Nos.15-56527 & 15-56679 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT P. ALTO, *et al.*,

Plaintiffs-Appellants,

v.

SALLY JEWELL, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 11-cv-2276-BAS(BLM)

AMICUS CURIAE BRIEF OF SAN PASQUAL BAND OF MISSION INDIANS IN SUPPORT OFAPPELLEE UNITED STATES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure (FRAP) Rule 26.1(a), the undersigned states that the *Amicus Curiae* San Pasqual Band of Mission Indians is a federally-recognized sovereign Indian Tribe, a governmental entity to which the Rule 26.1 disclosure requirement is inapplicable.

STATEMENT REGARDING FRAP Rule 29(c)(5)

Pursuant to FRAP Rule 29(c)(5), *Amicus Curiae* states that no counsel for either party authored this brief in whole or part, nor contributed money that was intended to fund preparation of the brief; and that no person — other than the *Amicus,* or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

CONSENT OF THE PARTIES

Counsel for the Appellees have consented to the filing of this brief. Counsel for the Appellants have not consented to the filing of this brief.

STATEMENT OF *AMICUS CURIAE* INTEREST

The San Pasqual Band of Mission Indians (Tribe)[1] is a federally recognized Indian Tribe organized under a Constitution approved by the United States

[1] The Tribe's commonly recognized name is San Pasqual Band of Mission Indians, as named in the Tribe's Constitution. *See* the Tribe's Constitution. Appellants' Excerpts of Record (ER) at 539. The Bureau of Indian Affairs' (BIA) list of tribes recognized as eligible to receive federal services lists the Tribe as San Pasqual Band of Diegueno Mission Indians of California. *See* 81 Fed. Reg. 5019, 5022

Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, under which it exercises sovereign powers over the Tribe's members and its lands. Article III of the Constitution incorporates the terms of former federal regulations, 25 C.F.R. Part 48, to govern membership in the Tribe, to include authorization for tribal officials, subject to the approval of officials of the Bureau of Indian Affairs (BIA), to review certain membership decisions and to remove persons from the membership roll if a prior enrollment decision was based on inaccurate information. The subject matter of this case involves persons claiming rights of membership defined in the Tribe's Constitution, and Defendants-Appellees are federal officials acting pursuant to authorization provided by the Tribe's Constitution. The Tribe has a significant interest in preserving its rights as a sovereign government, including its inherent and well-established power to determine membership and to maintain the Tribe's membership roll in accordance with the Tribe's Constitution. This case directly implicates the Tribe's ability to define its own membership and the Tribe writes separately to address the impact of this appeal on its exercise of this inherent sovereign authority.

(January 29, 2016). The United States and the court below use the name San Pasqual Band of Diegueño Mission Indians.

SUMMARY

This case involves the actions taken by the Assistant Secretary for Indian Affairs pursuant to authority expressly delegated to him under the Constitution of the San Pasqual Band of Mission Indians to approve the removal of the names of individuals whose enrollment was based on information subsequently determined to be inaccurate. The question presented to the Assistant Secretary is whether the prior enrollment was based on inaccurate information. Pursuant to the delegation of authority, and after briefing from both parties, the Assistant Secretary made a carefully considered and reasonable decision, based on an exhaustive review of an extensive record, that the prior enrollment decision was based on inaccurate information and that Appellants' names must be deleted from the Tribe's membership roll. The district court, based upon a thorough examination of the record, correctly determined that the Assistant Secretary's decision was not arbitrary, capricious, or an abuse of discretion.

ARGUMENT

I. Introduction

This case involves the criteria and procedures governing membership in the Tribe, as set forth in the Tribe's Constitution.[2] Article III of the Constitution

[2] The Constitution was adopted by tribal voters on November 29, 1970, and approved by the Secretary of the Interior on January 14, 1971. *See* September 30, 2015 Order (Order) at 4. A complete copy of the Constitution is included in the

incorporates the terms of former federal regulations (25 C.F.R. Parts 48.1 through 48.15) to govern membership in the Tribe.[3] ER 543. The relevant provision of the Tribe's law, Section 48.14(d), requires the Tribe's Enrollment Committee to keep the membership roll current by deleting "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate," subject to the approval of the Secretary. *Id*. In the prior proceeding in this case, *Alto v. Black*, the Ninth Circuit found that the Assistant Secretary's authority was vested in him by Section 48.14(d), and that the Assistant Secretary "must apply the tribe's own enrollment criteria . . . ." *Alto v. Black*, 738 F.3d 1111, 1124 (9th Cir. 2013).

