UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA, Plaintiff, vs. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GALE A. NORTON, Secretary of the Interior, MICHAEL D. OLSEN, Acting Assistant Secretary – Indian Affairs, Defendants.	Case No.: JR-05-CV-00739

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In an effort to avoid, or at least delay a determination on the merits, Defendants move to dismiss this lawsuit brought by the California Valley Miwok Tribe ("Tribe"). This Motion should be denied, and the Tribe allowed to proceed, because the facts and law plainly compel it. Furthermore, since the commencement of this litigation, Defendants have increased the intensity of their assault on the Tribe. As explained more fully in the Statement of Facts, Defendants have taken aggressive steps to strangle the Tribe by attempting to halt their state and federal funding. These steps include unilaterally modifying the Tribe's PL 93-638 contract ("638"), and inducing the Gambling Control Commission of California ("Commission") to withhold the Tribe's disbursements from the Revenue Sharing Trust Fund ("RSTF").[1]

The only way for the Tribe to defend itself against unlawful actions by Defendants is by resorting to the courts. If the Tribe is denied an opportunity to have a determination on the merits, then Defendants will soon succeed in either pushing this Tribe out of existence, or, installing a puppet government.

The purpose of this suit is for the Tribe to protect its sovereign authority. To do so, the Tribe simply asks this Court to answer a question of law. The Tribe believes that it has a sovereign authority to control its membership and adopt governing documents without interference from Defendants. Defendants, on the other hand, believe that it is within their power to dictate membership and government issues to the Tribe as they see fit. The Tribe seeks a quick determination on the question of whether it may adopt governing documents pursuant to 25 U.S.C. § 476(h).

Notwithstanding Defendants' character attacks on the Tribe, little is in dispute on key factual questions. The Tribe has been adopting governing documents and abiding by them for some years now, and Defendants have recently decided that they cannot do so.

[1] The RSTF is a fund paid for by gaming California tribes for the benefit of non-gaming California tribes.

With respect to the character attacks, Defendants spend a great deal of time referring to a "larger tribal community" as if they were tribal members. However, nothing can be further from the truth. Defendants imply that the Tribe has improperly excluded tribal members from tribal membership. In fact, the people to whom they refer are not now, nor have ever been tribal members, or even been associated with the Tribe. Defendants know this, and have admitted that they know that the Tribe numbers less than 10. Indeed, it is clear from Defendants' actions over the last century that the Tribe has never been large, nor did Defendants intend it to be. For example, in 1935, Defendants recognized one person for the purpose of adopting the Indian Reorganization Act. Subsequently, Defendants recognized only one other individual, in 1967, for the purposes of terminating the Tribe pursuant to the California Rancheria Act. This is of particular significance in light of the fact that at the time of termination, several individuals who claimed to be of the Indian community protested being excluded from the termination process. However, Defendants excluded them nonetheless. In addition, the tribal reservation that belonged to the Tribe prior to termination was less than one (1) acre in size. Except for the 6 individuals that make up the membership of the Tribe at this time, Defendants have only recognized two other Indians as members of the California Valley Miwok Tribe (formerly Sheep Ranch Rancheria). Thus, any references to the "larger tribal community" are simply unfounded arguments for which Defendants cannot provide support. More importantly, the references to fictional tribal members are not relevant to the question of law to be resolved by this Court. However, in order to address Defendants' mischaracterizations, we are providing more historical facts regarding the Tribe for the sake of context.

Defendants take the contradictory position that the March 26, 2004 letter should have been appealed, but also that the March 26, 2004 letter did not violate any laws. The March 26 letter was, in fact, a model of ambiguity carefully crafted not to violate

25 U.S.C. § 476. Basically, the March 26, 2004 letter did not reject the Tribe's constitution. It stated that possession of a constitution was not proof of being organized. Because of this, there was no need for the Tribe to challenge it because it had no net effect of the Tribe's organization or operations. On February 11, 2005, Michael Olsen made a decision that actually interfered with the Tribe's self-governance. The fact that Michael Olsen referred to the March 26, 2004 letter does not assign to it an effect that it lacked when standing on its own. Simply put, the March 26, 2004 letter had little or no effect on the Tribe, whereas Michael Olsen's decision had devastating consequences for the Tribe.

