Colin Cloud Hampson (Bar No.174184)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
750 B Street, Suite 3130
San Diego, California 92101
Telephone: (619) 546-5585

Attorneys for Cahto Tribe of the Laytonville Rancheria

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CAHTO TRIBE OF THE LAYTONVILLE RANCHERIA, Plaintiff, vs. AMY DUTSCHKE, Regional Director for the Pacific Region, Bureau of Indian Affairs, United States Department of the Interior, KEN SALAZAR, Secretary of the Interior, United States Department of the Interior, LARRY ECHO HAWK, Assistant Secretary – Indian Affairs, United States Department of the Interior, Defendants.	Case No. 2:10-CV-01306-GEB-GGH **MEMORANDUM IN SUPPORT OF CAHTO TRIBE'S MOTION FOR SUMMARY JUDGMENT** Hearing: May 2, 2011 9:00 a.m. Judge: Garland E. Burrell, Jr.

MEMORANDUM IN SUPPORT OF
CAHTO TRIBE'S MOTION FOR SUMMARY JUDGMENT

Table of Contents

Table of Contents

Table of Authorities

Page

Cases

Table of Authorities

Page

Table of Authorities

Page

Statutes and Rules

Table of Authorities

Colin Cloud Hampson (Bar No.174184)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
750 B Street, Suite 3130
San Diego, California 92101
Telephone: (619) 546-5585

Attorneys for Cahto Tribe of the Laytonville Rancheria

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CAHTO TRIBE OF THE LAYTONVILLE RANCHERIA, Plaintiff, vs. AMY DUTSCHKE, Regional Director for the Pacific Region, Bureau of Indian Affairs, United States Department of the Interior, KEN SALAZAR, Secretary of the Interior, United States Department of the Interior, LARRY ECHO HAWK, Assistant Secretary – Indian Affairs, United States Department of the Interior, Defendants.	Case No. 2:10-CV-01306-GEB-GGH **MEMORANDUM IN SUPPORT OF CAHTO TRIBE'S MOTION FOR SUMMARY JUDGMENT** Hearing: May 2, 2011 9:00 a.m. Judge: Garland E. Burrell, Jr.

INTRODUCTION

The decision issued by the Regional Director of the Bureau of Indian Affairs Pacific Region on March 26, 2009 should be vacated. In that 2009 Decision, the Regional Director claimed authority to review a tribal enrollment matter which the Regional Director does not possess under law, and purported to direct the Tribe to re-enroll one or more persons who had been removed from the Tribe's rolls more than 13 years earlier, on September 19, 1995. There

are multiple reasons why the 2009 Decision was unlawful. *First*, the Regional Director in the 2009 Decision assumed authority to review the Tribe's decision even though the Regional Director was bound, under principles of claim and issue preclusion and administrative finality by a 2002 decision issued by the Interior Board of Indian Appeals ("IBIA) which had concluded that the Regional Director and Agency Superintendent did not have authority to review the Tribe's enrollment decision. *Second*, while the Regional Director, for nearly six years following the 2002 IBIA decision, treated that decision as fully resolving the matter, the Regional Director then abruptly reversed position and without reasoned explanation reopened the matter and, as such, his decision was arbitrary and capricious. *Third*, even if not bound by the 2002 IBIA decision, the Regional Director's 2009 Decision exceeded the authority provided by the federal regulation on which he relied, and *fourth*, violated federal law by failing to defer to the Cahto Tribe's reasonable interpretations of tribal law, improperly substituting the BIA's interpretation of tribal law for the Tribe's interpretation. *Finally*, the Regional Director's 2009 Decision, to the extent it purports to decide an appeal for persons not named in the appeal, violated the BIA's regulations governing enrollment appeals.

STATEMENT OF FACTS

A. Background

The Cahto Tribe is a federally-recognized Indian tribe, Answer (Doc. 9) ¶¶ 2,7, organized under Articles of Association adopted by the Tribe in 1967[1] and revised in 2006. AR 233-241 ("2006 Articles"). Those Articles vest the governing power of the Tribe in the Tribe's General Council – comprised of all adult members of the Tribe. 2006 Articles, art. IV (AR 234); 1967

[1] Administrative Record ("AR") 279, 286-294 ("1967 Articles"). The Administrative Record was lodged with the Court on Sept. 20, 2010. *See* Not. of Lodging (Doc. 17). A Supplement to the Administrative Record was lodged with the Court on December 15, 2010. *See* Not. of Lodging (Doc. 24) ("Supp AR").

Articles, art. IV (AR 287). The General Council elects a four-member Executive Committee to represent the Tribe and administer the tribal government. 2006 Articles, art. V (AR 234).

The Articles of Association further establish the criteria for membership in the Tribe. Article III.A.3 of the 1967 Articles, the provision in effect at the relevant period in 1995, provided that persons who otherwise satisfied the eligibility criteria for membership:

> shall be ineligible for membership if they have been affiliated with any other tribe, group or band to the extent of (a) being included on a formal membership roll, . . .[or] (c) having been named as a distributee or dependent of a distributee in a reservation distribution plan.

AR 286-287; *see also Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, BIA*, 38 IBIA 244, 244-245 (2002) (AR 323-324) ("*Cahto Tribe*") (discussing membership provisions of Articles of Association).

The Tribe's ordinance governing enrollment, Ordinance No. 1 (AR 280-285) ("Enrollment Ordinance"); *see also* Answer (Doc. 9) ¶9, provides, *inter alia*, for an Enrollment Committee, enrolling periods, applications for enrollment, approval and disapproval of applications for enrollment, membership roll preparation, keeping the membership roll current, and appeals of denials of applications for enrollment.

On September 19, 1995 the Tribe's General Council voted to remove from the Tribe's membership 22 individuals, members of a family with the surname Sloan (sometimes described as the Sloans/Heckers). Supp AR 156-181 (Sept. 19, 1995 General Council Meeting Minutes and Exhibits). The General Council found that the Sloans "have been affiliated with other tribes by being included on formal membership rolls and/or * * * have been a distributee of a reservation distribution plan, namely the Hoopa/Yurok settlement." *Cahto Tribe*, 38 IBIA at 245 (AR 324) (quoting Sept. 19, 1995 General Council Minutes). The decision was based on evidence that these Sloan family members had accepted payments under the Hoopa-Yurok

Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified at 25 U.S.C. §§ 1300i *et seq.*), and that some of them had been included on an initial voters list for the Yurok Tribe. The General Council concluded that this rendered them ineligible for membership under Article III.A.3 of the Tribe's Articles of Association, finding that the Sloans "were either on the membership rolls of the Yurok Tribe or were distributees under the Hoopa/Yurok Settlements Act," AR 222-223 (Sept. 19, 1995 General Council Minutes ¶¶ 7-9). The Tribe reaffirmed this decision in 1999. AR 198-201 (Resolution No. 99-6-3 (Jun. 3, 1999)).

On six separate occasions from 1995 to 1999 Bureau of Indian Affairs ("BIA") officials declined requests by the Sloans and others to intervene and maintained that the Tribe's disenrollment action was an internal matter. For example, in an October 4, 1995 letter the Central California Agency Superintendent wrote "that the matter was internal to the Tribe and that he had therefore referred it to the Tribe's Executive Committee." *Cahto Tribe*, 38 IBIA at 245 (AR 324); Supp AR 373. In a letter dated January 28, 1997 the Superintendent wrote to one of the disenrolled Sloans that "[w]hether you were enrolled or disenrolled by the tribe is not an issue that can be dealt with by the Bureau of Indian Affairs, as this is an internal tribal matter and tribes have an inherent right to determine membership, without federal involvement." AR 64; Supp AR 182. Therefore, he advised, "the Bureau of Indian Affairs is reluctant to become involved in your disenrollment issue with the Cahto Tribe as it may be looked at as interference." *Id.* Then in a March 21, 1997 letter the Regional Director wrote:

> it is the Bureau's position that any action regarding membership in a tribe, whether it be disenrollment, enrollment, or adoption, is an internal tribal matter. There have been several Federal Court decisions which have determined this position. One of the most significant is Santa Clara Pueblo v. Martinez decided by the United States Supreme Court on May 15, 1978. In that court decision, the right of tribes to determine their members and to deal with issues of membership, was affirmed. For this reason, the Bureau of Indian Affairs is reluctant to become

> involved in your disenrollment issue with the Cahto Tribe as it may be looked at as interference.

