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December 29, 2023

VIA EMAIL harley.long@bia.gov

Harley Long, Superintendent
Central California Agency
Bureau of Indian Affairs
U.S. Department of the Interior
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814

Dear Superintendent Long,

I am writing in response to your letter dated December 19, 2023, addressed to Silvia Buley and other General Council members of the California Valley Miwok Tribe. This letter has been reviewed with considerable interest and concern by both me and my colleagues at our law firm.¹

First, your letter inaccurately describes our firm's legal representation of the California Valley Miwok Tribe. It implies that our representation is improper or illegitimate, a notion we strongly refute. This implication is deeply troubling and warrants rectification. We request a detailed response from you or the Bureau of Indian Affairs dispelling any misconceptions that may have arisen from your communication.²

It is a matter of public record that our representation is exclusively of the California Valley Miwok Tribe, as a political entity, under the direction of its General Council, and in accordance with its 1998 governing documents. We do not represent individual tribal members.

Second, your letter also expresses an unwillingness to act, or consider acting, in accordance with the law by reinitiating government-to-government relations with the Tribal government precisely because you appear to have determined there are no existing members of the Tribe. Our client has long engaged in a protracted effort to reestablish such government-to-government relations with the Bureau. The Tribe, as a federally recognized entity listed since 1994, is entitled to maintain such relations under Congress' statutory mandates. Considerable legal precedent indicates that once on the list the United

¹ We note that your letter indicates that a reply reference "Executive Direction."

² Such a charge potentially sends a nationwide chilling effect by projecting an agency policy to any Indian group that may not be conducting formal relations with the Bureau of Indian Affairs, that the Agency will demand that any legal representation must have individual legal services agreements with each individual that make up the Indian polity including state recognized tribes, groups seeking federal acknowledgment, or in those with competing governments in a leadership dispute.

States is obliged to conduct relations with the Tribe to fulfill Congress' statutory mandates, and only rare instances, is a short hiatus, in those relations, allowed. It is concerning that the Central California Agency seems to misunderstand the legal principles of self-governance and self-determination for federally recognized Tribes.

As is well known to you and your predecessor, the hiatus in relations between the Department of the Interior and our client was improperly characterized as a leadership dispute for many years. There is no leadership dispute today and no members of the Tribe are in disharmony. All members of the Tribe are enrolled members on our client's tribal roll.³

In fact, over the years, our client has been consistently treated as a polity by the United States, as evidenced by the regular award of ISDA 638 contracts. Furthermore, the courts have never questioned our client's rights, in its capacity as a political Indian entity, to protect its interests, whether as a plaintiff or defendant. This includes cases you referenced in your letter to justify interference in the Tribe's established membership rules. Such rules are fundamental to self-governance and are critical to the social self-identification of all Indian tribes, thereby being essential to the survival of any Indian tribe as a distinct community.

As the Tribe's trustee, it is reasonable to expect that, in the absence of direct statutory authority or a judicial order,⁴ your office would refrain from intervening in membership issues given the precedents set by the Supreme Court. Historically, your office has adhered to this principle in numerous well-documented instances within the Central California Agency, including in recent times.

To that end, it is striking that the proper balance between equal protection and tribal self-determination is not best left to this tribe's, or any tribe's, judgment under modern self-determination and self-government principles. Any compelling interest the California Central Agency asserts to remake, control, establish, or assist in creating membership rolls, especially using an untested CDIB process to choose and sort the 2015 "Eligible Groups" through an unpublished, non-transparent, unnoticed process is inconsistent with these principles and United States policy; therefore, your office's process is facially unlawful.

³ As BIA officials queried in 2011, "It always seemed arbitrary to me, and I could never get a good answer from [NAME REDACTED] and [NAME REDACTED] as to why submitting a constitution suddenly meant they [PKBR's client CVMT] were no longer an organized tribe. And that 07 Olsen letter was written by SOL and signed by Olsen without ever going through the BIA!" The official's observation connotes that a policy to control the membership of the Tribe was being steered by officials not authorized, or perhaps, not delegated, under department rules, statutorily or constitutionally, to make policy decisions about one of the United States solemn relationships.