In the moving papers, Defendants state "…the Tribe is not organized and therefore, can adopt no governing documents until it becomes organized." Defendants' Motion to Dismiss, at 3. This statement fairly captures the thrust of the government's position with respect to the Tribe. It is difficult to imagine how such a position would be permissible when applied to any group of adults in this nation. It should not be permitted to be applied to a sovereign Indian tribe.

The Tribe respectfully requests that Defendants' Motion be denied, and this case be allowed to proceed to the merits.

STATEMENT OF FACTS

I. The Establishment of Sheep Ranch Rancheria of Miwok Indians

In 1915, a Federal Government Indian Agent located a cluster of 13 Miwok Indians living on a 160-acre site in or near the City of Sheep Ranch, California. The Federal Government decided to purchase 2-acres of the 160-acre parcel in trust for the Miwok Indians on or about April 11, 1916. The Miwok homestead was coined the "Sheep Ranch Rancheria." Over time, the number of individuals living on the Rancheria dwindled, although no accurate count was ever made as to the number of individuals for which the parcel of land was purchased. Nevertheless, in 1935, the Department of the

Interior conferred federally recognized tribal status upon the Miwok Indians after locating one individual, and allowing him to vote on the organization of the Tribe.

II. The Termination of Sheep Ranch Rancheria

In 1965, the United States began investigating the feasibility of terminating the Sheep Ranch Rancheria of Miwok Indians under the Rancheria Act. The Rancheria Act allowed for the transfer of Indian lands to individual Indians in fee simple, pursuant to a distribution plan. A distribution plan would only become final upon governmental and distributee approval as outlined in the Rancheria Act. After the land's distribution, those Indians receiving any part of the formerly Indian homesteads, as well as their dependent, immediate family members, would no longer be entitled to any services or statutory protection based on their status as Indians. Moreover, the federal trust relationship to these individuals and the Tribe would be terminated along with the federal recognition of the Tribe. *See* Pub. L. 85-671, 72 Stat. 619, as amended by Pub. L. 88-419, 78-390.

On February 4, 1965, William Gianelli, a realty specialist for the United States Government, inspected the Sheep Ranch Rancheria. Shortly thereafter, Mr. Gianelli recommended in a memorandum that the United States enter into a termination plan with the Miwok Tribe pursuant to the Rancheria Act. Following a December 29, 1965 meeting between Tribal Operations Officer Jess Towns, Mr. Butler and Ms. Dixie at the Rancheria, Mr. Butler and Ms. Dixie submitted written requests for distribution of the assets of the Sheep Ranch Rancheria.

Pursuant to the Rancheria Act, a list of the Indians living on Sheep Ranch Rancheria was prepared on December 30, 1965. The list indicated that Mabel Hodge Dixie was the only Indian living on Sheep Ranch Rancheria. In a letter dated February 3, 1966, the Area Director responded to a protest from Lena Shelton on behalf of herself, her brother Tom Hodge, her daughter Dora Shelton Mata and her two granddaughters. Ms. Shelton was protesting the omission of the parties from the list of persons eligible to

vote on whether a plan would be made for the distribution of the assets of the Sheep Ranch Rancheria. The response included the following:

> After having given careful consideration to the reasons for your protests, it has been determined that neither your name nor the names of members of your family can be included in the list of eligible voters because none of you meets the requirements in any of the five categories quoted above. Although you presently live next to the rancheria, we find no record that you have ever resided on it. Records do substantiate the fact that your brother, at one time, lived on the rancheria, but such former residence does not make him eligible to vote because no vested interest was acquired by anyone for merely occupying the rancheria. **Exhibit 1.**

An election was held on February 9, 1966, in which only Mabel Dixie voted. The result of the election was that the Bureau of Indian Affairs ("BIA") would prepare a plan for the distribution of the tribal assets of the Sheep Ranch Rancheria. The Commissioner of Indian Affairs approved of the distribution plan on August 18, 1966. On October 12, 1966, James E. Officer, BIA Associate Commissioner, transmitted a teletype message to the Area Director in Sacramento that stated: "You are authorized to have Mabel Hodge Dixie vote on whether she accepts the contents of the plan, as conditionally approved by the Commissioner on August 18, and if she does you may carry out its provisions." Consequently, a referendum was held by which the distribution plan was officially accepted by Ms. Dixie on October 14, 1966.

