NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 06-5023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA VALLEY MIWOK TRIBE,
formerly Sheep Ranch Rancheria of Me-Wuk Indians of California,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
DIRK KEMPTHORNE, Secretary of the Interior; and
MICHAEL D. OLSEN, Principal Deputy, Acting Assistant
Secretary-Indian Affairs,

Defendants-Appellees.

On appeal from the United States District Court for the District of Columbia,
No. 05-CV-739 (Honorable James Robertson, Jr., Judge)

BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici – All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant California Valley Miwok Tribe.

B. Ruling under Review – References to the rulings at issue appear in the Brief for Plaintiff-Appellant. The district court's Order of March 31, 2006 is published at 424 F. Supp. 2d 197 (D.D.C. 2006).

C. Related Cases – The case on review has not previously been before this Court or any other court. United States is not aware of any related cases currently pending in this Court or any other court.

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GLOSSARY

BIA	Bureau of Indian Affairs
IRA	Indian Reorganization Act
Tribe	California Valley Miwok Tribe

JURISDICTION

A. District court – The district court had jurisdiction under 28 U.S.C. § 1331 (federal question).

B. Court of Appeals – The district court entered final judgment on all claims on March 30, 2006. Dkt. 37; A211. On April 10, 2006, the United States filed a timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Dkt. 38. The district court granted the motion on May 2, 2006. Dkt. 41; A212. Plaintiff-Appellant timely filed its notice of appeal on June 16, 2006. Dkt. 42; A213. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are included in the attached addendum.

ISSUES ON APPEAL

Silvia Burley and her two daughters, who purport to be the elected government (the "Burley Government") of the California Valley Miwok Tribe (the "Tribe")[1] appeal the district court's judgment dismissing its claims that the United States, the Secretary of the Interior, and the Assistant Secretary-Indian Affairs

[1] Throughout this brief we refer to Plaintiff-Appellant as the "Burley Government" when necessary to distinguish it from the larger entity – the Tribe – that the Burley Government purports to represent.

(collectively the "United States") violated (1) the Administrative Procedure Act ("APA"), and (2) 25 U.S.C. § 476(h), a provision of the Indian Reorganization Act ("IRA")[2], by declining to recognize the Tribe as "organized" under the IRA, declining to recognize Silvia Burley as chairperson of the Tribe, and declining to accept the tribal constitution and other governing documents proffered by the Burley Government to the Bureau of Indian Affairs ("BIA"). The issues on appeal are:

I. Whether, under 25 U.S.C. § 476(h), BIA was required to recognize the Tribe as organized and recognize the Burley Government and its governing documents, where the vast majority of the Tribe's potential membership did not have the opportunity to participate in Burley's election or the adoption of the documents.

II. Whether the district court abused its discretion when it denied the Burley Government's motions for leave to file supplemental complaints.

[2] Act of June 18, 1934, Ch. 576, 48 Stat. 984, codified at 25 U.S.C. §§ 461 through 479.

STATEMENT OF THE CASE

A. Introduction

This case arises out of a long-running leadership dispute within a federally-recognized Tribe which, in the view of BIA, has never been "organized" or "reorganized."[3] The current appeal involves a challenge to BIA decisions finding that the Tribe is not organized and declining to recognize the tribal government and governing documents proffered by Silvia Burley, who claims to be the chairperson of the Tribe. The district court dismissed for failure to state a claim, finding that Plaintiff-Appellant could not demonstrate that the Burley Government and its governing documents reflect the will of a majority of the tribal community as required by the IRA.[4]

On appeal, the Burley Government does not dispute that the vast majority of the potential membership of the Tribe did not have an opportunity to participate in the election of Burley as chairperson or in the adoption of the governing documents. Instead, the Burley Government argues that BIA was required, under

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[3] A "reorganized tribe" is a tribe that has adopted a constitution pursuant to the IRA or certain other federal statutes. An "organized tribe" is a tribe that has adopted a constitution outside of those statutes. 25 C.F.R. § 81.1(p); 25 C.F.R. § 82.1(g), (k), (l).

