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

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| THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al,*<br><br>Defendants,<br><br>and,<br><br>CALIFORNIA VALLEY MIWOK TRIBE<br><br>Defendant-Intervenor | Case No. 1:11-cv-00160-RWR<br><br>Hon. Richard W. Roberts |

**FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION**

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## I. INTRODUCTION

Federal Defendants Ken Salazar, Larry Echo Hawk, and Michael Black, in their official capacities, respectfully submit this response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment. Plaintiffs' Motion, ECF No. 49, challenges the Assistant Secretary – Indian Affairs' August 31, 2011, decision ("2011 Decision") under the Administrative Procedure Act ("APA"). The narrow issue before this Court is whether the Assistant Secretary reasonably halted any further governmental efforts to compel a Tribe to organize, where the evidence in the record demonstrated that the United States has consistently recognized this Tribe's membership as comprised of only five members.

The Assistant Secretary's August decision reflects a policy change based on giving greater weight to considerations of tribal sovereignty. The decision is well reasoned and constitutes the lawful exercise of the expansive discretion Congress delegated to the Assistant Secretary. Indeed, the Assistant Secretary's determination – which defers to this tribe of five and its General Council, first established in 1998 – is entirely consistent with principles of tribal self-determination incorporated in the IRA. While Plaintiffs are entitled to disagree with the Department's decision, disagreement is not enough under the APA, where the decision is in accordance with law and supported by the facts.

## II. BACKGROUND

The Indian Reorganization Act recognizes that "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto . . . ." 25 U.S.C. § 476(a). Sections 476(a) through (d) set out standards and procedures by which a federally-recognized tribe that wishes to organize can adopt an appropriate constitution and bylaws. Specifically, Section 476(a) provides:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when –
>
> > (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
> > (2) approved by the Secretary pursuant to [25 U.S.C. § 476(d)]

25 U.S.C. § 476(a). No provision requires a tribe to organize (or reorganize); instead, upon voting not to reject the IRA, 25 U.S.C. § 478, a tribe "may adopt an appropriate constitution and bylaws." § 476(a). Once submitted, however, the Secretary retains the "power to reject a proposed constitution that does not enjoy sufficient support from a tribe's membership." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) ("*Miwok II*").

In 2004, Congress enacted the Native American Technical Corrections Act, Pub. L. No. 108-204, 118 Stat. 542 (2004), which, among other things, amended Section 476 by adding a new Subsection (h). It states:

> Notwithstanding any other provision of this Act --
> > (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
> > (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

25 U.S.C. § 476(h). This section merely codifies the right to organize that tribes inherently posses independent of the IRA.

## A. FACTUAL AND PROCEDURAL BACKGROUND

### i. History of the Sheep Ranch Rancheria

In 1906, Congress authorized the Bureau of Indian Affairs ("BIA") within the United States Department of the Interior ("Interior") to purchase land and water rights for the use of Indians in California who lived outside of reservations or who lived on reservations that did not contain land suitable for cultivation. Act of June 21, 1906, 34 Stat. 325. In 1915, an agent working for the Office of Indian Affairs, now the Bureau of Indian Affairs, recommended the agency purchase one or two town lots, of one to two acres each, in Sheepranch, California, for a group of 12 Indians; a group that constituted the last remnants of a band of Indians that resided in and near an old mining town designated as "Sheepranch." Decision, AR002051; Letter from the BIA Agent, 2011 AR000001[1]. Then, in 1916, the United States acquired 0.93 acres in Sheepranch for the benefit of those Indians. AR000006. In 1935, the sole Indian resident on the Rancheria, Jeff Davis, voted on the IRA. AR00018; AR000020.

By 1958, Congressional enthusiasm for rancherias reached its nadir, and the California Rancheria Act was enacted. Act of August 18, 1958, 72 Stat. 619, amended by the Act of Aug. 1, 1964, 78 Stat. 390. The Act established a procedure for the termination of the rancherias and the distribution of the land and other assets to eligible Indians in fee simple. *Id*. Following termination, the lands became subject to all state and federal taxes and the distributees and their dependents would lose their special federal status as Indians. *Id*. Moreover, the Department's regulations for implementing the Termination Act provided that, in the case of unorganized

[1] The documents in the administrative record are cited as CVMT-2011-[Bates Number]. For example, the Letter from the BIA Agent is CVMT-2011-000001. For purposes of brevity, Defendants citation in this brief refers only to the Bates Number. Thus, that same Letter is cited as AR000001.

tribes, only the Indians actually residing on the Rancherias prior to distribution were presumptively entitled to share in the distribution of the assets (25 C.F.R part 242, published at 30 Fed. Reg. 10,099, Aug. 13, 1965; rescinded at 46 Fed. Reg. 26,476, May 13, 1981).

In accordance with the Rancheria Act, the Tribe was scheduled for termination in 1966, and an election was held at the Rancheria on the question of whether the Termination Act should apply to the Sheep Ranch Rancheria. The Bureau identified Ms. Dixie as the only member entitled to share in the distribution of assets of the Sheep Ranch Rancheria, because she was the only Indian then residing on the Rancheria. 1966 Memo regarding meeting with Mabel Hodge Dixie, AR000039. Both Mrs. Mata and Mrs. Shelton protested the BIA's determination that Ms. Dixie was the only eligible member. The BIA, however, concluded that neither Ms. Shelton, Ms. Mata, nor their family members could vote on the distribution of assets because they did not meet the eligibility critieria set forth in 25 C.F.R. §§ 242.3(a) and (d). AR000041-46. Ms. Dixie subsequently voted to terminate the Rancheria and accept the distribution plan. In the BIA's 1966 Rancheria Distribution Plan, Ms. Dixie was identified as the sole distributee of the tribal assets and she was subsequently issued a deed to the land. Distribution Plan, AR000048; Deed, AR000054.

Thereafter, the process of terminating the Rancheria came to a halt. In 1967, Ms. Dixie quit claimed the property back to the United States. AR000057-58. Ms. Dixie died in 1971, and pursuant to an October 1, 1971, probate order, the land then passed to Ms. Dixie's husband (Merle Butler) and four sons (Yakima, Melvin, Tommy, and Richard Dixie). AR000061. The Rancheria land is now held in trust by the United States for Ms. Dixie's heirs. AR000633.

Until 1998, the membership of the Tribe appears to have consisted of only Yakima and his brother Melvin, as the sole remaining heirs of Mable Hodge Dixie. The whereabouts of

Melvin, however, were unknown, and Mr. Dixie described himself as "the only descendant and recognized tribal member of the Sheep Ranch Rancheria, of Me-wuk Indians of California." AR 82 (stating he was "the only tribal member of Sheep Ranch Rancheria at the present time."). In 1998, however, Mr. Dixie expanded the membership rolls of the Tribe with the adoption of Silvia Burley, her two daughters (Anjelica Paulk and Rashel Reznor), and a granddaughter (Tristian Shawnee Wallace). AR000110. The BIA later acknowledged, "the documents evidencing your action do not state any restrictions upon the rights of those members." AR000241. As such, the Burleys are now entitled to "all benefits, privileges, rights, and responsibilities of Tribal membership." *Id*.

In September of 1998, BIA staff met with Mr. Dixie and Ms. Burley to discuss membership issues and organization of the tribe under the IRA. The BIA informed Mr. Dixie and Ms. Burley that "Tribe[s] that are in the process of initially organizing usually consider how they will govern themselves until such time as the Tribe adopts a Constitution through a Secretarial Election, and Secretarial approval is obtained." 1998 Letter, AR000172-76. Given the small size of the Tribe, the BIA recommended that the Tribe establish an interim General Council until they should choose to reorganize under the IRA. *Id*.