The deed to Sheep Ranch was executed to Mabel Dixie on April 11, 1967, recorded in Calaveras County on April 26, 1967, and delivered on May 2, 1967.

III. The Government's Failure to Appoint a Conservator for Mabel Dixie Before Executing the Deed

Prior to the deed's execution, on January 30, 1967, the Sacramento Area Office of the BIA received a letter from Mabel Dixie dated January 27, 1967 that stated: "I hereby request that your office take whatever action is necessary to have Mr. Hayden Stevens appointed conservator under state law for me."

In response, Leonard M. Hill informed the Regional Solicitor and the Area Director in a letter dated February 17, 1967, about Ms. Dixie's request for the

appointment of a conservator. The letter provided the following statement in support of the recommended appointment:

> Section 8 of the Amended Rancheria Act, provides that the Secretary of the Interior shall protect the rights of individual Indians who are minors, non compos mentis or persons who, in the opinion of the Secretary of the Interior, are in need of assistance in conducting their affairs. In such circumstances, we have assisted in effecting the appointment of conservators or guardians as may be deemed adequate.
> We have concluded that Mrs. Dixie is in need of assistance in conducting her affairs. She, herself, feels this need and has voluntarily made a written request. Mr. Hayden Stephens, Postmaster at Sheepranch, who has known Mrs. Dixie for several years, has consented to serve as her conservator. Mrs. Dixie has discussed this matter with him and they have both indicated agreement in writing.

The Tribal Operations Officer, Victor T. Courtwright, even represented to Ms. Dixie that they were in the process of completing arrangements to have a conservator appointed.

Despite the letters of Mabel Dixie, Hayden Stephens, Leonard M. Hill and Victor T. Courtwright, the BIA failed to appoint a conservator prior to conveying Sheep Ranch Rancheria on April 11, 1967.

IV. The Government's Unsuccessful Attempts to Reverse the Termination of the Tribe

In September 1967, the BIA took the first of several unsuccessful steps to try to reverse the unlawful termination of the Tribe. The first was to have Mabel Dixie execute a quitclaim deed transferring the Sheep Ranch Rancheria back to the United States, again without appointing the requested conservator. The BIA then took the position that the quitclaim deed had reversed the action taken under the Rancheria Act, thereby preserving the status quo as it had existed prior to the transfer of the land to Ms. Dixie. However, following Mabel Dixie's death on July 11, 1971, the Department of the Interior's Probate Hearing Examiner Alexander H. Wilson found that the September 6, 1967 quitclaim deed purporting to transfer the land known as the Sheep Ranch Rancheria back to the United

States was invalid. Further, the Hearing Examiner found that the land that encompassed the Sheep Ranch Rancheria had passed to Mabel Dixie and was therefore part of her estate, and then ordered the division of that land among her heirs.

Despite this pronouncement from the Department of the Interior's Administrative Officer, the BIA did not change its records to reflect that the Sheep Ranch Rancheria had been transferred in fee, and was part of the estate of Mabel Dixie. Instead, the land's status lay dormant for over a decade until the BIA undertook its second attempt to reverse the transfer of Sheep Ranch Rancheria to Mabel Dixie, and termination of the Tribe under the Rancheria Act. This action began on January 9, 1989. The BIA Sacramento Area Director wrote a memorandum to the BIA Superintendent of the Central California Agency questioning the status of the Sheep Ranch Rancheria. In that memorandum, the Area Director acknowledged the fact that the probate judge in 1972 had found that the quitclaim deed executed by Mabel Dixie was invalid, and that the Government had continued to ignore that valid Administrative Order by listing the Sheep Ranch Rancheria land as property held in trust by the Federal Government for the Tribe.