AR 214; *see also Cahto Tribe*, 38 IBIA at 245 (AR 324) ("In letters written in 1997 to one of the disenrolled individuals, the Superintendent and the Regional Director continued to take the position that the matter was internal to the Tribe.")

On April 9, 1999 the Superintendent advised a tribal member that "disenrollment actions . . . are clearly internal tribal issues," and that "the Bureau of Indian Affairs cannot get involved in tribal disputes between the elected officials and the general membership." Supp AR 537-538. In a May 18, 1999 letter to a disenrolled Sloan family member the Regional Director reiterated that the Bureau "cannot provide . . . a forum [to hear the Sloans' appeal] either as you have correctly described our policy of non-intervention." Supp AR 578-579. The Regional Director further advised Mr. Sloan that he must seek his remedy with the General Council. *Id*. On June 15, 1999 the Superintendent denied again requests to become involved in the membership issue, stating "there have been any number of Supreme Court decisions, including Martinez vs Santa Clara that prohibit the BIA from interfering in internal tribal issues . . . or becoming a party to membership issues." Supp AR 320. During this period, by letters dated May 13, June 24, and August 2, 1999, one of the Sloan Family members, Gene Sloan submitted appeals to the Regional Director and Agency Superintendent, seeking, on behalf of his "family members," BIA review of the Tribe's decision. *See* AR 202-203; AR 190-194; AR 179-181.

Two days after receiving a July 27, 1999 letter from Congressman Mike Thompson asking the BIA to look into the matter, Supp AR 580, on July 29, 1999 the Superintendent began to reverse position and wrote a letter to the Tribe questioning the Tribe's disenrollment decision and asking the Tribe to re-examine the issue. Supp AR 581-582. While the Superintendent

reiterated that the Bureau "did not challenge the tribal right to deal with membership issues," Supp AR 582, he stated that the Bureau did not agree with the Tribe's conclusion that receipt of payments under the Hoopa-Yurok Settlement Act constituted a distribution under a distribution plan within the meaning of Article III of the Tribe's 1967 Articles. Supp AR 581. The Tribe and the Bureau communicated about the issue for a number of months, and the Tribe attempted an internal resolution which was unsuccessful. *Cahto Tribe*, 38 IBIA at 245 (AR 324).

By letter dated February 18, 2000, the Superintendent issued a decision informing the Tribe that that he did "not recognize the tribe's decision to disenroll" the Sloans. AR 175. In that letter, the Superintendent stated that this was "based upon what we view as the tribe's misinterpretation of the Hoopa-Yurok Settlement Act, a federal law, relative to the tribe's Articles of Association, as amended." *Id.* At the same time, the Superintendent recognized that:

> the Agency does not make it a practice to become involved in matters that are rightfully addressed at the tribal level. Nor does the Agency propose to dictate courses of action that may be contrary to tribal laws, especially in the area of tribal enrollment. The Agency supports all 52 tribes situated in our service area in their sovereign right to determine criteria for membership, take actions relative to this membership, and to develop and enforce tribal laws that address enrollment.

Id. The Superintendent's decision stated that it could be appealed pursuant to 25 C.F.R. Part 2 governing administrative appeals. *Id.*

The Tribe appealed the Superintendent's decision to the Regional Director. Answer (Doc. 9) ¶ 14; AR 160-174 (Cahto Tribe Notice of Appeal and Statement of Reasons). The Sloans participated in the proceeding on appeal before the Regional Director, defending the Superintendent's decision. AR 128-159 (Answer of the Interested Parties (Gene Sloan et al)). By letter dated December 19, 2000 the Regional Director affirmed the Superintendent's decision. AR 105-107. The Regional Director, like the Superintendent, recognized that his authority to intervene was limited, stating:

> Under ordinary circumstances, this office would agree that the Cahto Tribe has a right to interpret its own laws and to determine its own membership, and that the BIA has no right to interfere in this situation . . . .

AR 106. However, the Regional Director affirmed the Superintendent's decision based on his interpretation of the Hoopa-Yurok Settlement Act and the Tribe's 1967 Articles. *Id.* The Regional Director's decision stated that it could be appealed to the Interior Board of Indian Appeals pursuant to 43 C.F.R. §§ 4.310 – 4.340. *Id.*

The Tribe appealed the Regional Director's December 19, 2000 decision to the IBIA. *See Cahto Tribe, supra;* Supp AR 10-13 (Notice of Appeal). The Sloan family members participated in the proceedings in the appeal before the IBIA where all parties, including the Regional Director, had the opportunity to brief the question of the BIA's authority to issue decisions on the disenrollment issue and the merits of the disenrollment issue. Answer (Doc. 9) ¶ 15; *see also infra* at 15-16.

By an opinion and order entered on December 19, 2002, the IBIA vacated the Regional Director's and Agency Superintendent's decisions. *Cahto Tribe*, 38 IBIA at 244, 250 (AR 323, 329). The IBIA explained that: "[t]he Board does not reach the merits of the enrollment dispute because it agrees with the Tribe that the BIA officials lacked decision-making authority in the circumstances here." *Id*. at 246 (AR 325). The IBIA, in its decision, discussed the possible alternative ways in which the BIA might have authority to review a tribal disenrollment decision, but found none of these applicable to the decisions made by the BIA in this matter. *Id.* at 246-249 (AR 325-328). First, the IBIA considered whether "the Tribe gave BIA authority to review its disenrollment action when, on September 29, 1995, its attorney sought BIA recognition of the tribal action" but concluded that the BIA responded to the September 29, 1995 request on

October 4, 1995, and there was no indication that the Tribe ever renewed any request for BIA review. *Id.* at 246 (AR 325).

Second, the Board considered whether the BIA might have jurisdiction to review the matter under 25 C.F.R. Part 62, which provides for an appeal to the BIA from an adverse enrollment action "when the tribal governing document provides for an appeal of the action to the Secretary." 38 IBIA at 247 (AR 326) (quoting 25 C.F.R. § 62.4(a)). The IBIA noted that the parties disagreed as to whether the Enrollment Ordinance provided such authority to the Secretary where the matter at issue was disenrollment. 38 IBIA at 247 (AR 326). While the Board declined to decide whether Part 62 would apply to a disenrollment action, the Board found Part 62 inapplicable because "neither the Superintendent nor the Regional Director purported to, or did act, under authority granted in 25 CFR Part 62." 38 IBIA at 248 (AR 327).

Third, the IBIA considered whether the BIA might have authority to review the Tribe's decision in order to protect the integrity of the government-to-government relationship between the Tribe and the United States. As to this, the Board found that the BIA has consistently acknowledged the authority of the Tribal leadership and concluded that because there was no evidence that the government-to-government relationship had been impaired by the disenrollment dispute, this too did not provide a basis for BIA review of the disenrollment decision. 38 IBIA at 248 (AR 327).

Fourth, the IBIA considered whether the BIA might review the matter because of alleged violations of the Indian Civil Rights Act, 25 U.S.C. § 1302. The Board concluded that it did not because the Indian Civil Rights Act "is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise properly within its jurisdiction." 38 IBIA at 248-249 (AR 327-328).

The IBIA further explained that the matter involved a question of tribal membership which "[h]istorically . . . has been considered a matter within the exclusive province of the tribes themselves," and that "'[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.'" 38 IBIA at 249 (AR 328) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)).