> You've basically got four people who are golden members, if you want. Now we don't know where Melvin is, so that basically leaves us with three people . . . And so usually what we'll do is we'll call that group of people a general council. They're the body. They're the tribe. They're the body that has the authority to take actions on behalf of the tribe. So in this case, we'd be looking at, possibly, three people."
> ****
> The general council has all the authority. And it's in effect until the tribe, the council or the majority of the general council decides that they need something different or better, which would be your constitution

AR000144. Two months later, Mr. Dixie and Ms. Burley signed GC resolution 98-01, which established the General Council as the interim governing body of the Tribe. AR000177-79.[2/] The passage of the resolution was confirmed by the letter from the Central California Agency-BIA to Mr. Dixie on February 4, 2000. February 4, 2000 letter to Mr. Dixie, AR000240-46. Neither party challenged the Superintendant's determination.

**ii. The Underlying Leadership Dispute and Litigation in This Court and the D.C. Circuit Regarding The Secretary's Discretion to Reject Constitutions**

Soon after Mr. Dixie and Ms. Burley established the General Council, a leadership dispute arose between Mr. Dixie and Ms. Burley. Over the course of the next five years, no less than five constitutions were submitted for purposes of reorganizing under IRA. Each of these constitutions was either not acted upon or rejected outright by the Bureau.[3/] Relevant here, however, it was the Secretary's rejection of Ms. Burley's 2004 constitution that formed the basis of litigation in the District Court, a decision eventually appealed to the D.C. Circuit.

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[2/] Although Mr. Dixie challenges his signature on the 1998 Resolution, the only allegations of fraud in the intervening years leading up to the present dispute were Mr. Dixie's allegations of fraud and misconduct revolving around his resignation as tribal chairman of the General Council on April 20, 1999. *See* February 4, 2000 letter to Mr. Dixie, AR000240-246. In responding to Mr. Dixie's claims, the BIA concluded the CVMT was lawfully established as a General Council. *Id*. at AR000243 ("On November 5, 1998, the majority of the adult members of the Tribe, adopted #GC-98-01, thus establishing a General Council to serve as the governing body of the Tribe."). Mr. Dixie never challenged the BIA's acceptance of the tribal resolution.

[3/] The Secretary did not call an election to vote on the 1999 Yakima-Burley Constitution. The 1999 Dixie-Constitution was rejected because "the body that approved it did not appear to be the proper body to do so." *Cal. Valley Miwok Tribe v. Pac. Reg'l Dir., Bureau of Indian Affairs*, 51 IBIA 103, 109 (2010). Following Dixie's attempt, Burley and her daughter Rashel adopted their own tribal constitution on March 6, 2000, withdrew this constitution, and subsequently adopted a new version in September of 2001; this constitution was sent to the BIA CCA and was also rejected. *Miwok* I, 424 F.Supp.2d 197. Then, in 2004 Burley made a third attempt to submit a constitution that conferred membership upon only Ms. Burley, her family, and their descendants. *Id.* at 203 n7.

In early 2004, Ms. Burley submitted a constitution in a third attempt to reorganize the tribe under the IRA; this constitution conferred tribal membership only upon Ms. Burley and her descendants. *Cal. Valley Miwok Tribe v. United States*, 424 F.Supp.2d 197, 203 n.7 (D.D.C. 2006) ("*Miwok I*"). The Secretary declined to approve the constitution, finding that it did not reflect the participation of the greater tribal community. *See Miwok II*, 515 F.3d at 1267. Ms. Burley subsequently brought suit in district court claiming the Secretary's refusal was an unlawful intrusion in the internal affairs of the Tribe, and that under Section 476(h), the Secretary was left with no discretion to reject the proposed constitution. *Id.* at 1266. The District Court rejected Ms. Burley's arguments, finding that Ms. Burley's reading of 476(h) was "erroneous." *Miwok I*, 424 F.Supp.2d at 203.

On appeal, the D.C. Circuit affirmed the District Court's decision, and found reasonable the Secretary's argument that 476(h) allowed the Secretary "to reject any constitution that does not 'reflect the involvement of the whole tribal community.'" *Id*. The Secretary argued that the broad grant of authority in conjunction with 476(h) "includes the power to reject a proposed constitution that does not enjoy sufficient support from a tribe's membership." *Id*. The D.C. Circuit found this reading permissible under *Chevron* and concluded that the Secretary's decision to reject what the court characterized as Ms. Burley's "antimajoritarian gambit" was permissible under the APA.

**iii. BIA's attempts to initiate the Tribe's organization under the IRA.**

Following the District Court's dismissal of Burley's lawsuit, but while Burley's appeal before the D.C. Circuit was pending, the Superintendent issued the November 6, 2006 Decision, the goal of which was to initiate the Tribe's organization under the IRA. AR001261-62. The Agency informed both parties that it would publish a notice of the General Council meeting

inviting "the members of the Tribe and potential members" to participate. *Id*. These efforts would "initiate the reorganization process," but the BIA cautioned both parties that the organization efforts would proceed, "even if one or both of you declines to participate." *Id*.

Burley subsequently appealed the November 2006 Decision to the Regional Director. 2007 Regional Director Decision, AR001494-98. On April 2, 2007, the Regional Director determined that intervening in an "internal tribal dispute" was required because the leadership dispute posed a threat to the government-to-government relationship with the Tribe. *Id.* Because the leadership dispute was at an impasse, the Regional Director concluded it was reasonable that the agency attempt to bring together a group of putative members who would be entitled to participate in the efforts initiated by the 2006 Decision. *Id*. at 5, AR001498.

Then, a week after the Regional Director's decision, the BIA published notices in local newspapers announcing plans to initiate the Tribe's organization of a formal governmental structure. Notice, AR001501. The notice described the group of potential members as lineal descendants of: 1) individuals listed on the 1915 census of the Sheepranch Indians; 2) Jeff Davis (the sole individual on the IRA voter list in 1935); and 3) Mabel Hodge Dixie (the sole distributee under the 1964 Distribution Plan). Those individuals that believed they were lineal descendants were encouraged to submit a birth certificate, death certificate, or other official documentation to establishing their connection to the Sheep Ranch Rancheria. As a result of the notice, the Bureau received 503 applications, but the Bureau had only completed an "internal review" of the applications when Ms. Burley appealed the decision to the Interior Board of Indian Appeals. Decl. of Troy Burdick, Superintendent of the Central California Agency, AR002104-06.

On appeal, Ms. Burley argued, among other things, that the Tribe was already organized, that BIA's proffered assistance was not requested by the Tribe, and that the BIA's actions constitute an impermissible intrusion into tribal government and membership matters that are reserved exclusively to Indian tribes. IBIA Decision, AR001685-1705.[2] The Board did not reach the merits of Ms. Burley's challenge, and instead dismissed the matter because: 1) any argument regarding organization or the participation of putative members was either "explicitly or implicitly" addressed in the 2005 final decision of the Assistant Secretary and, therefore, outside the jurisdiction of the Board, AR001702; 2) and the BIA's decision to "create a base roll of individuals who satisfy criteria that BIA has determined . . . [and] who will be entitled to participate – effectively as members . . . – is properly characterized as an enrollment dispute," over which the Board also lacks jurisdiction. AR001702-03. The Board, therefore, referred the second claim to the Assistant Secretary.