This memorandum was followed by an opinion memorandum forwarded to the Area Director from the Acting Regional Solicitor, Pacific Southwest Region Sacramento, dated September 13, 1990. In that memorandum, the Regional Solicitor concluded that the quitclaiming of the Sheep Ranch Rancheria back to the United States by Mabel Dixie "…cancels or terminates the contract (Distribution Plan). With the Distributee's repudiation, she gave up any interest she may have acquired in the Rancheria pursuant to the Rancheria Act."

Armed with this memorandum, the United States petitioned to modify Mabel Dixie's Estate by deleting Sheep Ranch Rancheria from the list of assets. Nevertheless, on April 14, 1993, Administrative Law Judge William R. Hammet denied the Petition and affirmed the probate court's finding that the quitclaim deed filed by Mabel Hodge Dixie was invalid. In so holding, the administrative law judge noted: "If, in fact, the

deed to Mabel Hodge Dixie was a valid conveyance, the recitations made in the deed were a material misrepresentation of the facts, no matter how innocently made, leading Mabel Hodge Dixie to execute the quitclaim deed."

V. The Restoration of the Tribe's Federally Recognized Status and Effort to Obtain New Tribal Lands

As of May 12, 1992, the Tribe had no members recognized by the Federal Government. A tribal roll and census report published on February 8, 1989 further reflects that the Tribe had "0" population.

Soon after the administrative hearing in 1993 that confirmed that the Sheep Ranch Rancheria had been transferred to Mabel Dixie in 1967, Congress passed the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791 (1994) ("List Act"). The List Act requires that "[T]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 4791(a). The Tribe's name was placed on the list of federally recognized tribes pursuant to the List Act.

VI. The Reorganization of the Tribe

In 1998, the Tribe began to reorganize under its inherent authority. On or about September 24, 1998 the Superintendent of the BIA Central California Agency sent a letter to Yakima Dixie as Tribal Chairman, following a meeting between the Tribe, Mr. Raymond Fry and Mr. Brian Golding. In that letter the BIA recognized that Yakima Dixie, Melvin Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristan Wallace "posses the right to participate in the initial organization of the Tribe." The letter goes on to recommend a general council form of government.

On or about April 20, 1999, Yakima Dixie presented his resignation as tribal chairperson to the Tribal Council. Yakima Dixie participated in the unanimous vote of the tribal council to accept his resignation. On or about May 8, 1999, the Tribe held a

general election. Yakima Dixie participated in the unanimous vote to elect Silvia Burley as Chairperson, himself as Vice Chairperson, and to ratify the Tribe's constitution. In a June 25, 1999 letter, the Superintendent of the BIA Central California Agency recognized Silvia Burley as Tribal Chairperson.

On or about July 30, 1999, the Secretary of the Interior and the Sheep Ranch Band of Me-Wuk Indians of California entered into a Self-Determination Contract to provide funding to the Tribe for tribal government activities. On or about September 30, 1999, the Tribe became a "contracting Tribe" pursuant to the Indian Self Determination Act, Public Law 93-638. Public Law 638 provides for federal funding to organized tribes to support and assist tribes in the development of tribal government, tribal programs, and tribal economic development.

On March 6, 2000, the Tribe ratified its Constitution. In a July 12, 2000 letter from the Superintendent of the Central California Agency office to Silvia Burly, Chairperson, the BIA confirmed their recognition of Silvia Burley as Chairperson of the Tribe, with the Vice-Chairperson position being vacant and Rashel Reznor as Secretary/Treasurer of the Tribe. In a July 26, 2000 letter from the Superintendent of the Central California Agency to the Secretary of Indian Affairs, the BIA confirmed that Silvia Burley was Chairperson of the Tribe and that she was an elected official of the Tribe.

In a June 7, 2001 letter from the Deputy Commissioner of Indian Affairs to Silvia Burley, Chairperson, the BIA approved the Tribe's name change from "Sheep Ranch Rancheria of Mi-Wuk Indians" to "California Valley Miwok Tribe." The letter confirmed that the Tribe has a tribal council which can and does conduct business on behalf of the Tribe through resolutions.