In 1995 the BIA enrolled the descendants of Marcus Alto, Sr. (Alto Sr. descendants) under the now-defunct regulations (25 C.F.R. Part 76) that authorized preparation of a judgment fund roll. In 2008, the Tribe's Enrollment Committee

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Administrative Record (AR) at AR 1591. Article III provides for membership decisions to be made "according to the Code of Federal Regulations, Title 25, Part 48.1 through 48.15." *See* ER 539.

[3] The Part 48 regulations incorporated in Article III were promulgated in 1960 for purposes of preparing the Tribe's original roll. *See* 25 Fed. Reg. 1830 (March 2, 1960), redesignated as 25 C.F.R. Part 76, at 47 Fed. Reg. 13,327 (March 30, 1982). *See* Part 48 (ER 540-43). In 1987, Part 76 was amended to allow the BIA to prepare a roll to serve as a basis for the distribution of judgment funds. *See* 52 Fed. Reg. 31,392 (August 20, 1987) (ER 245). Part 76 was deleted in 1996 after judgment funds were distributed and the rules were "no longer required." *See* 61 Fed. Reg. 27,780 (June 3, 1996) (ER 249). *See also* Order at 3-5.

considered a tribal member's challenge under the terms of Part 48 to the enrollment of the Alto Sr. descendants asserting that the enrollment was based on inaccurate information. Acting in accordance with the Tribe's law, the Tribe's Enrollment Committee examined the challenge and took action to delete them from the Tribe's roll, based on an extensive record of evidence that showed they had been enrolled in 1995 based on inaccurate information. In a January 28, 2011 Decision (2011 Decision), Assistant Secretary Echo Hawk approved the Tribe's determination that the Alto Sr. descendants' names should be removed from the membership roll of the Tribe. ER 201-20.

The Alto Sr. descendants filed this action under the Administrative Procedures Act (APA), challenging the 2011 Decision. The suit named only federal officials as defendants and sought reinstatement as members of the Tribe. Although the Tribe intervened for the limited purpose of filing jurisdictional motions, the Tribe expressly preserved its sovereign immunity in that limited intervention, and the Tribe is not a party in the suit.

By order dated September 30, 2015 (Order), Federal District Court Judge Bashant affirmed the Assistant Secretary's conclusion that the enrollment of the Alto Sr. descendants "was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band's roll." Order at 38, quoting 2011 Decision (ER 220). The court found that the Appellants

failed to meet their burden to demonstrate that the Assistant Secretary's 2011 Decision is in any way arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and that they also failed to demonstrate that the decision is not supported by substantial evidence. Order at 37.

While focused on review of the 2011 Decision under the deferential standards of the APA,[4] the district court's analysis is grounded in recognition of the Tribe's sovereign authority to make its own laws and the fundamental importance of the Tribe's right to determine its own membership. Order at 3, citing, *inter alia*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

Even though the Tribe is not a party, this case directly implicates the Tribe's right of self-government and its ability to maintain a current and accurate membership roll. The Tribe's Constitution, and the Part 48 regulations incorporated by Article III, govern the membership question presented in the present case. *See Alto v. Black*, 738 F.3d at 1124. As *amicus curiae*, the Tribe sets out, for the court's benefit, the Tribe's interpretation of the membership provision of the Tribe's Constitution at issue in this case, and the vital importance of

[4] In *Alto v. Black*, the Ninth Circuit affirmed the district court's jurisdiction to consider the merits of the Appellants' claims related solely to the propriety of final agency action reviewable under the APA. 738 F.3d 1111, 1125.

preserving the Tribe's sovereign right to maintain an accurate membership roll through this constitutional provision.

II. Federal Law Recognizes the Tribe's Exclusive Sovereign Authority to Make and Enforce Its Own Laws Governing Membership in the Tribe

The Supreme Court has long recognized that Indian tribes have inherent sovereign powers related to self-government. *United States v. Lara*, 541 U.S. 193, 204 (2004); *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). A cornerstone of federal recognition of tribal sovereignty is the principle that tribes have the right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). One of the fundamental sovereign powers of a tribe is the inherent authority to determine its own membership. As the U.S. Supreme Court stated in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 72 n. 32, 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."[5] *See* Order at 3. Federal court decisions and federal policy reflect this principle. As the Order notes, the Ninth Circuit in this case identified two applicable federal policies that warrant

[5] *See also, Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008) ("As part of their residual sovereignty, tribes retain power . . . to determine tribal membership . . . .") (citations omitted); *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007) ("An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress").

consideration: (1) [a] tribe's right to define its own membership for tribal purposes"; and (2) "federal policy favoring tribal self-government[.]" Order at 16 citing *Alto v. Black*, 738 F.3d at 1115 (quoting *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013)). These intertwined policies are reflected in the United States' government-to-government relations with tribes.