**iv. Pending litigation and the December 2010 and August 2011 decisions**

On December 22, 2010, the Assistant Secretary issued a decision letter intended to resolve the citizenship question that the Board had referred. Almost immediately, Plaintiffs filed suit and requested injunctive relief. ECF No. 1, 8.[3] "[R]ecognizing the complex and fundamental nature of the underlying issues," the Assistant Secretary withdrew the December

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[2] Ms. Burley also challenged the 2006 decision on two additional bases: 1) as partially implemented, it violated the Tribe's Fiscal Year (FY) 2007 contract with BIA under the Indian Self-Determination and Education Assistance Act (ISDA), through which the Tribe performed governmental and enrollment functions; or, in the alternative, that the Decision constituted an unlawful reassumption of that contract, *see* 25 C.F.R. Part 900, Subpart P (Retrocession and Reassumption Procedures); and 2) the Regional Director erred in stating that the Tribe was never terminated and thus is not a "restored" tribe, which is a status that is relevant to the Tribe for purposes of Indian gaming.

[3] Plaintiffs subsequently withdrew their motion for injunctive relief in light the Assistant Secretary's reconsideration. *See* ECF No. 19.

decision and requested additional briefing from the parties. April 1, 2011, Withdrawal, AR001998-99; April 8, 2011, request for briefing, AR002004-06.[4] Both Mr. Dixie and Ms. Burley submitted briefs addressing the issues identified by the Assistant Secretary. Dixie Brief on Reconsideration, AR (Supp.) 002121-58; Burley Brief on Reconsideration, AR (Supp.) 002322-51.

On April 19, 2011, both Plaintiffs and Federal Defendants requested this Court stay the litigation and all attendant deadlines during the pendency of the Assistant Secretary's reconsideration. ECF No. 22. This Court granted the first stay and a subsequent extension until September 2, 2011. ECF No. 24.

On August 31, 2011, the Assistant Secretary issued his reconsidered decision. *See* 2011 Decision, AR002049-57. Based on the materials submitted by Mr. Dixie and Ms. Burley, the litigation records from both the prior federal court actions, and the proceedings before the Board, the Assistant Secretary concluded that: 1) The tribe is a federally recognized tribe, and has been continuously recognized by the United States since 1916; 2) at the present date, the citizenship of the Tribe consists solely of Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace; 3) the Tribe operates under a General Council form of government, pursuant to Resolution #GC-98-01, which was passed in 1998; 4) the General Council is vested with the governmental authority of the Tribe, and may conduct the full range of government-to-government relations with the United States; 5) although the General Council form of

[4] Among which, were: 1) whether the Secretary has an obligation to ensure that potential tribal members participate in an election to organize the Tribe; 2) the parties' respective positions regarding the status of the Tribe's organization and the Federal Government's duty to assist the Tribe in organizing; and 3) the respective parties' views on what the Secretary's role is in "determining whether a tribe has properly organized itself." Assistant Secretary, April 8, 2011, letter, AR002004.

government does not render the Tribe an "organized tribe" under the IRA, as a federally recognized tribe it is not required to organize in accord with the procedures of the IRA; 6) Under the IRA, as amended, it is impermissible for the federal government to treat tribes not organized under the IRA differently from those organized under the IRA; and 7) with respect to finding number six, the Assistant Secretary "diverge[s] with a key underlying rationale of past decisions . . . and decide[s] to pursue a different policy direction," and finds that "it is inappropriate to invoke the Secretary's broad authority to manage 'all Indian affairs and [] all matters arising out of Indian relations . . . to justify interfering with the [tribe's] internal governance."

As it stands today, the Tribe continues to be governed by a General Council, first established in 1998, and that General Council is comprised of the five adult citizens of the Tribe. Although the tribe remains unorganized, "unless asked by the CVMT General Council, the Department will make no further efforts to assist the Tribe to organize and define its citizenship." *Id*. at 2055.

## III. STANDARD OF REVIEW

### A. Administrative Procedure Act ("APA")

Review of this action falls under the APA, 5 U.S.C. § 706 *et seq*. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (reviewing alleged NEPA violation under the APA). The APA establishes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 703-704 (D.C. Cir. 2009).

This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also BellAtlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1202-08 (D.C. Cir. 1996). Thus, "[u]nder familiar and well-established principles," an agency decision is not arbitrary and capricious if the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1476 (D.C. Cir. 1998) (alterations in original; citations omitted).

While the considerable deference provided to the agency does not shield the decision from a "thorough, probing, in-depth review," the question is not whether the Court itself would have made the same decision, because "the court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 415-16. Rather, the Court must uphold the decision if the agency followed the required procedures, evaluated relevant factors, and reached a reasoned decision which did not constitute a clear error of judgment or exceed the bounds of its statutory authority. *Id*. While courts may require "a more detailed justification" when its prior policy has engendered serious reliance interests, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S.Ct. 1800, 1811 (2009), it remains Plaintiffs' burden to prove that these criteria have not been met and that the agency's decision was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

**B. Summary Judgment Under the APA**

In reviewing final agency action under the APA, "the standard [for summary judgment] set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the

administrative record." *Pub. Emps. for Envtl. Responsibility v. U.S. Dept. of the Interior*, 2011 WL 6812854 (D.D.C. December 28, 2011) (citing *Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs*, No. 01–0273, 2005 WL 691775 at *7 (D.D.C. Mar. 23, 2005)). In APA actions, the Court reviews the agency's administrative record, and may not "find" underlying facts. The only issues presented are issues of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005)).

## IV. ARGUMENT

### A. THE AUGUST 2011 DECISION IS THE PRODUCT OF REASONED DECISIONMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The central issue in this case is the extent to which the AS-IA must compel a Tribe's organization in the absence of the Tribe's consent. Part and parcel of that question is which individuals comprise the Tribe and what governmental body must the Assistant Secretary recognize in the interim. The August Decision reasonably concludes that: 1) the Federal Government does not have an obligation to compel a tribe's organization in the absence of a tribe's request; 2) the Federal Government does not have an obligation to compel the inclusion of a tribe's potential citizens, where such determinations are best left to its five actual citizens; 3) and the Tribe's General Council, established by the tribe's actual citizens and recognized by the Department since 1998, is a sufficient tribal entity such that the United States can conduct government to government relations.

Notwithstanding Plaintiffs' arguments to the contrary, the questions posed by the particular circumstances of this Tribe implicate the very policy judgments that Congress delegated to the Assistant Secretary. The 2011 Decision constitutes a reasonable exercise of the

Assistant Secretary's expansive authority, it is supported by the facts as well as the law, and, as a result, should be upheld.

**i. Congress delegated to the Assistant Secretary wide latitude in managing all Indian affairs, and the August Decision is a proper exercise of that authority.**

Congress delegated to the Assistant Secretary the power to manage "all Indian affairs and [ ] all matters arising out of Indian relations." 25 U.S.C. § 2. As the D.C. Circuit observed in *Miwok II*, "[w]e have previously held that this extensive grant of authority gives the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians." 515 F.3d at 1267 (citing *Udall v. Littell*, 366 F.2d 668, 672 (D.C.Cir.1966) ("In charging the Secretary with broad responsibility for the welfare of Indian tribes, Congress must be assumed to have given [her] reasonable powers to discharge it effectively.").