[4] The district court also found that summary judgment would be available on the Burley Government's APA claim. Supp. App. 44, Slip Op. 14 n.8.

25 U.S.C. § 476(h), to recognize the Tribe as organized, and to recognize the Burley Government and its proffered governing documents, notwithstanding this lack of participation. The district court properly rejected this argument, reasoning that while Section 476(h) recognizes the "inherent sovereign power" of "each Indian tribe" to "adopt governing documents under procedures other than those specified in" the IRA, Section 476(h) does not eliminate the IRA's requirement that governing documents be ratified by a majority vote of the adult members of the tribe.

B. Statutory Framework – The Indian Reorganization Act

Congress enacted the IRA to improve the economic status of Indians by, among other things, ending the United States' prior policy of "allotment" of tribal land, and permitting and encouraging each tribe to "organize for its common welfare."[5] 25 U.S.C. § 476(a); see *Morton v. Mancari,* 417 U.S. 535, 542 (1974). Sections 476(a) through (d) set out standards and procedures by which a federally-recognized tribe that wishes to organize "may adopt an appropriate constitution

[5] From the 1870's until passage of the IRA in 1934, the United States followed a policy of dismantling the tribal land base, allotting parcels of tribal land to individual members, and conveying "surplus" tribal land to non-Indians. See General Allotment Act, ch. 119, 24 Stat. 388; *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 253-254 (1992); *Hodel v. Irving,* 481 U.S. 704, 707-708 (1987).

and bylaws" and secure the Secretary's approval of those documents.

Specifically, Section 476(a) provides:

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

25 U.S.C. § 476(a).

The IRA does not require tribes to organize (or reorganize), however, and it allows tribes and the residents of Indian reservations to exclude themselves from the application of most of the Act's provisions through "a majority vote of the adult Indians[.]" 25 U.S.C. §§ 478, 478a, 478b.

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

> Notwithstanding any other provision of this Act --
>
> > (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

> (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

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

C. Facts

1. Background

The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California,[6] is a federally recognized tribe.[7] 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979); 60 Fed. Reg. 9250, 9253 (Feb. 16, 1995). While the parties dispute the legitimacy of the current (purported) tribal government, there is no dispute that, prior to 1999, the Tribe was never organized and never had a government or governing documents that were recognized by the United States. A12, A96.

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[6] The Burley Government purported to re-name the Tribe in June 2001. A15.

[7] Recognized tribes and their members are eligible for various federal services and benefits. *See, e.g.,* 25 U.S.C. §§ 450f, 450b(e) (recognized tribes eligible for certain self-determination contracts). In addition, only recognized tribes are eligible to operate gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq*.

The land known as the Sheep Ranch Rancheria, which consists of 0.92 acres located in Calaveras County, California, was purchased by the United States in 1916 for the benefit of approximately 14 landless and homeless California Indians in the area. A96; Supp. App. 3. Those Indians had rights to the Rancheria's land and the right to participate in its governance. See A96. In 1967, title to the Rancheria land passed to the Rancheria's sole Indian resident, Mabel Hodge Dixie.[8] Supp. App. 9. Ms. Dixie died in 1971, and the Rancheria land is now held in trust by the United States for Ms. Dixie's heirs. See Supp. App. 6. As discussed below, the Rancheria land was the subject of separate litigation brought by the Burley Government in the Eastern District of California.

2. The Tribe's initial efforts to organize

Ms. Dixie's heirs included four sons, one of whom – Yakima Dixie ("Dixie") – claims to be a hereditary chief of the Tribe. Supp. App. 33, Slip Op. 3. In August 1998, Dixie "adopted" Silvia Burley, her daughters Rashel Reznor and Anjelica Paulk, and her granddaughter, Tristan Wallace, as members of the Tribe. See A13; Supp. App. 33, Slip Op. 3 n.2. On September 24, 1998, BIA advised Dixie that he, his brother Melvin Dixie, Burley, and Burley's daughters and