Control of membership is part of a tribe's broad authority over intra-tribal affairs. The U.S. Supreme Court has recognized the power of tribes to make their own substantive law in internal matters.[6] As part of this general policy supporting tribal self-governance, the federal courts and the BIA defer to tribal law governing a tribe's internal relations such as membership.[7] The Supreme Court, in considering the Indian Civil Rights Act (ICRA), recognized the intent of Congress to defer to tribal forums in order preserve tribal sovereignty and self-determination,

[6] *Santa Clara Pueblo*, 436 U.S. at 55.

[7] *Wheeler v. U.S. Dep't of Interior*, 811 F.2d 549, 553 (10th Cir. 1987). *See also*, *Smith v. Babbitt*, 875 F. Supp. 1353, 1360-61 (D. Minn. 1995) ("The great weight of authority holds that tribes have exclusive authority to determine membership issues. A sovereign tribe's ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations."), *aff'd*, 100 F.3d 556, 559 (8th Cir. 1996) (discretion over tribal membership decisions is "vested" in tribal authorities).

and to avoid substantial interference with the Tribe's ability to maintain itself as a culturally and politically distinct entity.[8]

In addition to deference to tribal forums, the federal government also defers to a tribe's substantive interpretation of tribal laws, including the terms and application of constitutions adopted pursuant to the Indian Reorganization Act (IRA). BIA authority under provisions of the IRA, "even though required by statute, is an intrusion into tribal self-government. The 1988 amendment to 25 U.S.C. § 476 indicates that Congress intended to minimize that intrusion."[9] Thus, even where the BIA "may be required by statute or tribal law to act in intra-tribal matters, it should act so as to avoid any unnecessary interference with a tribe's right to self-government." *Wheeler v. U.S. Dep't of Interior*, 811 F.2d at 553; *see also, Cahto Tribe of the Laytonville Rancheria v. Pacific Reg'l Dir.*, 38 IBIA 244, 246-47 (2002). The Interior Board of Indian Appeals (IBIA), the administrative body in the Department of the Interior that reviews BIA actions, has concluded that "under the doctrines of tribal sovereignty and self-determination, a tribe has the right initially to interpret its own governing documents in resolving internal disputes, and the Department must give deference to a tribe's reasonable

[8] *Santa Clara Pueblo*, 436 U.S. at 72.

[9] *Cheyenne River Sioux Tribe v. Aberdeen Area Dir.*, 24 IBIA 55, 63 (1993). *See also, Thomas v. U.S.*, 141 F.Supp.2d 1185, 1195 (W.D. Wis. 2001).

interpretation of its own laws." *United Keetoowah Band of Cherokee Indians in Okla. v. Muskogee Area Dir.*, 22 IBIA 75, 80 (1992).[10] The Tribe's interpretation need only be reasonable; it need not be the most reasonable interpretation of its law. *See, e.g., Reese v. Minneapolis Area Dir.*, 17 IBIA 169, 173 (1989).

The deference to a tribe's interpretation of its law is heightened when the tribe's law governs matters of tribal membership. As set forth above, the power to control membership is a fundamental aspect of tribal sovereignty, and the determination of tribal membership raises issues of historical values particular to each tribe. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 72 n.32. The federal government plays no role in a tribe's membership decisions, except where membership is governed by specific treaty or law, or where a tribal constitution authorizes the Secretary of the Interior to review enrollment.[11] The IBIA recognizes the tribes' broad authority and the BIA's limited role. In *Cahto Tribe of the Laytonville Rancheria v. Pacific Regional Director*, the IBIA stated that BIA review authority is consistent with federal court decisions recognizing that tribal

[10] The Ninth Circuit recognized this policy in *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d at 1230 n.9 ("The agency concedes that the BIA gives deference to tribes' reasonable interpretations of their own laws." citing *United Keetoowah Band* 22 IBIA at 80).