Plaintiffs contend, however, that the Assistant Secretary's Decision "reaches far beyond the scope of the issue referred by the Board and addresses issues the Board properly dismissed . . . ." Pls.' Mem. at 43. Plaintiffs go so far as to argue that the Assistant Secretary "lacked jurisdiction" to address any issues related to "the organizational status of the tribe, the recognition of the Burley government, and the participation of the entire Tribal community in the organizational process." *Id.* at 43-44. Plaintiffs' arguments are without merit for a number of reasons.

First, Plaintiffs' attempt to circumscribe the Assistant Secretary's discretion requires this Court to disregard Congress's expansive delegation of authority that vests the Assistant Secretary

with the broad power to manage all Indian affairs. *See* 25 U.S.C. § 2; *see also* 25 U.S.C. § 9;[5] 43 U.S.C. § 1457; *Miwok II*, 515 F.3d at 1267. While the Board is of limited jurisdiction, *see* 43 C.F.R. §§ 4.330(b),[6] 4.337(b),[7] no such jurisdictional limits apply to the Assistant Secretary.

Second, and as a corollary, Plaintiffs provide bare legal support for the sweeping proposition that Congress's expansive delegation of authority is circumscribed by the scope of the Board's referral. Plaintiffs initially rely on 25 C.F.R. § 2.2, the regulatory definition of "appeal," but Plaintiffs provide no explanation as to how that provision operates as a restriction on the discretionary authority of the Assistant Secretary. Plaintiffs reliance on 43 C.F.R. § 4.318[8] is likewise misplaced, where the regulation only imposes a limitation on the Board's

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[5] Under 25 U.S.C. § 9, Congress authorized the Executive Branch to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs . . . ."

[6] Which states in pertinent part:

> Except as otherwise permitted by the Secretary or the Assistant Secretary--Indian Affairs by special delegation or request, the Board shall not adjudicate:
>
> (1) Tribal enrollment disputes;
>
> (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority;

[7] "Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary--Indian Affairs for further consideration."

[8] Section 4.318 states: "An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." This provision governing the Board's scope of review is located under the subpart titled "General rules applicable to proceedings on appeal before the Interior Board of Indian Appeals." "43 C.F.R. § 4.318 is not an independent grant of jurisdiction for the Board to review BIA decisions at will. Rather, it defines the scope of

scope of review on appeal, not the Assistant Secretary's authority to manage all Indian affairs. Not only are Plaintiffs' regulatory citations inapposite, but Plaintiffs' interpretation is directly undermined by the wealth of authority that establishes the Assistant Secretary's "plenary administrative authority in discharging the federal government's trust obligations to Indians." *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir.1986); *Udall*, 366 F.2d at 672.

Finally, Plaintiffs' argument that the Assistant Secretary acted unlawfully in "overturning" the 2004 and 2005 decisions is equally unavailing. Plaintiffs' contention that the Assistant Secretary cannot address his own earlier determinations simply because they are "final for the DOI and not subject to further appeal within the DOI" is directly at odds with Supreme Court precedent that the APA does not require "regulatory agencies to establish rules of conduct to last forever." *State Farm*, 463 U.S. at 42. Indeed, the Assistant Secretary has the full authority to reconsider "the wisdom of its policy on a continuing basis," *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863-864 (1984)), and Plaintiffs' attempts to undermine the 2011 Decision on procedural grounds ultimately fails.

**ii. It is axiomatic that an agency is free to alter its policies so long as it provides a reasonable explanation.**

Under the APA's arbitrary-and-capricious standard, "[t]he scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43; *see* 5 U.S.C. 706(2)(A). That is no less true when the policy under review reflects a change in position. *See Fox*, 129 S.Ct. at 1811.

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the Board's authority to review the BIA's decision which are otherwise properly before it." *Split Family Support Group v. Nw. Regional Director*, No. IBIA 01-29-A, 36 IBIA 5,6 (2001).

The APA does not require "[r]egulatory agencies [to] establish rules of conduct to last forever." *State Farm*, 463 U.S. at 42 (quoting *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)). Instead, under the APA, a court must uphold an agency's revised policy so long as the agency has given a reasoned explanation for the change. *See Anna Jaques Hosp. v. Sebelius*, 583F.3d 1 (D.C. Cir. 2009). As the Supreme Court recently reaffirmed,

> [an agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.

*Id*. at 1811 (emphases in original). Most significantly, the majority in *Fox* declared that no heightened APA review exists for decision involving a change in agency position. The Court noted that it found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard." *Id.* at 1810. Further, the Court's earlier opinions "neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance;" indeed, "[t]he statute makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 1811.

The reasoning of *Fox* and *Anna Jaques* make it clear that "it is not relevant under *State Farm* whether an agency is reversing existing policy or simply creating a new one; instead, what is relevant is whether the agency supplied a 'rational connection between the facts found and the choice made.'" *Bluewater Network v. Salazar*, 721 F.Supp.2d 7, 22 (D.D.C. 2010) (citing *State Farm*, 463 U.S. at 43).

**a. The Assistant Secretary's determination that the Department need not compel organization in the absence of Tribal consent is permissible under the IRA.**

The Assistant Secretary was fully justified in halting the Department's efforts to expand the citizenship of the Tribe. Decision at 6. Although the Assistant Secretary is vested with the authority to manage "all Indian affairs and [ ] all matters arising out of Indian relations." 25 U.S.C. § 2; *see also supra*, Section I(A), the "sovereign nature of Indian tribes cautions the Secretary not to exercise freestanding authority to interfere with a tribe's internal governance." *Miwok II*, 515 F.3d at 1267. While the exercise of this authority is "vital" when the government is determining whether a tribe is organized under the IRA, *id*., it does not flow from this authority that the Assistant Secretary must *compel* a tribe to organize under the IRA.

The Assistant Secretary's determination that "[o]nly a upon request from the General Council will the Department assist the Tribe in . . . developing and adopting other governing documents," AR 2056, is entirely consistent with the IRA's emphasis on tribal autonomy and self-determination. In 1934, Congress passed the IRA with the general recognition that the allotment policy had failed to serve any beneficial purpose for Indians.[9] The "overriding purpose" of the IRA was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417

[9] For most of the 19th century, the prevailing national policy toward Indians was to segregate reservation lands for the exclusive use and control of Indian tribes. *See Cnty. of Yakima*, 502 U.S. at 253-54. Late in the 19th century, however, Congressional sentiment gave way to a policy of "allotting" reservation lands to tribal members individually. The objectives of allotment were simple and clear cut: Extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large. *Id.*; *see also* General Allotment Act, ch. 119, 24 Stat. 388 (1887).

U.S. 535, 542 (1974).[10] To that end, the Act encouraged each tribe to "organize for its common welfare." 25 U.S.C. § 476(a); *see also Cnty. of Yakima*, 502 U.S. at 235 (1992) (the IRA marked an "abrupt end" to the prior policy of allotment and a return "to the principles of tribal self-determination and self-governance."); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Not satisfied solely with centralized government of Indians, [the IRA] encouraged tribal governments and courts to become stronger and more highly organized.").

The vehicle for the realization of the goals of tribal self-determination and self-governance can be found in Section 16, which delegates to each individual tribe the discretion to organize and "adopt an appropriate constitution and bylaws . . . ." *See* 25 U.S.C. § 476. The Act provides two ways a tribe *may* organize, and subsequently seek the Secretary's approval of the proposed constitution. First, "[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when" ratified by a majority vote of the adult members of tribe and approved by the Secretary. Section 476(a). Second, "each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section." Section 476(h).