In an October 31, 2001 letter from Dale Risling, Superintendent of the Central California Agency, to Silvia Burley, the BIA confirmed receipt of the September, 2001 version of the Tribe's constitution, which amended the constitution ratified on March 6,

2000, which the BIA confirmed receipt of on March 9, 2000. Mr. Risling stated the following:

> "The Agency will continue to recognize the Tribe as an unorganized Tribe and its elected officials as an interim Tribal Council until the Tribe takes the necessary steps to complete the Secretarial election process. Agency staff is available to provide technical assistance in this matter upon receipt of the Tribe's written request. We are returning the original document to the Tribe without any action."

On or about January 24, 2002, the federal district court dismissed Yakima Dixie's lawsuit for lack of jurisdiction by virtue of tribal sovereignty and failure to exhaust administrative remedies. No. CIV S-01-1389 LKK/DAD. The court took judicial notice of evidence that Silvia Burley and Rashel Reznor were recognized by the BIA as the sole members of the governing body of the Tribe.

On or about November 24, 2003, the BIA released a recognition letter acknowledging that the BIA maintains a government to government relationship with the Tribe through the tribal council chaired by Silvia Burley.

In a January 5, 2004 letter from the Superintendent Central California Agency to Silvia Burley, Chairperson, the BIA granted the Tribe "Mature Contract Status" under the FY-04 Mature Status-Consolidated Tribal Government Program. A "Mature Contract" is a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization. 25 U.S.C. § 450b.

On or about February 4, 2004, the Tribe passed Resolution R-1-02-04-2004 assuming jurisdiction and establishing an administrative forum to address Yakima Dixie's appeal. On or about February 5, 2004, the Tribe notified the BIA that they had assumed jurisdiction over Yakima Dixie's claims.

On February 10, 2004, Mr. Dale Risling, Superintendent, BIA Central California Agency, testified under oath that Silvia Burly is the recognized Chairperson of the

California Valley Miwok Tribe. On February 10, 2004, Mr. Raymond Fry, Tribal Operations Officer, BIA Central California Agency Office testified under oath that the BIA recognizes Silvia Burley as Tribal Chairperson.

On March 22, 2004, the Tribe's Administrative Hearing Officer, acting pursuant to Tribal Council Resolution R-1-02-04-2004, forwarded a notification of an administrative hearing in Yakima K. Dixie v. California Valley Miwok Tribe, Case No. CVMT-AH-2004-001 to Silvia Burley and Yakima Dixie relating to the issue raised by Yakima Dixie regarding the Tribal Chairmanship.

On or about March 26, 2004, Dale Risling, Sr., Superintendent of the Central California Agency, prepared a letter addressed to Ms. Silvia Burley, Chairperson, California Valley Miwok Tribe. The letter stated that despite the fact that the Tribe has a constitution, the BIA considers the Tribe to be "unorganized." The letter further stated that "[I]t is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified."

On February 11, 2005, Michael D. Olsen, Acting Assistant Secretary – Indian Affairs, sent a letter addressed to Yakima Dixie, of the "Sheep Ranch Rancheria of MiWok Indians of California." In this letter, the Assistant Secretary dismissed Yakima Dixie's appeal as untimely. The Assistant Secretary went on to state that:

(1) the BIA had rejected the Tribe's constitution;

(2) the BIA did not recognize Silvia Burley as tribal chairperson, but as a "person of authority within the California Valley Miwok Tribe."

(3) the BIA would not recognize anyone as the tribal chairperson until the tribe has organized as described in the letter of March 26, 2004.

(4) the BIA did not recognize the tribal hearing process as a legitimate tribal forum.

On July 19, 2005, Defendants implemented Modification No. Fourteen to Contract No. CTJ51T62802, the Tribe's 638 contract. Defendants implemented this modification without the Tribe's consent, and cited the February 11, 2005 letter of Michael D. Olsen as the reason for the modification. **Exhibits 2 and 3.**[2]

On August 4, 2005, the Commission notified the Tribe that it was withholding all future distributions to the Tribe from the Revenue Sharing Trust Fund ("RSTF"). Referring to Defendants July 19, 2005 letter, the Commission stated:

> "This most recent action and the position of the BIA regarding tribal leadership and organization leave us with no alternative, but to withhold funds until such time as there exists sufficient tribal government organization and leadership to allow the BIA to conduct government-to-government relations with the Tribe—either through a recognized tribal chair or representative."