The IBIA concluded that "nothing presently before the Board shows that BIA had any jurisdiction, in the circumstances in which the issue arose, to render a decision in the Tribe's disenrollment dispute." *Id.* The IBIA then expressly declined to remand the case for further proceedings, stating that "[t]he Board does not remand this matter to the Regional Director because there is no evident need for action on his part." *Id.* at 250 n.4 (AR 329). The Board instead vacated the Regional Director's and Agency Superintendent's decisions. *Id.* at 247, 250 (AR 326, 329). The Regional Director did not seek reconsideration of the IBIA decision or pursue any other avenue of appeal.

For six years following the IBIA's 2002 decision in *Cahto Tribe*, the BIA, including the Agency Superintendent and the Regional Director, treated the IBIA's 2002 decision as fully and finally resolving the question of BIA authority over the Tribe's September 19, 1995 disenrollment action. During this period no one suggested that any issues regarding that 1995 Tribal decision were unresolved or pending.

However, in late 2008 and early 2009 the Sloans by letter and in person, petitioned the Regional Director to consider the appeals made in Gene Sloan's letters of May 13, June 24 and August 2, 1999, arguing that these were still pending. *See* AR 9-10, 38-39, 47-56 (Letters dated October 3, 2008, February 9, 2009 and March 16, 2009 from T. Vollman to Regional Director). On December 18, 2008, the Sloans filed a federal suit seeking judicial review of the IBIA's 2002

decision and informed the BIA that they would pursue that suit and an administrative appeal if the Regional Director did not act on the appeals contained in Gene Sloan's 1999 letters. *See* AR 38-39 (Letter from T. Vollman to Regional Director (Feb. 9, 2009)); *Sloan v. U.S. Dept. of the Interior*, No. 2:08-CV-03070-GEB-GGH (E.D. Cal).

By a decision issued on March 26, 2009, the Regional Director changed his position, reasserted authority to intervene in the Tribe's 1995 enrollment decision and announced that the appeals which had been submitted by Mr. Sloan to the BIA nine years earlier – on May 13, June 24 and August 2, 1999 – were still pending before the BIA and had not been resolved by the IBIA's 2002 decision. AR 1-2 (2009 Decision). In his 2009 Decision, the Regional Director assumed jurisdiction over the enrollment matter claiming authority to do so under 25 C.F.R. Part 62, rejected the Tribe's September 19, 1995 decision, and directed the Tribe "to place the Sloan/Hecker [f]amily members' names on the Tribe['s] membership roll immediately." AR 5. The Regional Director stated that the decision was final for the Department of the Interior. *Id.*

B. The Present Action.

The Cahto Tribe brought this action under the Administrative Procedure Act for judicial review of the Regional Director's 2009 Decision. The Tribe seeks an order vacating the 2009 Decision on the ground that it was issued without lawful authority and was arbitrary, capricious and contrary to law in violation of the Administrative Procedure Act.

JURISDICTION

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (civil actions brought by Indian tribes), and 5 U.S.C. § 702 (Administrative Procedure Act). This is an action brought by the Tribe under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, for judicial review of the Regional Director's March 26,

2009 decision. The Tribe is aggrieved by the decision which the Regional Director stated was final for the Department of Interior.

ARGUMENT

I. PRINCIPLES OF ADMINISTRATIVE FINALITY, CLAIM AND ISSUE PRECLUSION BARRED THE REGIONAL DIRECTOR FROM REVIEWING THE TRIBE'S 1995 DISENROLLMENT ACTION

The IBIA, in its 2002 decision, *Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director, BIA*, 38 IBIA 244 (2002) (AR 322-329), ruled that the BIA did not have authority to review the Tribe's 1995 disenrollment action. While the IBIA, in that decision, acknowledged the possibility that the BIA might have authority to review such decisions under 25 C.F.R. Part 62 if the Tribe's Enrollment Ordinance provided a delegation of such authority, the IBIA found that neither the Regional Director nor the Agency Superintendent had relied on Part 62 to review the matter. The IBIA then expressly declined to remand the case to the Regional Director for further proceedings because "there is no evident need for action on his part." *Id.* at 250 n.4 (AR 329). The IBIA determination was final for the Department. The Regional Director was a party to the proceeding before the IBIA, was bound by it, and precluded from thereafter asserting authority to review the Tribe's 1995 disenrollment decision.

A. Principles of Administrative Finality Apply to the IBIA Decision in *Cahto Tribe*

Principles of res judicata (claim preclusion) and collateral estoppel (issue preclusion) govern decisions of administrative bodies acting in a judicial capacity to the same degree as court decisions. This is sometimes described as the doctrine of administrative finality. As the U.S. Supreme Court explained:

> We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those

> determinations of administrative bodies that have attained finality. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." . . . . Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. . . . The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, . . ., which acts in a judicial capacity.

Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104, 107-08 (1991) (citations omitted). The Ninth Circuit has applied this rule. *See, e.,g., Stuckey v. Weinberger*, 488 F.2d 904, 911 (9th Cir. 1973); *see also Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007) (res judicata barred initiation of second deportation case against alien where new charges could have been brought during the pendency of the prior proceeding); *Medina v. INS*, 993 F.2d 499, *reh'g denied*, 1 F.3d 312 (9th Cir. 1993) (INS bound by citizenship determination in prior adjudication before Board of Immigration Appeals); *see also Restatement (Second) of Judgments* § 83 (1982) ("Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal that when it is a court.")

Courts have held that IBIA decisions have preclusive effect. *See Wichita and Affiliated Tribes v. Hodel*, 788 F.2d 765, 780 (10th Cir. 1986) (Assistant Secretary bound by IBIA determination in previous related proceeding); *United States v. Karlen*, 645 F.2d 635, 638-640 (8th Cir. 1981) (offensive collateral estoppel applied to prevent party to IBIA appeal from relitigating in subsequent action questions resolved by IBIA); *O'Bryan v. United States*, 93 Fed.

Cl. 57, 64 (2010), *appeal pending*, Docket No. 2010-5129 (Fed. Cir.) (party to IBIA appeal could not relitigate an issue that was raised or could have been raised in a previous action).[2]

B. The Regional Director Was Precluded From Reopening Questions Related to the Bureau's Authority To Intervene in the Disenrollment of the Sloans

Whether analyzed under the standards for res judicata or collateral estoppel, the Regional Director, as a party to the proceedings which resulted in the IBIA's 2002 decision, was precluded by that decision from relitigating the IBIA's determination that the BIA lacked jurisdiction to review the Tribe's 1995 decision to disenroll the Sloans. Res judicata (or claim preclusion) bars a claim when the earlier suit "(1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005) (internal quotation marks omitted); *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002) (same). Collateral estoppel bars a party from relitigating an issue that was decided in a prior proceeding if (1) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action; (2) there was a full and fair opportunity to litigate the issue in the previous action; (3) the issue was actually litigated in the previous action; and (3) the issue was lost as the result of a final judgment. *In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000); *Kendall v. Overseas Dev. Corp.*, 700 F.2d 537, 538 (9th Cir.

---

[2] IBIA proceedings satisfy the standards for adjudicatory proceedings for purposes of administrative finality. IBIA appeals are adversarial and based on the administrative record prepared by the Bureau deciding official and briefs of the parties presenting argument. 43 C.F.R. §§ 4.311, 4.335. The Board may require a hearing to hear argument and to receive additional evidence. *Id.* § 4.337(a). Hearings must be recorded and, if requested, transcribed. *Id.* § 4.23. The Board may subpoena the attendance of witnesses at a hearing or for a deposition. *Id.* § 4.26. Ex parte communication regarding the merits of a proceeding is prohibited. *Id.* § 4.27(b). The IBIA's proceedings in *Cahto Tribe* conducted pursuant to these provisions were sufficiently formal to support application of res judicata and collateral estoppel to the 2002 decision.