[11] *Santa Clara Pueblo v. Martinez*, 436 U.S. at 461.

membership is "considered a matter within the exclusive province of the tribes themselves," except where specifically provided in federal statutes or tribal law.[12]

In the *Cahto* decision the IBIA made clear that "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 tribe's right to self-government." 38 IBIA at 242-43. In this case, the BIA's authority to review the Tribe's membership determinations is circumscribed by its unique role under the terms of the Tribe's Constitution. Acting as the Tribe's designated review authority under Part 48, the BIA must exercise that authority consistent with the Tribe's interpretation and application of its laws governing membership.[13] Thus, the Assistant Secretary's application of the Tribe's law and the district court's deference to the applicable federal policies in affirming the Assistant Secretary's decision are prescribed by long-standing precedent.

[12] 38 IBIA at 249, citing *Santa Clara Pueblo*, 436 U.S. at 72 n.32 ; *see also*, *Smith v. Babbitt*, 100 F.3d at 559; *Ordinance 59 Ass'n v. U.S. Dep't of Interior*, 163 F.3d 1150, 1157 (10th Cir. 1998).

[13] *See Santa Clara Pueblo*, 436 U.S. at 72 n. 32; *Smith v. Babbitt*, 100 F.3d at 559.

III. Provisions of the Tribe's Constitution Govern Membership in the Tribe and the Assistant Secretary's Decision is Consistent with the Tribe's Law

The Tribe's Constitution, and the Part 48 regulations incorporated therein, govern membership and enrollment in the Tribe, and there is simply no basis for the Appellants' argument that the defunct Part 76 regulations somehow supersede the express terms of the Tribe's Constitution. The law controlling the Assistant Secretary's actions is the Tribe's law and the matter came to the Assistant Secretary through the Tribe's exercise of its authority under the Tribe's law. Appellants' argument flies in the face of the law of this case. The decision of the Ninth Circuit panel in *Alto v. Black* found that the Assistant Secretary's authority was not "committed to the agency discretion by law" but was vested in him by Section 48.14(d), which is incorporated in Article III, section 2 of the Constitution, and that the Assistant Secretary "must apply the tribe's own enrollment criteria…." *Alto v. Black*, 738 F.3d at 1124.

Membership in the Tribe is governed by the enrollment criteria and procedures provided for in Article III of the Tribe's Constitution, including the terms of 25 C.F.R. Part 48 in effect at the time the Constitution was approved in 1971.[14] The underlying criteria provide that a person is entitled to membership

[14] See relevant text of the Constitution, *supra* note 1 (ER 539).

upon proof that he or she is a biological descendant of a person named on the Tribe's original roll. 25 C.F.R. 48.5 (ER 541). *See* Order at 4.[15]

In addition to enrollment criteria, the Part 48 regulations include authority for the Enrollment Committee to correct the tribal roll, and for the BIA to review and approve changes to the roll. 25 C.F.R. § 48.14 describes actions that the Enrollment Committee *must* take in order to maintain a current roll for tribal purposes, including, among others, routine actions such as correcting the roll with regard to dates of birth, degrees of Indian blood, and family relationships. 25 C.F.R. § 48.14(c) and (d) (ER 543). Specifically relevant in this case, Section 48.14(d) provides that the "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate may be deleted from this roll, subject to the approval of the Secretary." *Id.* The Tribe's membership roll is not static, and by incorporating Section 48.14(d) into its Constitution, the Tribe intentionally reserved a mechanism to enable the Tribe to maintain an accurate and current roll and to correct its roll by deleting the names of individuals enrolled on the basis of incorrect information.

[15] The Assistant Secretary noted that only biological descendants of persons named on the Tribe's original roll qualify for membership in the Tribe. 2011 Decision at 4, 15 (ER 204, 215).

Pursuant to Section 48.14(d), the Enrollment Committee, when presented with a challenge to a prior enrollment, must determine if the individual(s) was enrolled on the basis of inaccurate information, and if so whether to delete the name(s) of the individual(s) from the roll. The Enrollment Committee must then submit its decision to the BIA for the Secretary's approval. Submission of this question represents a delegation of the Tribe's otherwise exclusive authority over membership matters, and the question presented to the Secretary for approval under Section 48.14(d) is whether the enrollment of the individuals was based on inaccurate information. If an individual so removed from the roll believes he or she is eligible for enrollment on alternative grounds or information, the individual may apply for membership pursuant to Section 48.4.