Exhibit 4.

On August 12, 2005, Defendants sent a letter to the Tribe that stated:

> "This letter is to inform you that the Superintendent of the BIA Central California Agency, Troy Burdick, has today authorized me to inform you that the BIA Central California Agency has agreed to revoke the July 19, 2005, suspension of the current P.L.93-638 contract between BIA and the California Valley Miwok Tribe."

Exhibit 5.

On August 19, 2005, Defendants implemented a second modification that only partially revoked the July 19, 2005 modification, contrary to Defendants' representation in their August 12, 2005 letter. **Exhibits 6 and 7.**

On August 24, 2005, the Commission informed the Tribe that they intended to reinstate the distribution to the Tribe in view of Defendants' August 19, 2005 letter, despite the letter's equivocality. **Exhibit 8.**

On August 29, 2005, the Commission informed the Tribe that they were once again suspending the RSTF funds to the Tribe. In their letter, the Commission stated:

/ / /

[2] This will be the subject of a Motion to Supplement the Pleadings.

> "In our letter of August 24,2005, we indicated that it was our intention to make the RSTF distribution for the quarter ending June 30, 2005 to the California Valley Miwok Tribe (the Tribe). In the interim, however, we have had several conversations with the Bureau of Indian Affairs (BIA) regarding their view of Ms. Burley's status and have internally reviewed the matter, including all of the correspondence attached to our August 4, 2005 letter. Based on this review we have determined that at this time, such distribution is inappropriate."

Exhibit 9.

Plaintiff has exhausted any and all available administrative remedies in that no administrative appeal is available to remedy the actions of the Assistant Secretary of Indian Affairs.

SUMMARY OF ARGUMENT

This action arises from a February 11, 2005 letter from the Acting Assistant Secretary – Indian Affairs. In his letter, the Acting Assistant Secretary concluded that the Tribe's inherent sovereign authority to governing documents was conditioned upon the BIA's approval of the Tribe's membership. The secretary went on to state that until the BIA is satisfied with these internal tribal issues, the BIA will not recognize any tribal government nor judicial forum, and internal disputes will be handled by the BIA. There is neither a treaty nor statute authorizing the BIA to interfere with the Tribe's internal matters. 25 U.S.C. § 476(h) clarifies that the Tribe retains the inherent sovereign power to organize their governing bodies pursuant to organizational governing documents that they determine. Accordingly, the Tribe seeks to persuade this Court to hold unlawful and set aside the February 11, 2005 letter as being arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law.

This Court has subject matter jurisdiction over this matter pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, et seq. §§ 702 and 704 waive Defendants' sovereign immunity, and subject the Secretary's decision to judicial review as specified in § 706(2)(A).

The Doctrine of Exhaustion of Administrative Remedies does not apply because the action of the Assistant Secretary, the highest authority within the agency, is defined as a "final decision" for the agency, subject to judicial review pursuant to 25 C.F.R. § 2.6(c).

Finally, the Tribe has alleged sufficient facts under a cognizable legal theory that entitle it to a remedy. The Tribe has alleged that Plaintiff's February 11, 2005 decision was final agency action reviewable under the APA, and that at a minimum, the action was unlawful under 25 U.S.C. § 476(4).

ARGUMENT

I. This Court has Subject Matter Jurisdiction over this Matter

A. Standard of Review

"Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

B. The APA Subjects Final Agency Action to Judicial Review

The Secretary's decision of February 11, 2005 is subjected to judicial review by 5 U.S.C. §§ 702 and 704, under the standard specified in § 706(2)(A). Dunlop v. Bachowski, 421 U.S. 560, 566 (1975).

The Tribe alleges that the Acting Assistant Secretary's decision constituted final agency action as defined in 25 C.F.R. § 2.6(c), which states that "[D]ecisions made by the Assistant Secretary – Indian Affairs shall be final for the department and effective immediately unless the Assistant Secretary – Indian Affairs provides otherwise in his decision.