[8] The United States transferred title to Ms. Dixie pursuant to California Rancheria Act, Pub. L. 85-671, 72 Stat. 619 (1958), as amended, Pub. L. 88-419, 78 Stat. 390 (1964), which provided for the distribution of the land and assets of certain Indian reservations and rancherias in California.

granddaughter "possess the right to participate in the initial organization of the Tribe" under the IRA. See A12. This group then formed an "unorganized" tribal government – that is, a government without a constitution. A13; see 25 C.F.R. § 81.1(g), (p), (v); 25 C.F.R. § 82.1(e), (k), (l), (p). The group named Dixie as Chairperson. A13. Shortly thereafter, Dixie allegedly resigned that position, and on May 8, 1999, the group held a "general election" at which Burley was elected Chairperson and Dixie was elected Vice Chairperson. A12.

BIA recognized Burley as tribal Chairperson in June, 1999. A12. The following month, BIA and the Tribe entered into a self-determination contract (also known as a Public Law 93-638 contract) pursuant to 25 U.S.C. § 450f.[9] A12. Under this contract, BIA provides funding to support and assist the Tribe in becoming organized through the development of a tribal constitution and

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[9] Dixie contends that he did not resign as Chairperson and disputes Burley's claim to be Chairperson; his claims have been the subject of separate administrative appeals and litigation. In 1999, Dixie asked BIA to reverse its recognition of Burley and the award of the self-determination contract to her tribal government. On February 4, 2000, BIA informed Dixie that this was an internal leadership dispute that should be resolved by the Tribe. A13. Dixie then filed suit in the United States District Court for the Eastern District of California, challenging Burley's claim to be Chairperson. *Sheep Ranch Miwok v. Silvia Burley,* No. 01-1389 (E.D. Cal. Jan. 24, 2002). A15, A34. On January 24, 2002, the district court dismissed without prejudice, holding that Dixie had failed to exhaust his administrative remedies because he had not administratively appealed BIA's February 4, 2000 decision. A34. As discussed below, Dixie then waited until June 2003 before attempting to raise his claim with BIA. A34.

organized government. A12, A16, A30.[10] The amount of this funding has been approximately $400,000 per year. [11]

3. BIA's October 31, 2001 letter finding the Tribe to be unorganized and its elected officials to be only an interim tribal council

On March 6, 2000, the Burley Government ratified a proposed tribal constitution. The Burley Government forwarded the proposed constitution to BIA and requested that BIA review and approve it and conduct a Secretarial election under the procedures of the IRA. A14; 25 U.S.C. § 476 (c), (d). On June 7, 2001, before BIA had taken action,[12] the Burley Government withdrew its request for a Secretarial election. A15.

In September 2001, the Burley Government submitted an amended version of the tribal constitution to BIA for approval under the IRA. A15. On October 31,

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[10] BIA suspended the contract on June 19, 2005, but reinstated it on August 19, 2005. A119, A204. BIA disputes the Burley Government's characterization (A189) of the reinstatement as "partial[]."

[11] As the district court noted, the Tribe receives additional funding from the California Gambling Control Commission, a state agency that makes payments to non-gaming tribes from the California Revenue Sharing Trust Fund. These payments are made on a per-tribe basis – the amount does not change based on the number of tribe members – and amounted to over $1 million in 2005. Supp. App. 43, Slip Op. at 13 n. 7.

[12] Section 476(c) provides that the Secretary "shall call and hold an election" within 180 days of a tribal request.

2001, BIA returned the amended constitution without taking action on it, and advised that

> [t]he 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[.]