1983). Claim and issue preclusion "apply to questions of jurisdiction as well as to other issues." *Underwriters Nat'l Assurance Co. v. N. C. Guar. Ass'n*, 455 U.S. 691, 706 (1982); *see also Gupta v. Thai Airways Int'l, Ltd*, 487 F.3d 759, 767 (9th Cir. 2007) (plaintiff precluded from relitigating in federal court, under a different legal theory, the question of jurisdiction over a foreign entity when he had sued the same defendant in state court in an action which the state court dismissed for lack of subject matter jurisdiction since plaintiff "had a full and fair opportunity to establish the jurisdiction of United States courts" in the first proceeding). These are also the standards applied by the IBIA.[3]

The elements of both doctrines are satisfied here.

First, the Bureau admits, and Interior regulations provide, that it was a party to and bound by the 2002 decision issued by the IBIA in *Cahto Tribe*. Answer (Doc. 9) ¶ 27; *see also* 43 C.F.R. § 4.311(c) ("The BIA is considered an interested party in any proceeding before the Board.")

Second, the issue of the BIA's authority to review the Tribe's 1995 disenrollment action was litigated in the proceedings before the IBIA where all parties, including the Regional Director, had a full and fair opportunity to be heard. Answer (Doc. 9) ¶¶ 15, 27. The Tribe challenged the Bureau's authority to exercise jurisdiction over the enrollment matter when it

---

[3] Federal courts, when considering issues of claim and issue preclusion, look at the claim and issue preclusion rules applied by the forum which entered the judgment in the first case. *See Kendall*, 700 F.2d at 538 n.1. Here that forum is the IBIA which has held that parties to appeals "may not relitigate the same jurisdictional issues decided in [prior] appeals." *Uintah and Uncompahgre Descendants v. Uintah and Ouray Agency Superintendent, BIA*, 51 IBIA 220, 221, 2010 WL 160782 (2010). Also, the IBIA has applied res judicata to a determination in a prior proceeding that the BIA lacked authority in a tribal enrollment matter. *Castillo v. Pac. Reg'l Dir., BIA*, 46 IBIA 209, 213, 2008 WL 723763 (2008). In *Lowe v. Acting E. Okla. Reg'l Dir., BIA*, 48 IBIA 155, 2008 WL 5539394 (2008), the IBIA held that res judicata barred the relitigation of a prior determination that the BIA lacked jurisdiction to review a tribal action.

appealed the Superintendent's February 18, 2000 decision to the Regional Director, asserting that exclusive power to resolve such matters remained with the Tribe. *See* AR 160-174 and AR 108-127 (Cahto Tribe's Statement of Reasons (Apr. 17, 2000) and Reply Brief (Jul. 26, 2000)). The Sloan family, including Gene Sloan, actively participated in the proceedings on appeal before the Regional Director and offered arguments in support of the Superintendent's authority to issue the February 18, 2000 decision. *See* AR 128-159 (Answer of Interested Parties (Gene Sloan et al.) (Jun. 20, 2000)). The Regional Director affirmed the Superintendent's decision, including the BIA's assumption of jurisdiction over the matter. AR 105 (Regional Director's December 19, 2000 decision); *see also Cahto Tribe*, 38 IBIA at 246 (AR 325).

The BIA's authority to act in the disenrollment dispute was again fully briefed in the appeal before the IBIA. *See* AR 330-356 and AR 357-372 (Cahto Tribe's Opening Brief (June 29, 2001) and Reply Brief (Oct. 5, 2001)); AR 373-400 (Answering Brief of Interested Parties (Gene Sloan et al.) (Aug. 29, 2001)). Indeed, the briefing on this issue included consideration on whether the BIA had jurisdiction under 25 C.F.R. Part 62 – the regulation under which the Regional Director in his 2009 Decision claimed to act.[4] For example, the Tribe argued that "as the plain language of the Ordinance states that it only applies to initial applications for enrollment," the "BIA's authority is limited to appeals of a 'rejection notice' from the Enrollment Committee" and the Enrollment Ordinance "does not govern disenrollment decisions." AR 366-367. The Sloans responded to the Tribe's arguments on these issues, and

---

[4] Related to the briefing on 25 C.F.R. Part 62, the IBIA also invited argument on the questions of its jurisdiction, including whether the Board had jurisdiction over the appeal or exclusive authority rested with the Regional Director under 25 C.F.R. Part 62. *See* AR 337 (Tribe's Opening Brief). The Tribe briefed this issue explaining that the IBIA's jurisdiction was unaffected by Part 62, AR 330, 337-338, and neither the Sloans nor the Regional Director questioned the IBIA's authority to review the appeal in light of 25 C.F.R. Part 62. AR 373, 387 n.14 (Interested Parties' (Gene Sloan et al.) Answering Brief).

presented their position defending the BIA's assumption of authority to review the Tribe's 1995 disenrollment decision under the Enrollment Ordinance and 25 C.F.R. Part 62. AR 386, 387 n.16, 396 (Interested Parties' (Gene Sloan et al.) Answering Brief); *see also* 38 IBIA at 246 (AR 325). The Regional Director, as a party to the proceedings before the IBIA, also had the opportunity to defend his authority to resolve the matter.[5] Answer (Doc. 9) ¶¶ 15, 27; 43 C.F.R. § 4.311 (BIA is a party to any appeal and any party may file a brief with IBIA.)

Third, the IBIA's decision fully resolved the question of the BIA's authority to review the Tribe's 1995 disenrollment decision. In its 2002 decision, the IBIA considered the various grounds on which the BIA might review a tribal decision on disenrollment and found them inapplicable to the action here. While the Board noted that it was "conceivable" that the BIA might have authority to review such decisions under Part 62, 38 IBIA at 247 (AR 326), the Board found Part 62 inapplicable because neither the Regional Director nor the Superintendent claimed to act pursuant to that regulation. *See id.* The Board concluded that "nothing presently before the Board shows that BIA had any jurisdiction, in the circumstances in which the issue arose, to render a decision in the Tribe's disenrollment dispute." 38 IBIA at 249 (AR 328). The Board then entered an order vacating the Regional Director's December 19, 2000 decision and the Superintendent's February 18, 2000 decision. 38 IBIA at 249, 250 (AR 328, 329). In so doing, the Board expressly stated that it was not remanding the case to the Regional Director for any further proceedings "because there is no evident need for action on his part." 38 IBIA at 250 n. 4 (AR 329) (emphasis supplied). Nor did the Board refer the matter to the Secretary or

---

[5] The Regional Director, however, did not file a brief on appeal. When the Regional Director moved to file a brief with the IBIA out of time, the IBIA denied the motion. The Regional Director sought reconsideration, which the IBIA denied. *See Cahto Tribe*, 38 IBIA at 250 (AR 329).

Assistant Secretary for review pursuant to Part 62 or any other authority, and the Regional Director did not seek reconsideration or pursue any other avenue of appeal.[6]

The clear import of the Board's 2002 decision in *Cahto Tribe*, and its refusal to remand the case for any further proceedings by the Regional Director, was that there was nothing further to be done by the BIA on this disenrollment dispute. Had the Board viewed the matter otherwise, the Board would have remanded the matter to the Regional Director for consideration of the availability of review under Part 62 or for clarification of the Regional Director's intent regarding Mr. Sloan's 1999 appeals. The Board has ordered such remands in enrollment cases where the intent of the Regional Director's decision was not clear. *See B.B. v. Rocky Mountain Reg'l Dir., BIA*, 39 IBIA 48, 2003 WL 23170161 (2003) (finding the Board without jurisdiction over an appeal under 25 C.F.R. Part 62, but remanding the case to the Regional Director for clarification of the intent of his decision). Alternatively, the Regional Director could have requested, and the IBIA could have referred the appeal to the Assistant Secretary-Indian Affairs for consideration under the appeal procedures in 25 C.F.R. Part 62. While the IBIA has explained that it is without jurisdiction to review enrollment appeals that are covered by Part 62, the Board has, in dismissing such appeals, in other cases simultaneously referred them to the Assistant Secretary-Indian Affairs for review. The Board has taken such action "even when it is not clear that an appeal would fall within the scope of Part 62," explaining that such a "referral does not constitute an opinion as to whether the appeal is proper under Part 62." *Vedolla v. Acting Reg'l Dir., BIA*, 43 IBIA 151, 154, 2006 WL 5097370 (2006).