It is the tribe's responsibility to initiate efforts to organize, however, not the Assistant Secretary. Thus, while the Assistant Secretary must ensure that the *proposed* constitution and organization "reflect majoritarian values," *Miwok II*, 515 F.3d at 1267-68, the Act does not impose upon the Assistant Secretary the duty to compel a tribe to organize under § 476(a) or (h).

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[10] *See also* H.R. Rep. No. 73-7902 (1934), and S. Rep. Gen. No. 73-2755 (1934) (the originally proposed legislation was captioned as an Act "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self government and economic enterprise.").

Vesting the Assistant Secretary with such authority over a tribe's internal affairs is not only antithetical to the essential nature of the Act, *see Morton*, 417 U.S. at 542, but would intrude upon those matters of self-governance that are the sole province of the tribe. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 55-56 (1978) (citations omitted) (stating that Indian tribes "retain[] their original natural rights in matter of self-government, and they "remain a 'separate people, with the power of regulating their internal and social relations,' [making] their own substantive law in internal matters, . . . and . . . [enforcing] that law in their own forums[.]") (citations omitted). Should the Tribe, through the General Council, of which Mr. Dixie is a member, move forward with organization in a manner that thwarts the will of the *enrolled members*, then the Secretary retains the discretionary authority to reject any governing documents generated through that organizational process. *See Miwok II*, 515 F.3d at 1266.

The Assistant Secretary's policy, embodied in the August Decision, "is permissible under the statute, [] there are good reasons for it, and [] the agency believes it to be better, which the conscious change of course adequately indicates." *Fox*, 129 S. Ct. at 1811. Because the Secretary's interpretation is permissible under the statute, that decision is due deference. *See Chevron*, 467 U.S. at 844; *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (emphasizing, subsequent to *United States v. Mead Corp.*, 533 U.S. 218 (2001), that the fact that an agency "reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due."); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) ("[D]eference under Chevron… does not necessarily require an agency's of express notice-and-comment rulemaking power."); *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) ("The Court [in Mead] explicitly stated that the absence of notice-and-comment rulemaking did 'not decide the case,'. . . .") (Breyer, J.

concurring); *see also Miwok II*, 515 F.3d at 1266 (observing that although the Assistant Secretary's interpretation was neither subject to notice and comment rulemaking nor formal adjudication, that *Chevron* – rather than *Skidmore v. Swift & Co*., 323 U.S. 134 (1944) – provides "the appropriate legal lens through which to view the legality of the Agency interpretation." ).

**b. The Assistant Secretary's conclusion that the current tribal membership consists solely of Yakima Dixie, Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace is consistent with federal Indian law and supported by the record.**

Previously, the BIA had engaged in efforts to identify a "putative group" of non-members who, based on criteria developed by the federal government, would be eligible to: 1) draft membership requirements; and 2) participate in the eventual reorganization of the tribe under the IRA. *See* November 2006; 2007 notices. The duty and responsibility of defining the contours of tribal membership, however, is within the exclusive province of the five enrolled members. *See Santa Clara*, 436 U.S. at 55-56. But the August Decision is not the Assistant Secretary's determination of the Tribe's membership, as Plaintiffs would have it. Instead, the Decision merely reaffirms the state of affairs that has existed since 1998, which includes Mr. Dixie's unequivocal adoption of the Burley family. In this regard, the 2011 Decision only marks the BIA's decision to defer, once again, to these individuals to develop membership criteria.

As the Superintendent observed in September of 1998 following the meeting with Mr. Dixie and Ms. Burley, unusual circumstances surrounded this Tribe because the federal government had never completed the termination process. AR000172-73. Thus, there existed no court decision identifying those initial members entitled to participate in the organization of the tribe. *Id*. The agency, however, addressed this problem and observed that with the passing of Mabel Hodge Dixie, a probate was ordered, and an administrative law judge issued an order of

determination of heirs in 1971, which identified five persons as having an interest in the Rancheria.[11] Under those circumstances, "for purposes of determining initial membership of the Tribe, [the agency] [is] held to the order of the Administrative Law Judge," and the two remaining heirs, Melvin and Yakima,[12] "are those person possessing the right to initially organize the Tribe." *Id.*[13]

In addition to the Dixie brothers, the BIA recognized that Mr. Dixie had unconditionally adopted Ms. Burley, her two daughters, and her granddaughter, and that those adoptees who were of majority age also possessed the "right to participate in the initial organization of the tribe." *Id*. Indeed, the BIA later acknowledged that "the documents evidencing the adoption do not state any restrictions upon the rights of those members." AR000241. As such, the Burleys are now entitled to "all benefits, privileges, rights, and responsibilities as members of the tribe." *Id*. This is the state of affairs that has existed since 1998, and the Assistant Secretary's

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[11] Merle Butler (husband, deceased), Richard Dixie (son, deceased), Yakima Dixie (son), Melvin Dixie (son), and Tommy Dixie (son, deceased).

[12] At the time of the 1998 meeting, however, the whereabouts of Melvin were unknown. *See* AR000144 ("you've [the Tribe] basically got four people who are golden members . . . we don't know where Melvin is, so that basically leaves us with three people."). Then, in February of 2000, the BIA again confirmed that, at a minimum, those persons entitled to participate in the organization of the Tribe were those persons over the age of 18 and who were "now living and listed on either 1) the Distribution Plan or 2) the Order of Determination of Heirs, and the lineal descendants of those persons." Although the Burleys fit neither description, the adoption and subsequent enrollment action extended to Ms. Burley and Ms. Reznor's entitlement to participate. AR000242.

[13] The membership of this small tribe was also confirmed in 1994 by Mr. Dixie himself when he wrote the BIA, requesting assistance with home repairs. AR000082. In that letter, Mr. Dixie described himself as the "only tribal member of Sheep Ranch Rancheria at the present time." *Id*. Mr. Dixie remained the lone surviving member of the Sheep Ranch Rancheria until 1998, when Mr. Dixie decided to expand membership and "signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolling Burley's two daughters and her granddaughter." AR000110-14.

confirmation in 2011 should be accorded "considerable deference." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, (1971).

The Assistant Secretary's decision that membership rights of an unorganized Rancheria inure only to those residents then residing on the Rancheria is also consistent with the law governing unorganized Rancherias. Historically, tribes that were unlawfully terminated under the Termination Act later restored their federal recognition through litigation.[14] AR000172; AR001689. The resulting court judgment would then identify the tribal members entitled to organize. *Id*. That class of persons was typically limited to individuals listed as "distributes or dependent members on the federally approved Distribution Plan." AR000172; *see also Alan-Wilson v. Sacramento Area Dir.*, 30 IBIA 241, 255 (1997) (concluding that the individuals entitled to participate in the organization of the Cloverdale Rancheria was based on the list of distributees and the distributees' lineal descendants.).

*Alan-Wilson* involved two competing governments vying for control of the Cloverdale Rancheria, a tribe that was terminated, then later restored under the stipulated judgment in *Hardwick v. United States*, Civil No. C-79-1710, 2006 WL 3533029 (N.D. Cal. Dec. 22, 1983). One party, represented by Mr. Wilson, was comprised of potential members, i.e. those individuals that were not lineal descendants of distributees or dependent members. The other, was comprised of the distributees, dependent members, or lineal descendants. Relevant here, the

[14] In a few cases, terminated Rancherias were restored by acts of Congress. *See*, *e.g.*, 28 U.S.C. § 1300l (Auburn Indian Restoration); 28 U.S.C. § 1300m (Paskenta Band of Nomlaki Indians of California Restoration); 28 U.S.C. § 1300n (Graton Rancheria Restoration). These Congressional restorations specifically expanded the membership as broader than simply residents and lineal discendants. *See* Section 1300l-3; Section 1300m-4; Section 1300n-4. As a result, if there is going to be an expansion of membership beyond the Department's practice in settling restoration litigation, an act of Congress is required.