The pending case arose out of the Enrollment Committee's fulfillment of its obligations under Section 48.15(d) and the exercise of the authority delegated to the Secretary to approve the removal of the names of individuals whose enrollment was based on information subsequently determined to be inaccurate. See *Alto v. Black*, 738 F.3d at 1124. Assistant Secretary Echo Hawk made a decision on a supplemented record and did not provide any deference to the Tribe's Enrollment Committee.[16] 2011 Decision at 8-10 (ER 208-10). The Assistant Secretary found

[16] On October 29, 2009, the Assistant Secretary, with the assistance of experts from the Bureau's Office of Federal Acknowledgment, sent a letter to counsel for the parties issuing an interim order requesting additional documents, and providing six

that the discrete pieces of evidence relied on in 1995 as the basis for enrollment were inaccurate and therefore met the requirement in section 48.14(d) necessary to approve the removal of Alto Sr. and those claiming membership through him from the Tribe's roll. 2011 Decision at 5-6 (ER 205-06). In addition, based on evaluation of the new and additional evidence in the record – far beyond the very limited record reviewed by the BIA in 1995 – Assistant Secretary Echo Hawk reached additional "corroborative" factual and legal conclusions, which support his decision to affirm the Enrollment Committee's disenrollment recommendation.[17] The Assistant Secretary concluded that "the enrollment of the Marcus Alto, Sr.['s], descendants was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band's roll." 2011 Decision at 20 (ER 220).

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months for their collection and submission. *See* letters dated October 29, 2009 (AR 0900). *See also* Office of Federal Acknowledgement Memorandum (AR 0886). (The BIA's Office of Federal Acknowledgement implements 25 C.F.R. Part 83, the "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe.") The Tribe and the Alto Sr. descendants responded to the Assistant Secretary's request. *See* Tribe's submissions, at AR 0995, 1008, 1069; Alto Sr. descendants' submission, at AR 0997.

[17] For example, the Assistant Secretary addressed an alternate theory that Jose Alto could be Alto Sr.'s biological father, and found that the cumulative evidence from Alto Sr.'s 1987 application for the judgment fund distribution, the censuses, statements in the affidavits, and the contradictions apparent in the applications for inclusion on the 1933 roll provide the preponderance of evidence to support the conclusion that Jose Alto was not Alto Sr.'s biological father. 2011 Decision at 17-19 (ER 217-19).

The 1995 enrollment decision (ER 241-43) was based on evidence that Assistant Secretary Deer relied upon to conclude that Alto Sr. was the biological son of Maria Duro Alto, and the question before the Assistant Secretary was whether that evidence was inaccurate. The Appellants do not provide any direct defense of the accuracy of the evidence on which the 1995 Decision was based. Instead, they focus on rebutting the Assistant Secretary's findings regarding the corroborative evidence, including evidence that Alto Sr. was non-Indian and was not the biological son of Jose Alto. The Appellants miss the mark. To prevail in their action, the Appellants must prove that the Assistant Secretary was arbitrary and capricious in reaching his conclusion that the limited information relied upon by Assistant Secretary Deer (to conclude that Maria Duro Alto was Alto Sr.'s biological mother) was inaccurate. The district court correctly found that the Assistant Secretary's reasoning regarding the corroborative evidence was not arbitrary and capricious, but even a finding that the Assistant Secretary erred in relying on one or more elements of corroborative evidence would not jeopardize or invalidate the critical conclusion that the 1995 Decision was based on inaccurate information.

IV. The District Court Correctly Decided the Preclusion Issues

The district court correctly applied the applicable precedent to the circumstances presented in this case and declined to apply the preclusion principles of claim preclusion, or res judicata, and issue preclusion, or collateral estoppel.[18] Although these principles may apply to administrative proceedings, they are not applied to administrative decisions with the same rigidity as to their judicial counterpart.[19] *See* Order at 14, citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966) and *United States v. Lasky*, 600 F. 2d 765, 768 (9th Cir. 1979). As the Order notes, "[t]his is particularly true where their application would contravene an overriding public policy." Order at 14, quoting *Lasky*, 600 F. 2d at 768. The district court identified two grounds for declining to apply the preclusion principles in this case: the critical differences between the authority on which the 1995 and 2011 decisions were made, and the overriding public policies of a tribe's right to determine its membership for tribal purposes and tribal self-government. Order at 16.

Unwilling and unable to address the clear authority granted to the Assistant Secretary under Section 48.14(d), the Appellants now argue that the Assistant

[18] We refer to these doctrines jointly as the "preclusion principles."
[19] Contrary to Appellants' argument, there is simply no rule providing for the "full faith and credit" to be applied to the 1995 administrative decision. Appellants' Br. at 32-33.