---

[6] As a party to the appeal, the Regional Director then had the right to seek reconsideration or remand after the IBIA issued its decision in *Cahto Tribe*. Petitions for reconsideration of an IBIA decision must be filed within 30 days of the date of the decision. 43 C.F.R. § 4.315(a); *see also* 43 C.F.R. § 4.21(d).

In its 2002 decision in *Cahto Tribe*, the Board did none of those things. Instead, the Board made clear that there was "no evident need for action" by the BIA. 38 IBIA at 250 n. 4 (AR 329). The BIA apparently understood that the matter was concluded by the IBIA's decision as it took no further action regarding the disenrollment matter for the next six years.

Fourth, the IBIA's decision was a final judgment on the matter. The IBIA's decision in *Cahto Tribe* was final for the Department. *See* 43 C.F.R. § 4.312 ("Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect."). Absent a remand, the Regional Director had no further jurisdiction over the matter. *Winters v. N.W. Reg'l Dir., BIA*, 43 IBIA 219, 2006 WL 5097378 (2006) (once a decision has been appealed to the IBIA, the BIA lacks jurisdiction to reconsider it absent a remand by the Board); *Bullcreek v. W. Reg'l Dir., BIA*, 39 IBIA 100, 101, 2003 WL 23170180 (2003); *Novak Brothers v. Acting Aberdeen Area Dir., BIA*, 32 IBIA 126, 1998 WL 233737 (1998) (vacating decision on appeal and remanding for further consideration upon unopposed request of Regional Director). Because the Regional Director did not seek reconsideration or make any other challenge to the IBIA's decision, the Regional Director was bound by the IBIA's determination which remained in effect in 2009.[7] As the court found in *Wichita*, where a BIA official "has

---

[7] While some members of the Sloan family, in December 2008 filed a federal suit in District Court challenging the IBIA's 2002 Decision, *see supra* at 9-10, there were no rulings from the district court in that action at the time that the Regional Director issued his 2009 Decision, so the 2002 decision in *Cahto Tribe* remained in effect and binding on the Regional Director. *See Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993) ("'the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided'"). The Sloans' federal action was thereafter dismissed by stipulation of the parties in part on the ground that the Sloans' challenge to the IBIA decision was mooted by the Regional Director's March 2009 Decision. Stip. Dismissal Rule 41(a) (Aug. 10, 2009), *Sloan v. U.S. Dept. of the Interior*, No. 2:08-CV-03070-GEB-GGH (E.D. Cal.). The Tribe was not a party to that federal action.

never formally challenged the IBIA's decision," "the Department is bound by the IBIA decision." 788 F.2d at 780. So too here.

In sum, because the BIA authority to review the Tribe's 1995 disenrollment decision was litigated and decided in proceedings before the IBIA where the Tribe, the Regional Director and the Sloan family were parties, and resolved by a final decision of the Board, the Board's decision on this issue is binding and barred the Regional Director from subsequently seeking to reopen the matter.[8]

II. THE REGIONAL DIRECTOR'S 2009 DECISION WAS ARBITRARY AND CAPRICIOUS

While the IBIA's 2002 decision in *Cahto Tribe* barred the BIA from thereafter asserting authority to review the Tribe's 1995 disenrollment decision, the Regional Director's assumption of jurisdiction in the 2009 Decision was also arbitrary and capricious. It was issued more than 13 years after the Tribe's September 19, 1995 decision and was wholly inconsistent with the BIA's action for six years following the IBIA's 2002 decision during which time BIA, including the Regional Director, treated the matter as fully resolved by the IBIA's 2002 decision. During this period, the BIA engaged in regular government-to-government relations with the Tribe, and the BIA never even suggested that there were any unresolved issues or pending appeals from the

---

[8] In his 2009 Decision the Regional Director sought to justify the reopening of the Sloan disenrollment matter citing to the IBIA's statement that "the record does not show what action, if any, the BIA took on Sloan's appeals." AR 2 n.1. In so doing, however, the Regional Director took that statement out of context and failed to consider the balance of the IBIA's decision – where the Board found Part 62 inapplicable because neither the Regional Director nor the Superintendent claimed to be acting pursuant to Part 62 and then refused to remand the matter because of the Board's conclusion that there was nothing further for the Regional Director to do. The Regional Director recognized that the proceedings resolved in the IBIA's decision in *Cahto Tribe* were not distinct from Gene Sloan's 1999 appeals when he stated that the Superintendent's February 18, 2000 decision should have provided notice of appeal rights under Part 62 rather than 25 C.F.R. Part 2. AR 1.

Tribe's 1995 disenrollment decision. But on March 26, 2009, the Department reversed course. Announcing that the appeals which Gene Sloan had submitted to the BIA nearly ten years earlier – in May, June and August 1999 – were pending and remained unresolved, the Regional Director in his 2009 Decision assumed authority to decide the validity of the Tribe's 1995 disenrollment decision. AR 1-3. In so doing, the Regional Director effectively reinstated the substantive decisions that the Regional Director and Agency Superintendent had made nine years earlier, on December 19, 2000 and February 18, 2000 respectively (and which had been vacated by the IBIA), asserting for the first time in the history of these proceedings, that the BIA had authority to act on this matter under 25 C.F.R. Part 62. With this, the Regional Director purported to reverse the Tribe's 1995 decision. *See* AR 105-07, 175-76; *compare* AR 1-8.

An agency's departure from past practice or a prior position, without a reasoned basis for doing so is arbitrary. *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). "'[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.'" *NW. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-88 (9th Cir. 2007) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (quoted in *State Farm*, 463 U.S. at 57)). The decision from the D.C. Circuit in *Williams Gas Processing-Gulf Coast Company, LP v. Federal Energy Regulatory Commission*, 475 F.3d 319 (D.C. Cir. 2006), illustrates these principles. There the court vacated a decision of the Federal Energy Regulatory Commission ("FERC") which directly conflicted with a FERC decision reached four years earlier because the agency "neither explained its action as consistent with precedent nor justified it as a reasoned and permissible

shift in policy" and "made no attempt to square this new policy statement with its directly contradictory stance" in a previous decision. *Id*. at 322, 326-27 (citation omitted) (adding that the rationale for the agency's departure from its past precedent must be stated in the agency decision itself, not articulated after the action is challenged). The same occurred here.

While the Regional Director's 2009 Decision described the BIA's view of the history of the proceedings, the Regional Director did not explain why, after six years of treating the 2002 IBIA decision has having fully resolved the claims arising from the Tribe's 1995 disenrollment decision, the BIA had just now come to the conclusion that the appeals made by Gene Sloan in 1999 were still pending. Nor did the Regional Director explain why he now viewed 25 C.F.R. Part 62 as authority for BIA review when – in the six years that had passed since the IBIA's decision and the 13-year history of this proceeding – the BIA had not relied on this regulation as a source of authority to act in this matter. [9] Nor did the Regional Director, in the 2009 Decision, explain how the BIA could now revive this long-dormant matter and assume jurisdiction to review the Tribe's 1995 decision given the IBIA's clear statement that it was not remanding the matter to the Regional Director "because there is no evident need for action on [the Regional Director's] part." 38 IBIA at 250 (AR 329).

The Regional Director's 2009 Decision contains no answers to any of these questions and no explanation whatsoever for his change in position. *See* AR 1-8. The Regional Director's abrupt change in position after such a long period of time without any reasoned explanation renders the 2009 Decision arbitrary and capricious.

---

[9] In the 2009 Decision, the Regional Director simply refers back to the Agency Superintendent's February 18, 2000 decision, pointing out that while the Superintendent had advised the parties that they had rights to appeal under 25 C.F.R. Part 2, the Superintendent's decision should have referred to appeal rights under 25 C.F.R. Part 62. AR 1.