Interior Board of Indian Appeals vacated the recognition of those two competing governments and determined that the only individuals entitled to participate in the reorganization of the tribe were distributees, dependent members, and lineal descendants of distributees or dependent members. 30 IBIA at 257 (stating that if the "Cloverdale Rancheria were restored to the status of a group of adult Indians residing on a reservation as of the time just prior to distribution, those adult Indians [recognized as members and eligible to organize] would be distributees, dependent members, and, by extension, their adult lineal descendants."). Following the dissolution of both tribal governments, the Board directed the Area Director, Mr. Dorson Zunie, to determine whether the Bureau had consistently applied the *Hardwick* criteria, i.e. whether the individuals were distributees, dependent members, or lineal descendants, to the remaining Rancherias. *See Alan-Wilson v. Acting Sacramento Area Dir.*, 33 IBIA 55, 56-7 (1998) ("*Wilson II*"). The Zunie report specifically found that in cases where BIA assisted in the reorganization of rancherias like Cloverdale (i.e., those lacking pre-termination constitutions), it took the position that the individuals eligible to participate were distributees and their lineal descendants. *Id.* Thus, the distribution plans prepared for Rancherias that were to be terminated – whether or not the termination process was completed – reflected actual membership in unorganized tribes, *i.e.*, "the Indians residing on a reservation." 25 U.S.C § 479.

As a result, the *Alan-Wilson* line of reasoning applies with equal force here, despite the fact that this Tribe never completed the termination process. As the Department acknowledged, "unusual circumstances" surrounded this Tribe because although the Department initiated the termination process, it was never completed. But the Department also had to take into account Mr. Dixie's unequivocal adoption of Ms. Burley and her family. Thus, the BIA reasonably concluded that Mr. Dixie, Ms. Burley, and her family members that were of majority age also

possessed the right to participate in the initial organization of the tribe. This decision occurred in 1998, and the Assistant Secretary's 2011 Decision affirms that decision. While Plaintiffs may prefer that membership be determined based on historical records and rolls, the inquiry is whether the Assistant Secretary's policy is permissible and whether there are good reasons for it. *See Fox*, 129 S.Ct. at 1811. Such is the case here.

Moreover, the Assistant Secretary's affirmation of those five individuals' citizenship does not "exclude a majority of [the] Tribe's members from citizenship," nor does it work to deprive Plaintiffs of "voting or other fundamental rights" as Plaintiffs suggest. Pls.' Mem. at 33 n.14 (citing ICRA, 25 USC § 1302(8)). As a preliminary matter, Plaintiffs provide no case law to support the notion that the federal government's actions can constitute a violation of ICRA. And that is for good reason. The "central purpose of the ICRA and in particular of Title I was to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans, 'and thereby to 'protect individual Indians from arbitrary and unjust actions *of tribal governments*.'" *Santa Clara*, 436 U.S. at 61 (emphasis added); *see also* § 1302(a) ("No Indian tribe in exercising powers of self – government shall –deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."). Additionally, Plaintiffs' argument assumes the very fact in dispute: That they are, in fact, members of the tribe. Because Plaintiffs, other than Mr. Dixie, are not members and have never been considered members, they have no rights of which they can be deprived.

Second, for the past fourteen years, the Assistant Secretary has consistently dealt with the General Council, its five members, and – aside from Mr. Dixie – the Department has *never* recognized Plaintiffs' faction nor acknowledged the remaining Plaintiffs as members of the Tribe. The Assistant Secretary's determination merely reflects Mr. Dixie's own choice to adopt

and enroll the Burleys such that they are entitled to all of the benefits and burdens of membership in the Tribe. In the absence of an overriding treaty or congressional enactment, the tribe retains the authority to define the contours of tribal membership, s*ee Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002) (finding that the Department appropriately declined to recognize a tribal election where tribal members were excluded from the tribe in contravention of the Act of 1970 and the Treaty of 1866), and the Assistant Secretary appropriately deferred, once again, to those membership determinations.

Finally, Plaintiffs' argument "that the overwhelming weight of evidence in the record shows that the Tribe's membership is not limited to the Burley Faction and Yakima Dixie," Pls.' Mem. 20, conflates the status of those *potential* members who submitted genealogies with those five *actual* members who the Assistant Secretary has long acknowledged. Plaintiffs inaccurately portray the notice as "identifying the Tribe's *known historical members* and inviting descendants of those *members* to submit documentation to the BIA." *Id*. at 22 (emphasis added). The Notice does not, as Plaintiffs suggest, definitively accord membership to those individuals who meet the criteria. The Notice states only that "the first step in the organizational process is to identify *putative* members of the Tribe who *may be eligible* to participate in all phases of the organizational process of the Tribe." AR001501 (emphasis added). Indeed, by May of 2007, the BIA had only conducted an "internal review" of the applications and genealogies. While the BIA had concluded which applicants are lineal descendants, the BIA did not send out those determinations and concluded that it would not initiate the organizational process until the IBIA decided Ms. Burley's appeal. Burdick Decl., AR002105-06.

Although the BIA recommended the criteria, it does not follow *a fortiori* that those individuals who submitted genealogies were members, either as a matter of fact or matter of law.

The 2011 Decision appropriately "clears away the misconception that these individuals have inchoate citizenship rights that the Secretary has a duty to protect." Decision, AR002050-51. Instead, these "potential citizens, if they so desire, should take up their cause with the CVMT General Council directly." *Id*. at AR2055.

The Assistant Secretary's deference to the Tribe's General Council is in accord with the principle that it is the sole responsibility of a tribe to define the contours of membership; it is not the domain of the Courts, *see* AR002054; *Santa Clara*,[15] nor the federal government. *See Williams v. Gover*, 490 F.3d 785, 790 (9th Cir. 2007) (observing that the restored Rancheria had the power to narrow the membership requirements, and that "BIA could not have defined the membership of Mooretown Rancheria, even if had [sic] tried."). And the Assistant Secretary's affirmation that the Tribe consists of the original five members rests upon a "rational connection between the facts found and the choice made." *See Kennecott Greens Creek Min. Co. v. Mine Safety and Health Admin*., 476 F.3d 946, 954, 961 (D.C. Cir. 2007) (citation omitted) (upholding the agency action, and observing that the "standard of review is deferential, and [the court] can find nothing in the administrative record that would justify second-guessing the agency's conclusions.").

**iii. The Assistant Secretary's decision to recognize the Tribe's General Council as sufficient to continue government to government relations is reasonable.**

The Department has a duty to recognize a tribal government if possible. *See Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) (holding that, by refusing to recognize either side in an election controversy, BIA had "effectively recognized a two-headed administration with no real power to govern"). In this case, the Department fulfilled its duty when it concluded the

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General Council, first established in 1998, was sufficient to conduct government to government relations. Decision AR002056. Although the struggle for control of the tribe has at various times threatened to impair the government to government relationship between the tribe and the United States, the Assistant Secretary's decision to continue working with the General Council, *see* August 2011 Decision, AR002049, 2055-56, properly conforms with the longstanding principle that "where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination." *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150 (D.D.C. 1999) (citing *Wheeler v. U.S. Dep't. of Interior*, 811 F.2d 549, 551 (10th Cir.1987)).

