ***decision was one that*** rejected Yakima Dixie's efforts to submit ***a Constitution*** under the Indian Reorganization Act. (AR 499-502; 609-611).

[3] Capitalized terms, unless otherwise defined herein, are intended to have the same meanings as ascribed to them in the Motion.

[4] The 2005 BIA letter upon which Plaintiffs so heavily rely and from which the previous cases in this circuit stem, explicitly states that Yakima Dixie's effort "to nullify the Tribe's adoption of [the four remaining Tribal members] were not previously raised and "are not, therefore, properly before me." (AR at 611). Therefore, for Plaintiffs to now argue that the 2005 BIA letter, and the subsequent cases in this circuit, somehow support the notion that the Tribe's existing membership or resolution form of government ceased to exist, or was otherwise undermined, is wholly inaccurate and disingenuous.

[5] And having before it the same cases in this circuit and the same past BIA decisions which Plaintiffs now claim warrant reversal of the August 2011 Decision.

Therefore, as the IBIA, the BIA and numerous federal courts have previously recognized – *absent determination by the Tribe itself – no outside entity*, including the Assistant-Secretary with his broad authority over Indian affairs as well as this Court– *has the authority and jurisdiction to reopen and reexamine internal tribal issues of membership and enrollment*. *See St. Pierre v. Norton, 498 F.Supp*. 2d 214 (D.C. Cir. 2007); *Smith v. Babbit*, 875 F.Supp. 1353 (D.Minn.1995). This Court committed a fundamental error of apprehension in finding otherwise in its Order, thus warranting reconsideration.

B. Although Plaintiffs Assert That They Have Standing In this Case Based Upon Lineal Descendancy, Lineal Descendancy Does Not, Under Tribal Law Bestow Tribal Membership on Any Individual

Having conceded the existence of only one Tribal government with which the United States has ever maintained relations, the Plaintiffs also readily admit another fact demonstrating why reconsideration of the Order is necessary: to wit, that Plaintiffs ***are not and have never been recognized as members of this Tribe.*** In their Opposition, Plaintiffs accept the undisputed record in this case – that in 1998 the BIA recognized a Tribal government "for the limited purpose of identifying the Tribe's members." Opposition at 3. Plaintiffs also do not contest that, save Yakima Dixie, *none* of the purported "hundreds" of Plaintiffs' "putative members"[6] were identified as members of the Tribe during this time. Yet in the same breath, Plaintiffs urge that this Court stand by its previous, erroneous ruling that, by virtue of lineal descendency, they were somehow – spontaneously and miraculously – vested with standing to bring their instant grievances before this Court.

[6] Notably and as recognized by the U.S. District Court for the Eastern District of California, Plaintiffs failed to involve themselves or otherwise take action to have themselves recognized as Tribal Members. Not coincidentally, it is only when Plaintiffs were made aware of a potential – highly lucrative – casino development venture proposed to Yakima Dixie during the same time that the "leadership dispute" arose within the Tribe and efforts to "reorganize" the Tribe to include these individuals were accelerated. *See generally, California Valley Miwok Tribe California, et al. v. Burley, et al. Case No. 2:09-cv-01900-JAM-GGH ("E.D. Action")*; AR 2322-2351, Ex. L thereto). Based upon this information, the Court dismissed Plaintiffs claims for lack of standing, and sanctioned Plaintiffs for initiating a frivolous lawsuit. *(Id.;* E.D. Action, Order at Dkt. 25).

Even assuming, *arguendo,* that Plaintiffs' allegations of lineal descendency are valid (despite an administrative record that is completely void of corroborating documentation), accepting this allegation as true does not vest standing upon the Plaintiffs as ***lineal descendancy does not bestow Tribal membership upon Plaintiffs, or otherwise bestow upon them any claims to participate in the governance of the Tribe.*** Thus, even if this Court were to accept as true Plaintiffs' claims to being lineal descendants of the Tribe, it is ***prohibited***, pursuant to fundamental tenants of federal Indian law and policy, from taking the profound and unjustified "leap" – as it did in its Order – concluding that (1) "tribal membership can be inferred from lineal descent;" and (2) Plaintiffs have been harmed by the August 2011 Decision because they have been denied the right to participate in the Tribe's governance. Order at 10. (*See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *U.S. v. Wheeler,* 435 U.S. 313 (1978). To be abundantly clear, with its August 2011 Decision, the Department did not "choose" one "faction" over the other, or otherwise prohibit the participation of any individuals in the Tribe's governance. Rather, recognizing the limited role of the Secretary in sensitive issues of tribal citizenship and governance – and only after painstaking review and analysis of the almost 100 year history of the Tribe with the United States – the Department appropriately concluded that the Tribe, through its own accord and initiative, had already established a form of government and recognized its membership. Once this form of government was established, the Department recognized that the Tribe – and the Tribe alone – with authority to make future determinations concerning the composition of its citizenship and its governance. *See Santa Clara, supra,* 436 U.S. at 54 (holding that "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." (quoting *Santa Clara v. Martinez*, 402 F.Supp 5, 18-19 (D. N.M. 1975)). The Court's

finding in its Order is a fundamental error of apprehension and a clear "failure to consider controlling decisions" – decisions which expressly prohibit this Court from making independent determinations of tribal membership based on claims of lineal descent - that would have otherwise altered its erroneous conclusions pertaining to this Court's subject matter jurisdiction. *See Singh v. George Washington University*, 383 F.Supp.2d 99, 101 (D.D.C. 2005).

III. CONCLUSION

The findings contained in the Order – namely, that the Tribe lacked a functioning Tribal government and that lineal descendants seeking to become members in the Tribe somehow have standing to air their internal tribal grievances before this federal forum – are fundamental errors of apprehension that require reconsideration. Because Plaintiffs' Opposition does not refute, but rather reinforces the arguments articulated by the Tribe, the Court must grant the Tribe's Motion in the interests of justice.

Dated: October 11, 2013

Respectfully submitted,

By: */s/ Robert A. Rosette*

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CERTIFICATE OF SERVICE

I certify that on October 11, 2013, I caused a true and correct copy of the foregoing **INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S ORDER, DATED SEPTEMBER 6, 2013 (REPLY TO DKT. NOS 78 AND 82)** to be served on the following counsel via electronic filing:

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