III. THE REGIONAL DIRECTOR'S DECISION WAS ERRONEOUSLY BASED ON A FEDERAL REGULATION, 25 C.F.R. PART 62, WHICH DOES NOT APPLY HERE

Even assuming, *arguendo*, that the IBIA's 2002 decision in *Cahto Tribe* did not preclude the Regional Director from asserting jurisdiction over the Tribe's 1995 disenrollment decision, or that the Regional Director's decision to belatedly claim authority to act on this matter was not arbitrary and capricious, the Regional Director erred in relying on 25 C.F.R. Part 62, which provides for appeal to the BIA from an adverse tribal enrollment action "when the tribal governing document provides for an appeal of the action to the Secretary." 25 C.F.R. § 62.4(a)(3); *see also id.* § 62.2(b)(2) (regulations inapplicable unless "[a]n appeal to the Secretary is provided for in the tribal governing document"). That regulation does not apply to the Tribal action at issue here, and its application to this matter violated federal law by unlawfully intruding on the Tribe's exclusive authority over enrollment matters.

A. Tribal Law Delegating Authority to Interior to Review Internal Tribal Enrollment Matters Pursuant to 25 C.F.R. Part 62 Must Be Clear and Express

Well-established federal law recognizes that tribes possess the "power to make their own substantive law in internal matters, . . . and to enforce that law in their own forums." *Santa Clara Pueblo*, 436 U.S. at 55-56 (citations omitted). A cornerstone of federal Indian law and policy is the protection and furtherance of tribal self-government. *See id.* at 63-64.

Furthermore, tribes enjoy exclusive jurisdiction over matters involving tribal enrollment. The Supreme Court stated in *Santa Clara Pueblo* that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* at 72 n.32. The Ninth Circuit recently reaffirmed this, stating that "[a]n Indian tribe has the power to define membership as it chooses, subject to the

plenary power of Congress." *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). As the BIA acknowledged early in the history of this matter, *supra* at 4-5, membership issues are particularly sensitive, and the federal government is hesitant to intrude upon them. *See Santa Clara Pueblo,* 436 U.S. at 72 n.32.

Accordingly, the federal government (courts and agencies such as Interior) must avoid intruding on tribal self-government when construing tribal law, particularly in enrollment matters.[10] In *Wheeler v. U.S. Dep't of Interior*, 811 F.2d 549 (10th Cir. 1987), the Tenth Circuit explained that

> Indian tribes have a right to self-government, and the Federal Government encourages tribes to exercise that right. Consequently, while the Department may be required by statute or tribal law to act in intratribal matters, it should act so as to avoid any unnecessary interference with a tribe's right to self-government.

Id. at 553*; see also Ransom v. Babbitt,* 69 F. Supp. 2d 141, 151 (D.D.C. 1999) (when construing tribal law, the Bureau "must effect as little disruption as possible of tribal sovereignty and self-determination").

Because of these fundamental principles, even where a tribe may delegate to the BIA authority to review a matter, such as in a manner contemplated by 25 C.F.R. Part 62, the Tribe's delegation of authority must be express and in plain terms. Related to this is the rule that, when the Bureau construes tribal law, it must do so in a manner that minimizes interference with tribal

---

[10] This resembles the "well established principle of Indian law. . . that statutory words should not be expanded beyond their clear meaning where to do so would result in an intrusion upon tribal sovereignty." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 151 (D.D.C. 1999) (citations omitted); *see also Santa Clara Pueblo,* 436 U.S. at 63-64 (stating that courts should be "more than unusually hesitant" to construe the Indian Civil Rights Act in a manner that diminishes the congressional purpose of "protect[ing] tribal sovereignty from undue interference").

self-government, particularly when internal matters such as tribal enrollment are involved. In *Cahto Tribe* the IBIA explained:

> Even where a tribe has given BIA formal authority to review tribal actions through its constitution or ordinances, *that authority must be narrowly construed*, and BIA review must be undertaken in such a way as to avoid unnecessary interference with the tribes' right to self-government.

38 IBIA at 246-247 (AR 325-326) (emphasis supplied); *see also Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Dir., BIA*, 21 IBIA 24, 32, 1991 WL 279697 (1991) (narrowly construing authority delegated to BIA in tribal constitution to approve tribal ordinances to include only those ordinances "specifically subject to Secretarial review"). The BIA, accordingly, cannot assert jurisdiction unless the tribal delegation of authority to the BIA to do so is express and made in plain terms. The Regional Director failed to apply these principles in his 2009 Decision contrary to federal law and, as a result, exceeded the authority provided by 25 C.F.R. Part 62.

B. The Regional Director's Finding of Review Authority Under Part 62.

The Regional Director's 2009 Decision found authority under 25 C.F.R. §§ 62.2(b)(2) and 62.4(a)(3) based on the following provisions of the Tribe's Enrollment Ordinance:

> Section 7, Membership Roll Preparation. "After final decisions have been rendered on applications, a roll is prepared with a certification as to its correctness by the Enrollment Committee, and the Area Director Bureau of Indian Affairs."
>
> Section 8, Keeping the Membership Roll Current, Each new Executive Committee, acting as an Enrollment Committee…(c) making corrections as necessary, including deleting of names of persons on the roll who were placed there erroneously, fraudulently, otherwise incorrectly or who have relinquished membership by written request.

AR 2-3 (emphasis in original).

The Regional Director interpreted these provisions to allow him to review the Tribe's disenrollment of the Sloans, as follows:

> Section 8(c) gives the Executive Committee the responsibility for making "corrections" to the roll, including the deletion of names placed "incorrectly" on the roll. In accordance with Section 7 of Tribe's Ordinance No. 1, these corrections are subject to the Regional Director's review. And it is evident that Section 8(c) of the ordinance was used by tribal representatives as authority for the Sloan/Hecker family members' disenrollment.

AR 3. The Regional Director concluded therefore that he had authority to decide Mr. Sloan's appeals pursuant to 25 C.F.R. Part 62. *Id.*

C. Tribal Law Did Not Authorize the Regional Director to Review the Disenrollment Action as Required by 25 C.F.R. Part 62.

In violation of controlling principles of federal law, the Regional Director misconstrued the Tribe's Enrollment Ordinance. Contrary to the Regional Director's conclusion, its plain text does not allow appeals of tribal disenrollment decisions to the BIA for purposes of 25 C.F.R. § 62.4.[11]

The Regional Director found, AR 3, that the Tribe made its disenrollment decision pursuant to Section 8(c) of the Enrollment Ordinance which directs the Executive Committee to keep the roll current by, *inter alia*, "deleting names of persons on the roll who were placed there erroneously, fraudulently, otherwise incorrectly or who have relinquished membership by written request." AR 282-283. Section 8 contains no express provision for BIA review of Executive Committee actions to keep the roll current. The Regional Director relied for his finding of review authority on Section 7 which provides for Regional Director "certification" of the

---

[11] Section 6 of the Enrollment Ordinance provides for appeals by "person[s] disapproved for enrollment." AR 282. It states that a person has a "right to appeal to the Area Director, Bureau of Indian Affairs, Sacramento, California, within 30 days following receipt of the rejection notice." *Id.* These provisions refer to applicants for enrollment. The text does not contemplate BIA review of disenrollment decisions.

correctness of a roll prepared "[a]fter final decisions have been rendered on applications." AR 3. However, the reference in Section 7 to decisions on all "applications" plainly indicates that the Bureau reviews supplemental rolls created by the Tribe to add members, not actions removing names from the Tribe's roll. Section 7 contains no reference to certifications by the Regional Director of actions taken under Section 8 to keep the roll current or of disenrollment actions by the General Council.

The Regional Director's interpretation impermissibly stretches the meaning of the provisions of Section 7 related to a roll prepared after acting on initial applications for enrollment to find authority to review an action taken pursuant to Section 8(c). Furthermore, the facts do not support the Regional Director's finding that the Tribe disenrolled the Sloans pursuant to Section 8(c). Section 8(c) applies to "corrections" to the roll made by the Executive Committee, while the General Council, not the Executive Committee, took the action to disenroll the Sloans in 1995 and reaffirm it in 1999. *See Cahto Tribe*, 38 IBIA at 245 (AR 324); Supp AR 156-181; AR 198-201.