Plaintiffs' belated attempt to overturn the 1998 General Council resolution based upon purported deficiencies, Mem. 36-37, is insufficient to carry their burden under the APA for a number of reasons. First, Plaintiffs cannot ignore the uncomfortable reality that the Assistant Secretary has recognized the General Council, of which Mr. Dixie is a member, on numerous occasions throughout the past 14 years. *See* Dec. 22, 1999 letter, AR 208-209; Feb. 4, 2000 letter;[16] Mar. 7, 2000, AR000254;[17] Oct. 31, 2001 AR000261; Nov. 24, 2003, AR000356;[18] Nov.

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[16] This letter informed Ms. Burley that Mr. Dixie had requested a meeting with the Department regarding the allegations of fraud associated with Mr. Dixie's resignation. At that meeting, Mr. Dixie personally requested that "only members of the General Council and one non-attorney representative for each side participate in this meeting."

[17] This letter reaffirmed that the General Council is comprised of Mr. Dixie and the Burley family. The letter also rejected Mr. Dixie's contention that the adoption of the Burley family was a "limited enrollment," that "the documents signed by Yakima Dixie to effect [the Burley's] enrollment expressed no such limitation," and that Mr. Dixie's subsequent actions "establish the contrary view that [the Burley's] possess full rights of membership . . . ."

[18] "As of this date, the Bureau of Indian Affairs maintains a government to government relationship with the California band of Miwok Indians through the tribal council chaired by Ms. Sylvia Burley."

11, 2006, AR001260-62;[19] Feb. 23, 2007, AR001455.[20] Indeed, throughout the years, the Department has entered into ten 638 contracts with the Tribe and the General Council. *See, e.g.,* Sept. 1, 2007 letter AR001454 (observing that the Department first entered into a 638 contract in 1999 with the Tribe, and again in 2004); Aug. 12, 2005, AR000855 (letter informing the tribe that the BIA would revoke the suspension of the current 638 contract); Aug. 19, 2005, AR000856 (638 contract); June 19, 2007, AR001519-20.

Second, Plaintiffs' argument that the 1998 Resolution is "invalid on its face" is belied by the actions of Mr. Dixie. In February of 2000, Mr. Dixie approached the Department, challenging his resignation as chairman of the General Council. *See* February 4, 2000 letter to Mr. Dixie, AR000240-246 (summarizing Mr. Dixie's allegations, and observing that "[o]n November 5, 1998, the majority of the adult members of the Tribe, adopted Resolution #GC-98-01, thus establishing a General Council to serve as the governing body of the Tribe."). But he did not challenge the propriety of the General Council itself. Given the opportunity, Plaintiffs have provided no explanation as to why they failed to bring to light the fatal defects that were ostensibly as apparent then as they are now.

Finally, while it is apparent that Plaintiffs would prefer the Assistant Secretary recognize their faction's tribal government, the only question under the APA is whether the Assistant Secretary acted reasonably in dealing with some governing body of the Tribe. *See Goodface*, 708 F.2d at 339. Any decision by the Department must still comport "with traditional notions of sovereignty and with the federal policy of encouraging tribal independence," and any final resolution should strike the proper balance in favor of "tribal self-determination and against

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[19] The Department stated in this letter that it would call a meeting of the General Council.

[20] This letter indicated the Department's intent to call a general council meeting.

Federal Government interference." *Wheeler*, 811 F.2d at 552.; s*ee also Ransom*, 69 F. Supp. 2d at 150 ("Even in the rarest of circumstances when 'legitimate tribal institutions are no longer functioning or are no longer able to fulfill their duties, the power to make such important determinations for the tribe in question lies with the people of the tribe—not with the federal government." ) (citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1146 (D.D.C. 1976). The August Decision reasonably defers, once again, to the Tribe's chosen form of government to resolve this internal matter, and this action meets the strictures of the APA. *See MD Pharm., Inc. v. DEA*, 133 F.3d 8, 17 (D.C. Cir. 1998) (upholding agency's decision as it "gave an adequate explanation for its decision" and "[t]aken as a whole, [the agency's] explanation demonstrates that it examined the data, considered the relevant factors, and made a reasonable judgment based on the record.").

### B. NEITHER JUDICIAL ESTOPPEL NOR COLLATERAL ESTOPPEL APPLY WHERE THERE EXISTS A NEW AGENCY ACTION, WHICH DETERMINES QUESTIONS OF LAW DISTINCT FROM THOSE PREVIOUSLY CONSIDERED.

Plaintiffs' misguided contention that an administrative agency's action can be "precluded" is not only doomed by its legal defects, but it stems from a flawed characterization of the prior litigation. The 2011 Decision reaffirms that the tribe consists of the five adult members, that those five members comprise the General Council, and that the Tribe remains unorganized under the IRA. If the Tribe, acting through its General Council, endeavors to organize under either 476(a) or 476(h) in a manner that thwarts the participation of the tribal community, then the Assistant Secretary will be bound by his legal duties outlined in *Miwok I* and *Miwok II*. But the questions posed by the 2011 Decision implicate a distinct set of legal issues.

**i. Judicial estoppel does not apply to changes in policy and has no force where the Assistant Secretary is not taking a position that is contrary to prior litigation.**

Plaintiffs contention that judicial estoppel[21] operates to bar the Assistant Secretary "from reversing itself" is premised on the flawed proposition that the 2011 Decision stakes out a new position that "is not only inconsistent with its prior position before this Court; it is completely opposite." Mem. at 40. This argument is baseless. Judicial estoppel is appropriate only when "a party's position [is] 'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation omitted). Furthermore, "[i]t is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984). Judicial estoppel does not apply where it "would compromise a governmental interest in enforcing the law[.]" *New Hampshire*, 532 U.S. at 755. Nor does it apply where the Government's position reflects "'a change in public policy,'" or a "change in facts essential to the prior judgment." *Id*. at 755-56 (quotation omitted).

In the prior litigation, the Secretary argued that it retained the authority to reject a tribe's attempt to organize under 476(h), where the proposed 2004 constitution was adopted without the participation of the vast majority of the potential members and which limited tribal membership to the descendants of Ms. Burley and her family.[22] The D.C. Circuit agreed, holding that "tribal

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[21] While "[t]he independent doctrine of judicial estoppel precludes a litigant from playing fast and loose with a court of justice by changing his position according to the vicissitudes of self interest ...." *Porter Novelli, Inc. v. Bender*, 817 A.2d 185, 188 (D.C. Cir. 2003), the doctrine has no force "where the shift in the government's position is 'the result of a change in public policy.'" *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001).

[22] As support, the Secretary observed that "the Burley Government submitted a purported tribal constitution that was developed by Burley and her two daughters without the participation

organization under the Act must reflect majoritarian values."[23] The 2011 Decision does not deviate from those prior arguments, and it does not conflict with *Miwok I* and *Miwok II*. Should the California Valley Miwok Tribe attempt to organize pursuant to 476(h) or under the IRA pursuant to 476(a), then the Secretary will be bound by his duty to ensure that those efforts at constitutional reform include the tribal community. The Assistant Secretary does not argue to the contrary. But that tribal community is limited to the five individuals, which includes Mr. Dixie, as acknowledged by the Department since 1998.