Secretary's authority is governed by the defunct regulations that were codified at Part 76 rather than the Part 48 regulations expressly incorporated in the Tribe's Constitution. In effect the Appellants seek to have this Court rewrite the Tribe's Constitution by judicially superseding the explicit incorporation of the terms of Part 48. The Appellants' new argument is an affront to the Tribe's right of self-governance and the law of this case. *See Alto v. Black*, 738 F.3d at 1124.

It is important to distinguish between the Tribe's law, the regulations at Part 48 incorporated by reference into the Tribe's Constitution, and the regulations promulgated by the BIA in 1987 as Part 76, in order to allow the BIA to prepare a roll to serve as a basis for the distribution of judgment funds. *See* 52 Fed. Reg. 31,392 (August 20, 1987) (ER 245-48). While many of the terms in the two sets of regulations are similar, it is the regulations in Part 48, expressly adopted as the Tribe's law, that govern the responsibilities of the Enrollment Committee and the Secretary's approval authority in this case.

When the Tribe, exercising its sovereign authority over membership matters, incorporated the Part 48 regulations in the Tribe's Constitution, those regulations became tribal law. By the terms of Section 48.14(d) the Tribe expressly reserved the authority to remove names from the membership roll upon a finding that the enrollment of the individual was based on information that was subsequently determined to be inaccurate, subject to approval by the Secretary. *See* Order at 17.

Appellants' argument that the Assistant Secretary should be prohibited by preclusion principles from approving the Tribe's correction of its membership roll pursuant to the mechanism set forth in Section 48.14(d) conflicts directly with the plain language of the Part 48 regulation and the Tribe's reasonable interpretation of that provision of the Tribe's Constitution. It would deprive the Tribe of its inherent authority to maintain its membership roll in the manner determined by the Tribe in the exercise of its sovereign authority. Thus, the district court correctly found that application of the preclusion principles would negate the Tribe's right to define its own membership and violate the federal policy favoring tribal self-government. *Id.*

The court's analysis of the preclusion issue is well-reasoned and based on a thorough review of the applicable law. After a detailed review of the Part 48 and Part 76 regulations, Judge Bashant found that the 1995 Decision and the 2011 Decision relied on fundamentally different regulations permitting their respective actions. Order at 16. The Part 76 regulations, the basis for the 1995 Decision, permitted the Assistant Secretary to review applications for the distribution of judgment funds. *See* Order at 15-16. On the other hand, the Part 48 regulations incorporated in the Tribe's Constitution permit the Tribe, with approval of the Assistant Secretary, to keep the Tribe's membership rolls accurate and current. Specifically, Section 48.14(d) requires that the membership roll be kept current by

deleting "[n]ames of individuals whose enrollment was based on information subsequently determined to be inaccurate . . . subject to the approval of the Secretary." Order at 15, quoting 25 Fed. Reg. 1831 (March 2, 1960). Although the 2011 Decision necessarily reexamined the accuracy of the information on which the 1995 Decision was based, the Assistant Secretary ultimately addressed a different claim and a different factual question in the 2011 Decision. If preclusion were applied, the Assistant Secretary would be unable to carry out his authority under Section 48.14(d) as incorporated in the Tribe's Constitution.

The district court's reasoning is consistent with the close consideration that courts give to the underlying intent of a statute when considering the application of preclusion principles to administrative proceedings. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991); *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986). The purpose of that judicial inquiry is to determine whether the application of the preclusion principles is consistent with the intent of the law governing the matter. Further, contrary to the application of judicial preclusion, administrative preclusion does not represent independent values of such magnitude and constancy as to justify the protection of the clear-statement rule. *Astoria*, 501 U.S. at 108-109. Therefore a clear statement of legislative intent is not required to overcome the application of the presumption. *Id*.

In *Astoria*, the court found that federal courts should recognize no preclusion by state administrative findings because the law clearly assumed the possibility of federal consideration after state agencies have finished theirs, and that the law providing for federal consideration would be left essentially without effect. *Id.* at 111-112. The courts interpret a law, where possible, so as to avoid rendering superfluous any parts thereof, and the court found that the statutory filing requirements sufficed "to outweigh the lenient presumption in favor of administrative estoppel." *Id.* at 112. In *Elliott* the court found that application of the common-law rule of preclusion to unreviewed state administrative proceedings would be inconsistent with the intent of Title VII of the Civil Rights Act. *Elliott*, 478 U.S. at 796.