Michael D. Olsen indicated in his letter that he was the Acting Assistant Secretary – Indian Affairs when he signed the letter. **Exhibit 10.** This is confirmed by Secretary Order No. 3252, in which the Secretary of the Department of the Interior explicitly

delegated the authority of the Secretary through the Assistant Secretary – Indian Affairs to the Principal Deputy Assistant Secretary – Indian Affairs. (Secretary Order No. 3252 attached as **Exhibit 11**). Because the February 11, 2005 letter is undeniably final agency action, it is reviewable under 5 U.S.C. § 704.

The Tribe seeks relief other than money damages, and states a claim that an official acted in an official capacity. Complaint at 3. Thus, 5 U.S.C. § 702 is the applicable waiver of sovereign immunity. In Cobell v. Babbitt, this Court explained the case law regarding § 702 from the Court of Appeals for the District of Columbia Circuit. In doing so, this Court emphasized that § 702 was intended to eliminate the defense of sovereign immunity in actions seeking relief other than money damages based upon the assertion of unlawful action by a federal officer. 52 F. Supp. 2d 11, at 21 (D.C. Dist. 1999). Thus, 5 U.S.C. §§ 702 and 704, confer jurisdiction to this Court to hear this matter with respect to claims under the APA, and § 702 waives Defendants' sovereign immunity with respect to claims outside the APA, such as those pursuant to 28 U.S.C. § 2201. Accordingly, Defendants' Motion to Dismiss should be denied.

C. The Tribe is Seeking Relief from External Interference, not an Internal Dispute

The issue in this case is whether Defendants can lawfully interfere with the Tribe's internal affairs by invalidating the Tribe's governing documents at will. Contrary to Defendants' assertions, the Tribe is seeking relief from external interference by Defendants. There is no internal dispute, despite Defendants' best efforts at orchestrating one by their puzzling efforts to empower Yakima Dixie in defiance of the Tribe's will. Specifically, there is no pending administrative appeal by Yakima Dixie. His appeals before both the tribal forum and the BIA have been dismissed. There is no pending court case regarding leadership. Most importantly, Yakima Dixie has been expelled from the Tribe, and is incarcerated due to a violation of his probation that included a charge of sexual assault. On September 2, 2005, he was sentenced to three years in state prison for

this probation violation. No tribal member supports Yakima Dixie. No other tribal member has challenged the tribal leadership at any time. In view of the above, the Tribe submits that any suggestion that there is a true internal dispute is misguided, disingenuous, or both.

II. Defendants' 12(b)(6) Motion should be Denied

A. The Tribe States Claims upon which Relief may be Granted

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41 at 45-46 (1957).

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or the absence of sufficient facts alleged under a cognizable legal theory. Ballister v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); Graeling v. Village of Lombard, 58 F.3d 295 at 297 (7th Cir. 1995).

As discussed above, the Tribe has stated a claim for which relief can be granted. The Tribe's legal theory is that tribes retain the inherent sovereign authority to, *inter alia,* adopt its governing documents, to determine its membership and to regulate its internal relations without external interference. Santa Clara Pueblo v. Martinez, 436 U.S. 49 at 56 (1978); 25 U.S.C. § 476(h). The Tribe has alleged that Defendants have acted in an unlawful manner that violated the Tribe's right to be free of external interference. This allegation, under the legal theory suggested above, makes out a claim sufficient to defeat a motion to dismiss for failing to state a claim. Conley at 45-46; Ballister at 699; Graeling at 297. Thus, Defendants' Motion should be denied.

B. The Doctrine of Exhaustion of Administrative Remedies Does Not Apply when the Agency Action is Final, and no Administrative Appeal is Available

Defendants concede that the type of exhaustion at issue in this case is "non-jurisdictional," where exhaustion is provided for but not mandated. However, they fail to

mention that non-jurisdictional exhaustion only applies where there is an available administrative remedy. There is no administrative remedy available here.