**ii. Plaintiffs confuse principles of collateral estoppel with agency action not in accordance with law.**

As an initial matter, issue preclusion cannot apply here, because the Plaintiffs were not parties in the earlier litigation and the federal government prevailed in the earlier cases. The Supreme Court has held that in litigation with the United States, the doctrine of nonmutual offensive collateral estoppel[24] may not be applied against the United States. *United States v.*

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of the many persons with documented connections to the Sheep Ranch Rancheria." Brief on Appeal, AR002063, 98. Thus, "far from demonstrating the legitimacy of the Burley Government, this course of events confirms that it is not representative of the majority of the potential membership of the Tribe." *Id*. Based upon the underlying facts of Burley's proposed constitution, the Secretary posited that "[s]ection 476(h) does not impose a duty on BIA to recognize a tribal government or governing documents where, as here, they are adopted without the consent or participation of a majority of the tribal community." *Id.* at 2099.

[23] Consequently, if the government is to be judicially estopped, "the estoppel must be limited to a precise argument presented by the government and accepted by the Court. Alternative arguments put forward by the government, but not accepted by a court in a previous case should not be judicially estopped in subsequent cases." *U.S. v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995). Thus, even if application of judicial estoppel were appropriate, it would be limited only to the discrete issues presented by the federal government and settled in *Miwok I* and *Miwok II*.

[24] Although there exists various permutations, the relevant principle here is offensive collateral estoppel. *See Milton S. Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996). Non-mutual defensive collateral estoppel, on the other hand, "bars a party who has had a full and fair opportunity to litigate an issue in an earlier case and lost from relitigating

*Mendoza*, 464 U.S. 154, 160-161 (1984). A person who was not a party to a prior judgment against the United States may not use that judgment to collaterally estop the United States.[25] Moreover, the United States prevailed in the earlier litigation. *See Milton*, 91 F.3d at 197 (citing *Jack Faucett Associates, Inc. v. AT&T Co.*, 744 F.2d 118, 124 (D.C.Cir.1984) (nonmutual offensive collateral estoppel "defendant from relitigating identical issues that the *defendants litigated and lost against another plaintiff*.") (emphasis added). And even if the doctrine was potentially applicable, it merely precludes relitigation of settled issues; it does not "preclude" agency decisionmaking.

Indeed, Plaintiffs' argument that the Assistant Secretary's "2011 Decision is precluded by the final decision of this Court and the Court of Appeals in *CVMT I* and *CVMT II*" suffers from a fundamental misunderstanding of the role that the equitable doctrine of collateral estoppel serves. While preclusive effect attaches to issues settled in the administrative forum, *see Borger Management, Inc. v. Sindram*, 886 A.2d 52, 62 (D.C. Cir. 2005), the doctrine does not, as Plaintiffs suggest, "preclude" actual agency decisionmaking. The equitable doctrine was never intended to constrain an agency's authority to revisit prior determinations, and Plaintiffs provide no authority for the proposition. Such a reading is directly contrary to the established principle

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that same issue in a later case against a different defendant." *Hinton v. Rudasill*, 624 F.Supp.2d 48 (D. D.C. 2009) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

[25] Plaintiffs admit that they "were not parties in CVMT I and II" but then contend that that fact "does not prevent the Court from giving preclusive effect to that judgment here." Mem. 37 n.17. But such an assertion flies in the face of Supreme Court precedent. In *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court held that the doctrine of non-mutual collateral estoppel does not operate against the Federal government. Moreover, the principle that requires full mutuality of parties when collateral estoppel is applied against the government is well established. *See United States v. Mendoza*, 464 U.S. 154, 104 (1984); *see also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980); *Montana v. United States*, 440 U.S. 147, 155-62 (1979).

that "an agency is free to change its mind so long as it supplies 'a reasoned analysis,'" *National Cable v. FCC*, 567 F.3d 659, 668 (D.C. Cir. 2009); *supra* Section IV.A(ii). The 2011 Decision constitutes a new final agency action, *see Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), premised on an entirely new administrative record, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). Plaintiffs' contention that the final agency action at issue is "precluded" by *Miwok I* and *II* is, for all intents and purposes, an argument that the decision is "not in accordance with law." § 706(2)(A). Indeed, Plaintiffs conceded this point during the administrative process. *See* Pls' Brief on Reconsideration, AR002123 ("Any decision that is contrary to [*Miwok I*, *II*] would be arbitrary and capricious."); AR002134 (same).

As a corollary, Plaintiffs' reliance on the equitable doctrine of non-mutual offensive collateral estoppel fails for another reason: The 2011 Decision constitutes an entirely new administrative decision that implicates questions of law not raised in *Miwok I* and *Miwok II*. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079 (D.C. Cir. 1987) ("A fundamental requisite of issue preclusion is an identity of the issue decided in the earlier action and that sought to be precluded in a later action."). In 2004, the Assistant Secretary rejected the submission of Ms. Burley's attempt to organize under the IRA on the grounds Assistant Secretary retained authority under 476(h) to "reject a proposed constitution that does not enjoy sufficient support from a tribe's membership." *Miwok II*, 515 F.3d at 1267. Both the D.C. Circuit and this Court agreed, concluding that the "Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values." *Id*. at 1267-68. The 2011 Decision, on the other hand, addresses: 1) whether the Assistant Secretary must compel a tribe to organize under the IRA in the absence of consent from either faction; and 2) whether the federal government has any obligation to a group potential members never enrolled as members in the tribe; and 3)

whether the Assistant Secretary recognition of the General Council was consistent with his duty to recognize some interim tribal governing body. *See* 2011 Decision, AR002049-57 at 2054. These issues are entirely distinct from those settled in the prior litigation.

Finally, the main thrust of Plaintiffs' collateral estoppel argument relies on an incorrect characterization of the 2011 Decision that takes entire provisions out of context. Plaintiffs contend that the "2011 Decision now states that the Burley Faction established a valid government by 'avail[ing] itself of the provisions in the [IRA] § 476(h)' and adopting the 1998 Resolution pursuant to its inherent authority." Pls.' Mem. at 38 (citing the 2011 Decision) (modifications in Plaintiffs brief). The Decision does not do this. Read in context, the passage cited merely described the Tribe's previous attempt to organize under the 476(h). *See* Decision AR002053 (observing the Tribe's "reluctance to 'organize' itself under the IRA, choosing instead to avail itself of the provisions in 25 U.S.C. § 476(h) . . . .," then going on to describe the D.C. Circuit's holding). The Decision does not recognize the Tribe as having organized under 476 or 476(h); instead, the Decision reaffirms the Tribe as governed by the 1998 General Council Resolution, and concludes that "unless asked by the CVMT General Council, the Department will make nor further efforts to assist the Tribe to organize and define its citizenship." 2011 Decision, AR002055.

Accordingly, the propriety of the Assistant Secretary's 2011 Decision is distinct from those issues settled in the prior litigation, and the purposes of "conserve[ing] judicial resources, [] preventing inconsistent decisions, and encourage[ing] reliance on adjudication" *Jack Faucett Associates, Inc. v. AT&T, Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984) (quoting *Mendoza*, 464 U.S. at 571), would be ill-served by estopping arguments on novel questions of law.

## CONCLUSION

The 2011 Decision embodies the Assistant Secretary's reasonable determination that any decision to organize, either under the IRA or pursuant to the Tribe's own process, is properly left to this Tribe of five members, governed by a General Council since 1998. While the Assistant Secretary's decision reverses some prior policies and factual understandings as to this particular Tribe, that decision is within the prerogative of the Assistant Secretary, it is permissible under the law, and it is supported by the record.

Based upon the foregoing, Defendant respectfully requests that its motion for summary judgment be granted.

Respectfully submitted this 29th day of March, 2012,

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