Decisions in the Ninth Circuit reflect that issue and claim preclusion need not be strictly applied where a law or regulation provides for revisiting prior administrative decisions. For example, in *Stuckey v. Weinberger*, the court found that, although regulations that permit reopening of prior, final factual determinations for "good cause" in certain cases may not be fully consistent with strict res judicata principles, they represent permissible action taken by the Secretary to ensure that the agency shall operate fairly. *Stuckey v. Weinberger*, 488 F. 2d 904, 911 (9th Cir. 1973) (en banc).

The plain language of Section 48.14(d) makes it clear that the intent of the regulation, and the statutory intent of the Tribe in incorporating the regulation is to permit the Secretary to reexamine final enrollment decisions to determine if a prior enrollment decision was based on inaccurate information, and if such a finding is made to approve deletion of names from the Tribe's membership roll. This interpretation is consistent with the Tribe's reasonable interpretation of its Constitution and the BIA's statement that the 1960 regulation provided procedures for the preparation of a membership roll and the authority to maintain a current roll thereafter. *See* ER 534-37 (Proposed Rule for revisions to Part 76). The district court's ruling on the preclusion issue is consistent with the decisions in *Astoria* and *Elliott*, and the Ninth Circuit decision in *Stuckey*.

The district court's second basis for declining to apply the preclusion principles is equally well-founded. As the Order notes, the courts are particularly cautious when applying the preclusion principles to administrative proceedings when their application would contravene an overriding public policy. *See* Order at 14, citing *Lasky*, 600 F.2d at 768. The district court set out the Indian law basis for the federal policies recognizing a tribe's right to determine its membership for tribal purposes and tribal self-government (*see* Order at 2-3), and then applied these well-established public policies when declining to apply the preclusion principles. Order at 16-17. Equally relevant is the United States' policy deferring

to applicable tribal law and a tribe's interpretation of its law governing internal relations such as membership. As set forth above, that deference is heightened when a tribe's law governs tribal membership.

The Appellants cite several inapposite cases to support their argument that a party cannot obstruct the application of preclusive effect by simply foregoing the right to appeal. *See, e.g.*, Appellants' Br. at 31-32. This is a red herring. The United States has not argued that the lack of judicial review or the lack of a fair hearing bars the application of the preclusion principles to the 1995 Decision, and these are not issues that the district court relied upon. Moreover, the cases cited by Appellants do not preclude the district court from declining to apply the preclusion principles because they conflict with the intent of the applicable statutory scheme and there are overriding public policy considerations.

Appellants present a meritless argument that neither the Tribe's right to define its own membership, nor the federal Indian policy of self-determination is at stake because the Tribe relinquished its sovereign right to the Department to conclusively determine the Alto Sr. descendants' membership by allegedly "adopting" Part 76. Appellants' Br. at 33. That argument contradicts the law of this case, which has found that the Assistant Secretary's authority in this dispute was vested in him by the Tribe's Constitution and the Part 48 regulations

incorporated therein. *Alto v. Black*, 738 F.3d at 1124.[20] As set forth above, the Tribe's right of self-governance and its right to maintain its membership roll pursuant to Section 48.14(d) are at stake in this case.

Appellants base their claim that the Tribe "adopted" the Part 76 regulations on July 13, 1986 solely on the publication of the Proposed and Final Rule for the revision of the Part 76 regulations as the basis for this assertion. ER 534 (Proposed Rule), ER 245 (Final Rule). Their reliance is misplaced.

The Proposed Rule does not state the question on which the Tribe's General Council allegedly voted or the purpose of the alleged vote. *See* ER 537. Notably, the Final Rule makes no reference to the alleged vote. ER 245. Additionally, the Proposed Rule and the Final Rule both underscore the narrow purpose of the revised Part 76 regulation: to bring current the membership roll to serve as the basis for the distribution of the judgment funds. *See* Final Rule at ER 245. The Proposed Rule contrasts this limited purpose with the purpose of Part 48 (incorporated in the Tribe's Constitution), which was to provide for the preparation of the original membership roll and the authority to maintain an accurate and current roll thereafter. *See* Proposed Rule at 2 (ER 537). Nothing in the Proposed Rule suggests that the Tribe relinquished the authority reserved in the Tribe's

[20] Appellants cite *Alto v. Black*, 738 F.3d at 1116, but nothing in the decision remotely supports this argument.