In order to assume authority pursuant to 25 C.F.R. Part 62, the Regional Director was obligated to construe any grant of delegated authority in the Enrollment Ordinance narrowly. The Regional Director's strained interpretation of the Tribe's Enrollment Ordinance did not do this and thereby violated the principle that the Department must construe tribal law in a manner that minimizes intrusions on tribal sovereignty. A construction that complies with federal law and is properly deferential to the Tribe's right to self-government cannot expand the provisions in the Enrollment Ordinance to fit the circumstances of the Tribe's 1995 disenrollment action. The Regional Director's attempt to do so under 25 C.F.R. Part 62 was in excess of the authority provided by this federal regulation, contrary to federal law and arbitrary and capricious.

IV. THE REGIONAL DIRECTOR'S DECISION IS CONTRARY TO FEDERAL LAW AS IT FAILS TO DEFER TO THE TRIBE'S INTERPRETATION OF TRIBAL LAW REGARDING ELEGIBILITY FOR MEMBERSHIP

The Regional Director also violated federal law by failing to defer to the Tribe's interpretation of the Tribe's 1967 Articles regarding eligibility for membership, improperly substituting his own view of tribal law, and thereby erroneously rejecting the Tribe's disenrollment decision. The Tribe's General Council found that the Sloans "have been affiliated with other tribes by being included on formal membership rolls and/or * * * have been a distributee of a reservation distribution plan, namely the Hoopa/Yurok settlement." *Cahto Tribe*, 38 IBIA at 245 (AR 324) (quoting the Sept. 19, 1995 General Council Minutes). The General Council found that this rendered the Sloans ineligible under Article III.A.3 of the 1967 Articles which provides that persons who affiliate with another tribe are not qualified for enrollment.

The Regional Director wrote: "[i]t appears that the Tribe equates the Act's Settlement Roll with a membership roll and the settlement plan with a reservation distribution plan. This is a conclusion with which we do not agree." AR 4 (2009 Decision). After presenting his analysis of the nature of the Hoopa-Yurok Settlement Act and concluding that the Act was not a termination act contemplated by Article III.A.3 of the Articles of Association, the Regional Director concluded, "[a]s such, the Bureau cannot agree with the Tribe's disenrollment of the Hecker/Sloan individuals on these grounds." *Id.* He also referred to "the Tribe's mis-interpretation of the Hoopa/Yurok Settlement Act, and its mis-application of Article III of its Articles of Association." AR 5. The Regional Director made no finding regarding the reasonableness of the Tribe's interpretation of the Articles of Association.

A. Regional Director Was Required to Defer To A Reasonable Interpretation by the Tribe of Its Articles of Association

Consistent with the federal policy of advancing tribal self-government and the rule that the federal government must avoid unnecessary intrusions into tribal sovereignty, *see supra* at 22-25, Department policy and precedent require that Interior Department officials defer to a Tribe's reasonable interpretation of tribal law. The court in *Ransom* observed that Interior policy provides that "the Department must give deference to a tribe's reasonable interpretation of its own laws." 69 F.Supp. 2d at 150-51. The IBIA has stated that:

> It is well established that a tribe has the primary authority to interpret its own constitution and that BIA must defer to a reasonable interpretation put forth by the tribe.

Brady v. Acting Phoenix Area Dir., BIA, 30 IBIA 294, 299, 1997 WL 316443 (1997); *Holland v. Acting Muskogee Area Dir., BIA*, 33 IBIA 64, 65 n.1, 1998 WL 1006449 (1998) ("Even when acting under its authority to carry out the government-to-government relationship, however, BIA must take care to avoid intruding upon tribal sovereignty. This means, among other things, that BIA must defer to a tribe's reasonable interpretation of its own laws."); *Parker v. S. Plains Reg'l Dir., BIA*, 45 IBIA 310, 318 n.12, 2007 WL 4303070 (2007) ("For cases involving tribal law, the Board defers to a tribe's reasonable interpretation of its own law.").

This requirement extends to interpretations of tribal law made by the governing body of a tribe, such as the General Council. *Brady*, 30 IBIA at 299; *San Manuel Band of Mission Indians v. Sacramento Area Dir., BIA*, 27 IBIA 204, 208, 1995 WL 137508 (1995). The General Council has authority to make adjudicative determinations pursuant to tribal law regarding the grounds for disenrolling members and the evidence upon which disenrollment decisions can be

based.[12] As the Supreme Court noted in *Santa Clara Pueblo*, "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies." 436 U.S. at 66 (citing *United States v. Mazurie*, 419 U.S. 544 (1975)). The IBIA has similarly so held – "even if the Tribe has no tribal court or other standing forum with jurisdiction over disputes of this nature, it can still provide a forum of some sort. In appropriate circumstances, even a general tribal meeting . . . may serve as a forum for the resolution of [] disputes." *Wanatee v. Acting Minneapolis Area Dir., BIA*, 31 IBIA 93, 96, 1997 WL 475855 (1997) (citation omitted).

A tribe's reasonable interpretation of its laws controls over a different interpretation by the Bureau of Indian Affairs even if it is reasonable, particularly in enrollment matters. *San Manuel Band*, 27 IBIA at 208. As the IBIA has explained:

> Where two reasonable interpretations of a tribe's constitution are possible, the rule requiring deference to the tribe's interpretation of its own laws comes into play. That rule has even more force here because the ordinance concerns tribal membership, a matter long considered to be within the exclusive province of the tribes.

Shakopee Mdewakanton Sioux Comm. v. Acting Minneapolis Area Dir., BIA, 27 IBIA 163, 171, 1995 WL 77152 (1995), *remanded on other grounds, Feezor v. Babbitt*, 953 F.Supp. 1 (D.D.C. 1996) (citation omitted).

The Regional Director's 2009 Decision acknowledged that "the Tribe has a right to interpret its own laws," AR 5, but failed to apply this principle. First, the Regional Director failed to even say whether he found the Tribe's interpretation to be reasonable. He merely stated that he "[did] not agree" with the Tribe's conclusion. AR 4. Second, to the extent that the 2009 Decision implicitly found the Tribe's interpretation unreasonable, it was incorrect.

---

[12] The Tribe has no tribal court.

B. The Tribe's Eligibility Determination Was Reasonable

Article III.A.3 of the 1967 Articles provided that a person shall be ineligible for membership if that person has been affiliated with any other tribe, group or band "to the extent of (a) being included on a formal membership roll, . . . [or] (c) having been named as a distributee or dependent of a distributee in a reservation distribution plan." AR 286-287. At the September 19, 1995 meeting, the General Council found that the Sloans were ineligible under both these provisions. This determination was reasonable.

1. The Tribe's Determination That the Hoopa-Yurok Settlement Act Was a Reservation Distribution Plan Was Reasonable.

The General Council held that the Hoopa-Yurok Settlement Act was "a reservation distribution plan" within the meaning of the 1967 Articles and that the Sloans were "distributees" because they were placed on the settlement roll and received settlement funds under the Act. Supp AR 157 (General Council Minutes ¶5(b)). The General Council based its decision on the plain language of the 1967 Articles, and its independent review of information regarding the Hoopa-Yurok distribution plan and the rights of individuals under that plan which were presented to and discussed by the General Council during its meeting on September 19, 1995.