⁴ For example, the U.S. Congress has directed membership rolls on the Modoc Nation by statute. In the *Tillie Hardwick* matter, tribes thought to be terminated agreed in a stipulated judgment that the restoration of relations with the United States would include the authority, by court order, for BIA facilitating the membership rolls of those tribes.

Despite the legal precedent and Indian law principles that might guide the Central Agency, your office has pressed the bounds of tribal self-determination and now trod into the thicket of tribal membership head-long. To do so, as your letter indicates, the Central Agency relies on an ever-shifting policy interpretation of the 2015 Decision and the 2022 Decision sometimes each read independently, sometimes read together, sometimes indicating that the 2022 Decision modifies the 2015 Decision; but always in a manner to ignore the requirements of the law that necessitate that a previously recognized government conduct government-to-government relations. Perhaps this is why your letter chooses to conflate individuals with individuals that are already members of a polity. This is an innovative interpretation of the 2015 and 2022 Decisions, effectuating a de-recognition of our representation of a duly elected Tribal Council and officers by the General Council of a federally recognized Indian tribe.

While the 2015 Decision and the 2022 Decision or court *dicta* might offer your office the impression that “reorganization” or “initial organization” is mandated, nothing in the 2015 and 2022 Decisions nor court holdings directs or orders the Central Agency to do so.

Indeed, the Agency lacks the authority to issue such an order or directive, as neither Supreme Court precedent nor any express act of Congress grants it this power. Furthermore, even if an order or directive to your office did exist, it is questionable whether the Central California Agency has been specifically delegated such authority under the Department Manual. We are particularly skeptical about the procedure your office has devised to determine eligible participants in the creation of a tribe’s constitution through the CDIB process, as it appears to be particularly dubious.⁵

On November 9, 2023, before Judge Cobb in the federal district court in Washington, D.C., during the *Haaland v. CVMT* case, both the Department of Justice and the Plaintiff asserted that the individuals represented by the Morgan Lewis Law Firm are not actual members of the Tribe but potential members. Nevertheless, they are involved in the Constitutional Committee as part of the process devised by your office.

Moreover, if that is the case, it is irreconcilable with federal Indian law; your office has chosen individual American citizens to create a tribal constitution. Your letter specifically states these individuals participating in the constitutional committee “have an opportunity to serve on the Committee whose goal is to create tribal laws that could direct the future of the Tribe.” In other words, your office commandeered the CDIB process to determine whether individual American citizens are sufficiently Indian allowing these same individuals to create tribal law which, in turn, allows them to become members of an Indian tribe after they create a constitution providing for their membership. No such order or directive can be found in any decision or court order or statute to allow such rogue agency action.

For the foregoing reasons, my firm requests that you provide us with written reasoning and justification for the impression you publicized about our representation. We firmly believe that if your office continues to address correspondence to individuals without regard to whether they are or are not

⁵ Certainly, the threshold conditions of the IRA Sections 16(a) and 19 cannot be met by allowing non-member individuals that the BIA has determined are Indian to create a new governing document for a constitutional referendum pursuant to the IRA and its accompanying Part 81 regulations.

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enrolled members of the Tribe, the Central California Office has arbitrarily and capriciously determined on behalf of the Department that the Tribe has no enrolled members—such action is unlawful.

In addition, on behalf of the Tribe, we urge the Department to abandon any effort to reorganize or organize an already federally recognized Indian tribe. We further appeal to either the Secretary of the Interior or the Assistant-Secretary – Indian Affairs to take jurisdiction over this matter.

As the Tribe has offered on numerous occasions, since 2019, to your Office and to the Assistant Secretary, it is willing to seek solutions to this resolve this matter to ensure that tribal self-government and self-determination is protected and allow individuals to self-identify and seek participation in the tribe under tribal law. Our client and its representatives are willing to meet Department officials on this issue at your earliest convenience.

Thank you for your attention to this matter and we look forward to working with the Department to resolve this issue. Should you have any questions or wish to discuss this further, please contact me at (202) 450-4887 or plepsch@ndnlaw.com.

Sincerely,

PEEBLES KIDDER BERGIN & ROBINSON LLP



Peter D. Lepsch

PDL:se

cc:

Debra Haaland, Secretary
Brian Newland, Assistant Secretary–Indian Affairs
Amy Dutschke, Regional Director
Matthew Marinelli, Department of Justice
Darren Modzelewski, Senate Committee on Indian Affairs