Constitution to maintain the Tribe's membership roll through the mechanism set forth in Section 48.14(d), or that the BIA intended the revised regulation to affect the Tribe's ability to maintain the membership roll and manage membership for tribal purposes pursuant to Part 48.

Moreover, because Part 48 regulations were incorporated in the Tribe's Constitution, any vote intended to affect the scope or application of the Part 48 regulations would require an amendment to the Tribe's Constitution. There has been no such amendment to the Tribe's Constitution, and even Appellants do not allege that there was a vote to amend the Constitution. Article X of the Tribe's Constitution sets out the requirements to amend the Constitution, which include a vote authorized by the Secretary in which at least 30 percent of those entitled to vote actually vote and approval by the Secretary. *See* Constitution at AR 1591.

The statutory authority for the Secretary of the Interior to call and hold an election to amend a constitution is set forth in 25 U.S.C. § 476(c), and because the Tribe's Constitution was adopted and approved under 25 U.S.C. § 476, any amendment would also have to satisfy the secretarial election procedures set forth in 25 C.F.R. Part 81. *See* 25 C.F.R. § 81.2. The Tribe's Constitution has not been amended since its adoption in 1970. AR 1140. The Proposed Rule does not state that the alleged vote on the draft revision to the Part 76 regulation was intended to amend the Tribe's Constitution. In any event, such a vote would be null and void

because it would conflict with Article X of the Constitution and 25 C.F.R. Part 81.[21]

Appellants' reliance on the "final and conclusive" provision in the former Part 76 regulations is misplaced because the Part 76 regulations did not affect the application of the authority reserved in the Tribe's Constitution. Further, the finality of the BIA's decisions in preparation of the judgment roll did not affect the Tribe's exercise of expressly reserved authority to maintain an accurate roll for tribal purposes under the terms of the Part 48 regulations. The Tribe's actions demonstrate that the Tribe interprets Section 48.14(d), as incorporated by its Constitution, to remain in effect, a reasonable interpretation of the Constitution entitled to deference by the federal government. *See Cahto Tribe of Laytonville Rancheria*, 715 F.3d at 1226 (BIA gives deference to tribes' reasonable interpretations of their own laws). Thus, as this court recognized in *Alto v. Black*, the question addressed by the Assistant Secretary (whether the enrollment of Alto Sr. and his descendants was based on inaccurate information) arose under and was governed by Section 48.14(d). *Alto v. Black*, 738 F.3d at 1124.

[21] In addition, in Article VII, Section 2, the Tribe reserved all sovereign powers not "expressly" addressed in the Constitution. AR 1140. Any action that effectively waives reserved power or sovereignty must be strictly and narrowly construed. *See, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58 (waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed").

The plain language of Section 48.14(d), and the interpretation of that section by the Tribe and the BIA, provides that the Tribe reserved for itself, subject to the approval of the Secretary, the authority to review prior enrollments and to delete the names on the membership roll if it is determined that the enrollment was based on information subsequently determined to be inaccurate. The district court's decision to decline to apply the preclusion principles is consistent with the applicable precedent of this Circuit. Further, the application of the preclusion principles in this matter would amount to a judicial revision of the plain language of the Tribe's Constitution governing membership matters, an area in which the Supreme Court has recognized that the courts should be most deferential. *See*, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

CONCLUSION

The Appellants challenged the Assistant Secretary's decision under the APA, and they bear the burden of proving that the Assistant Secretary violated the APA's arbitrary and capricious standard. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). Although the Appellants may not like the Tribe's Constitution, it is the law governing the Secretary's actions in this matter, and the Secretary was obligated to apply the Tribe's law in a manner that gives deference to the Tribe's reasonable interpretation of that law. *See Cahto Tribe of Laytonville Rancheria*, 715 F.3d at 1226. The question before the district court was strictly limited to

whether the Assistant Secretary violated the APA standards, and the district court correctly applied the deferential standard of the APA. The record supports the conclusion reached by the district court affirming the Assistant Secretary's conclusion that the enrollment of the Alto Sr. descendants "was based on information subsequently determined to be inaccurate and, as a result, their names must be deleted from the Band's roll." Order at 38, quoting 2011 Decision (AR 1156). The district court's order and judgment should be affirmed.

Respectfully submitted,

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April 8, 2016

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I hereby certify that on this 8th day of April, 2016, the *Amicus Curiae* Brief for the San Pasqual Band of Mission Indians was served via the court's electronic CM/ECF filing system, which will send notification of such filing to counsel of record:

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