As discussed above, 5 U.S.C. § 704 subjects final agency action to judicial review. Dunlop at 555-556. 25 C.F.R. § 2.6(c) defines decisions made by the Assistant Secretary – Indian Affairs as final agency action. There is no administrative remedy available unless the official provides for it in the decision. Id. Michael Olsen made no such provision here, therefore, no administrative remedy is available to the Tribe here. Coosewoon v. Meridian Oil Co., 25 F.3d 920 at 925 (10th Cir. 1994) (stating that the Secretary's inaction becomes final for purposes of judicial review because Secretary is the highest authority within the agency); Rosebud Sioux Tribe v. Gover 104 F. Supp. 2d 1194, 1203 (D. S.D. 2000) (action of the Assistant Secretary – Indian Affairs constitutes a "final decision" for the agency, subject to judicial review pursuant to 25 C.F.R. § 2.6(c)); Sokaogon Chippewa Community v. Babbitt, 929 F. Supp. 1165, 1182 (W.D. Wis. 1996) ("Decisions taken by the Assistant Secretary – Indian Affairs are not appealable unless she provides otherwise in her decision. 25 C.F.R. § 2.6(c)").

Defendants' reliance on Avocados Plus, Inc. v. Veneman is misguided. Defendants assert that the two-part analysis taught in Avocados is required in this situation, when that is not the case. In fact, the court in Avocados explained that non-jurisdictional exhaustion "…is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court." 370 F.3d 1243, 1247 (D.C. Cir. 2004) (emphasis added). While comparing the two types of exhaustion, the court stated that "…the existence of an administrative remedy automatically triggers a non-jurisdictional exhaustion inquiry…" Id at 1248. This implies that if there is no administrative remedy, there is no analysis. This conclusion is compelled because an opposite conclusion does not make sense. It is pointless to perform an analysis to determine if exhaustion is warranted, if there is no administrative remedy to require when the analysis is complete. More importantly, such

a conclusion is consistent with the plain language of 25 C.F.R. § 2.6(c), which explicitly states that there is no administrative remedy to a decision by the Assistant Secretary – Indian Affairs. Thus, there is no exhaustion requirement in this case because there is no administrative remedy to exhaust.

Even if exhaustion was an option, it would serve no purpose because 1) there are no facts in dispute and 2) it would be inadequate because of agency bias. Avocados at 1247.

There are no material facts in dispute. There is no dispute that the Tribe is federally recognized. There is no dispute that until recently, the Tribe maintained a government-to-government relationship with Defendants through the current tribal leadership. There is no dispute that until recently, the Tribe was a contractor under Public Law 93-638 with mature contract status. There is no dispute that the Tribe has adopted governing documents that include a constitution, and a resolution establishing a tribal forum. And there is no dispute that Michael Olsen's letter of February 11, 2005 explicitly rejected the Tribe's constitution and tribal forum. The only dispute is whether Michael Olsen's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); CW Gov't Travel, Inc. v. United States, 61 Fed. Cl. 559 (2004). Michael Olsen's action was either lawful or not, and rehashing undisputed facts in a nonexistent administrative forum would not serve any of the functions of the doctrine of exhaustion. Avocados at 1247.

With respect to bias, an administrative remedy may be inadequate where the administrative body is biased or has otherwise predetermined the issue before it. McCarthy v. Madigan, 503 U.S. 140 at 148 (1992) citing Houghton v. Shafer, 392 U.S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"). Here it would be similarly futile to require an administrative review of an

unlawful act through a process culminating with the person who committed the act. Administrative bias is further demonstrated with Defendants' recent unilateral modification of the Tribe's 638 contract, equivocal behavior following the modification, and continued interference with the Tribe's funding from the state of California. **Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.**

Defendants have not hesitated to interfere with the Tribe's internal matters during the pendency of litigation contesting the same or related interference by Defendants. If the Tribe were denied immediate judicial review, there is little doubt that Defendants will financially strangle the Tribe, and purge its membership in short order. Even if there was an unbiased administrative review (which is unlikely), it would not benefit the Tribe, since by that time Defendants' actions will have terminated the Tribe with respect to its current leadership and membership. Thus, the Tribe's interest in immediate judicial review far outweighs the government's interest in the goals of the exhaustion doctrine, which cannot be realized here, where no administrative remedy exists.

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CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that Defendants' Motion be denied, and this case be allowed to proceed.

Dated: September 2, 2005

Respectfully submitted,

/s/

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