The General Council carried out a "general discussion about the Hoopa/Yurok settlement, participation in it by the above persons, and other evidence available from and knowledge of the Bureau of Indian Affairs about the situation." Supp AR 157-158 (General Council Minutes ¶8). The Council also noted that "[e]ach of the persons received $15,000 settlement." Supp AR 158 (General Council Minutes ¶8). After reviewing this information, the Tribe concluded that "the evidence and information support the conclusion that the persons on the list were either on the membership rolls of the Yurok Tribe or were distributees under the Hoopa/Yurok Settlement Act." *Id.* ¶¶8-9. The General Council then concluded that under the Tribe's 1967 Articles of

Association, individuals who received the $15,000 settlement under the Hoopa-Yurok Settlement Act were "distributees of a distribution plan" and therefore ineligible for membership with the Tribe. *Id.*

The Tribe's conclusion that individuals who received distributions of funds under the Hoopa-Yurok Settlement Act became ineligible for membership in the Cahto Tribe is consistent with the plain meaning of the terms used in the 1967 Articles,[13] and the purpose and effect of the Hoopa-Yurok Settlement Act. The Act was designed to partition the joint Hoopa Valley Reservation between the Hoopa and Yurok Tribes and to settle claims asserted by individuals to proceeds from the harvesting of timber and other natural resources of the Hoopa Valley Reservation. Payments from the settlement fund could reasonably be construed as distributions of assets of that Reservation. For example, the Act provides:

> Upon enactment of this subchapter, the Secretary shall cause all the funds in the escrow funds, together with all accrued income thereon, to be deposited into the Settlement Fund.

25 U.S.C. § 1300i-3(a). The term "escrow funds" is defined as:

> the monies derived from the joint reservation which are held in trust by the Secretary in the accounts entitled . . . .

Id. § 1300i(b)(1). There follows a list of seven accounts of funds derived from the Reservation since funds from the Reservation were deposited in the Settlement Fund. The Act provides that "[a]ny such person on the Settlement Roll may elect to receive a lump sum payment from the Settlement Fund and the Secretary shall pay to each such persons the amount of $15,000 out of the Settlement Fund." *Id.* § 1300i-5(d)(1).

---

[13] Canons of construction require that the Articles of Association be construed according to its plain language. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816) (U.S. Constitution should be construed "according to the import of its terms" and "[t]he words are to be taken in their natural and obvious sense").

The Senate Indian Affairs Committee Report on the Act, *Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, to Clarify the Use of Tribal Timber Proceeds, and for Other Purposes*, S. Rep. No. 100-564 (Sept. 30, 1988) (excerpts attached as Exhibit 1), confirms that the monies distributed to qualified Settlement Roll applicants were a distribution of Reservation assets. The report states:

> The settlement terms are to be supported primarily through the use of funds earned from the reservation and maintained by the Secretary in escrow accounts.

Id. at 15. Further, the report states:

> Among the more important definitions is the definition of "Escrow funds," which lists the accounts maintained by the Secretary of the Interior into which income from Reservation economic activity (as opposed to individual trust monies) are deposited.

Id. at 16.

The Regional Director concluded that the term "reservation distribution plan" in Article III.A.3(c) refers only to a plan under the California Termination Act which stripped tribal members of their status as Indian. AR 4 (2009 Decision). However, this restrictive interpretation is not supported by the plain text of Article III.A.3(c) which makes no reference to the California Termination Act.

2. The Tribe's Determination That The Sloans Had Been Included on a Formal Membership Role With the Yurok Tribe Was Reasonable

The Sloans were disenrolled not only for receiving money under the Hoopa-Yurok Settlement Act, but also for being listed on a voter list of the Yurok Tribe. As shown by the minutes of the September 19, 1995 meeting the Tribe also had information that the Sloans "have been affiliated with other tribes by being included on formal membership rolls." Supp AR 157 (General Council Minutes ¶5(b)). For example, the Council had a copy of a document entitled

"Initial Yurok Voter List" dated June 21, 1979, Supp AR 174, which contained 17 names of individuals with the surname "Hecker" and an address in Laytonville, California. *See also* Supp AR 173. It also included a letter dated June 21, 1979 from the Sacramento Area Office addressed to the Tribe advising that the name Bert Hecker (Sloan) "appears on the INITIAL YUROK VOTER list." Supp AR 178. The BIA included the Sloans on the list of Yurok voters because the Court of Claims had found (pursuant to a request by a member of the Sloan family) that they qualified as "Indians of the Hoopa Valley Reservation." Supp AR 53-55; *see also* Supp AR 27-28 (Cahto Tribe's Reply Brief before Regional Director quoting 25 C.F.R. § 55.3 (1980)). The General Council thus concluded that the Sloans were "on the membership rolls of the Yurok Tribe" or, as noted above, distributes of a reservation distribution plan. Supp AR 158 (General Council Minutes ¶¶8, 9). Thus, the list of putative Yurok members was a reasonable basis for the conclusion that the Sloans were ineligible for membership in the Cahto Tribe under Tribal law. Just as citizens are normally the only persons who can participate in a nation's election, so also tribal members are the only persons who can participate in a tribe's election. *Cf. Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax cannot deprive citizens of their right to vote).

The Regional Director only stated that "Mr. Sloan (and others) indicate that they have not . . . been listed on any membership rolls of the . . . Yurok Tribe." AR 4 (2009 Decision). Thus, the Regional Director rejected the Tribe's factual finding which had been based on documentary evidence, in favor of his own determination which was based on bare assertions made by Mr. Sloan.

By failing to defer to the Tribe's reasonable interpretation of tribal law and substituting his factual determination for that of the Tribe's – for being included on a list of Yurok voters –

the Regional Director acted contrary to federal law in violation of the Administrative Procedure Act.

V. THE REGIONAL DIRECTOR'S 2009 DECISION WAS CONTRARY TO 25 C.F.R. § 62.5(b), TO THE EXTENT THAT THE 2009 DECISION PURPORTS TO RESOLVE ENROLLMENT MATTERS OF INDIVIDUALS WHO WERE NOT SPECIFICALLY IDENTIFIED IN THE APPEALS

Even assuming, *arguendo*, that the Regional Director had authority to review the Tribe's September 19, 1995 disenrollment decision and applied proper law, to the extent that his March 26, 2009 Decision purports to provide relief to anyone other than Gene Sloan, the specific individual who filed the 1999 appeals, the Regional Director acted in excess of authority under federal regulations and contrary to law.

BIA regulations governing enrollment appeals require that the notice of appeal specify the individuals on whose behalf it is taken. The relevant regulation, 25 C.F.R. § 62.5(b), recites that "[a]n appeal may be on behalf of more than one person. However, the name of each appellant must be listed in the appeal." In his March 26, 2009 Decision the Regional Director stated that the appeals which he was deciding were filed by one individual, Gene William Sloan. AR 1. Defendants admit that while each appeal also contained a general statement that the appeal was being made on behalf of his "family members," the appeal did not list by name which family members joined in the appeal, as required by federal regulation. Answer (Doc. 9) ¶ 42. The Regional Director directed the Tribe "to place the Sloan/Hecker [f]amily members' names on the Tribe['s] membership roll immediately" without specifying which family members had appealed or were the subject of the Regional Director's decision. AR 5.

A "federal agency is obliged to abide by the regulations it promulgates." *Sameena Inc., v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998). Procedural rules, as well as substantive rules are binding upon administrative agencies. *Dyniewicz v. United States*, 742 F.2d 484, 485

(9th Cir. 1984). To the extent that the Regional Director's Decision purported to direct the enrollment of any individual other than the specifically-named appellant, it is contrary to the Department's own regulations and in excess of authority in violation of the Administrative Procedure Act.

CONCLUSION

For all of the foregoing reasons, summary judgment should be awarded to the Cahto Tribe and the Regional Director's 2009 Decision should be vacated.

Dated this 21st day of January, 2011.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP

By /s/ Colin Cloud Hampson
Colin Cloud Hampson

Attorneys for Cahto Tribe of the Laytonville Rancheria

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2011, the Memorandum in Support of the Cahto Tribe's Motion for Summary Judgment was filed with the electronic filing system for the United States District Court for the Eastern District of California, to which the following attorneys are registered to be noticed:

Barbara M.R. Marvin
Barbara.Marvin@usdoj.gov
Attorney for Defendants

Winter King
king@smwlaw.com
Attorney for Gene W. Sloan et al.

/s/ Colin Cloud Hampson
Colin Cloud Hampson