A15

4. The Burley Government's "land-into-trust" litigation

On April 29, 2002, the Burley Government filed a complaint in the Eastern District of California alleging the United States violated the California Rancheria Act and breached a fiduciary duty to the Tribe when it transferred title to the Rancheria to Mable Hodge Dixie in 1967. *California Valley Miwok Tribe v. United States,* No. 02-0912 (E.D. Cal.), Supp. App. 1. The complaint[13] sought an order compelling the Department of the Interior to (1) declare the Tribe a "restored tribe" within the meaning of the Indian Gaming Regulatory Act; and (2) to take land into trust for the Tribe. *Id.* As the district court explained, the apparent goal

[13] This Court may take judicial notice of the allegations in the Burley Government's complaint. *Veg-Mix, Inc. v. U.S. Dept. of Agriculture,* 832 F.2d 601, 607 (D.C. Cir. 1987) (courts may take judicial notice of official court records); *Trudeau v. Federal Trade Com'n.,* 456 F.3d 178, 183 (D.C. Cir. 2006) (court may consider matters subject to judicial notice when deciding motion to dismiss for failure to state a claim).

of the lawsuit was to use the land taken into trust to build and operate a casino.[14] Supp. App. 12. Of particular relevance here, the Burley Government's complaint asserted that, as of April 2002, the Tribe had "a potential membership of 250 people." Supp. App. 1, 2.

The district court dismissed for lack of a waiver of sovereign immunity and, in the alternative, on statute of limitations grounds. Supp. App. 7. The Burley Government appealed and the Ninth Circuit affirmed in an unpublished decision. *California Valley Miwok Tribe v. United States,* 197 Fed. Appx. 678 (9th Cir. 2006).

5. BIA's March 26, 2004, decision finding the Tribe to be unorganized.

On February 11, 2004, the Burley Government again provided a copy of the tribal constitution to BIA, but stated that it was doing so only for BIA's records, and not for Secretarial review. A17. BIA responded on March 26, 2004, stating that it still considered the Tribe to be unorganized and Burley to be only a "person of authority" within the Tribe. A28. BIA explained that "this view is borne out not only by the document that you have presented as the tribe's constitution," but

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[14] The Indian Gaming Regulatory Act generally does not authorize gaming on lands acquired by the Secretary in trust for an Indian tribe after October 17, 1988. 25 U.S.C. § 2719(a). The Act provides an exception, however, for certain land of an Indian tribe "that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

also by BIA's "relations over the last several decades with members of the tribal community in and around Sheep Ranch Rancheria." A28. BIA further explained that

> Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was attempted or has occurred with the purported organization of your tribe. For example, we have not been made aware of any efforts to reach out to the Indian communities in and around the Sheep Ranch Rancheria, or to persons who have maintained any cultural contact with Sheep Ranch. To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts were you and your two daughters.

A29. After identifying several other individuals and groups with known or potential ties to Sheep Ranch, BIA advised that the Tribe's governing documents, base rolls, and membership criteria should not be drafted until "after the greater tribal community is initially identified." A29. BIA concluded by emphasizing "the importance of the participation of a greater tribal community in determining membership criteria," and reiterated the agency's continued willingness to "facilitate the organization or reorganization of the tribal community" through Public Law 93-638 self-determination contracts and other forms of assistance. A30.

The March 26, 2004 letter stated that it was subject to administrative appeal under 25 C.F.R. Part 2, and that the decision contained in the letter would become

final for the Department of the Interior in 30 days unless an administrative appeal was filed. A30-A31. Neither the Burley Government nor any other person filed an administrative appeal.

6. The February 11, 2005, decision in Dixie's administrative appeal

In October 2003, Dixie filed an administrative appeal challenging BIA's June 1999 recognition of Burley as tribal Chairperson; Dixie also sought to nullify his 1998 adoption of Burley, her daughters and granddaughter into the Tribe. See A33; see also n. 9 above. On February 11, 2005, the Principal Deputy, Acting Assistant Secretary–Indian Affairs dismissed Dixie's appeal on multiple procedural grounds. A33-34. Among other things, the decision found that Dixie's challenge to BIA's recognition of Burley as tribal Chairperson was rendered moot by the BIA's decision of March 26, 2004, rejecting the Tribe's proposed constitution. The decision explained that

> In that letter, the BIA made clear that the Federal government did not recognize Ms. Burley as the tribal Chairman. Rather, the BIA would recognize her as "a person of authority within California Valley Miwok Tribe." Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal Chairman. I encourage you, either in conjunction with Ms. Burley, other tribal members, or potential tribal members, to continue your efforts to organize the Tribe along the lines outlines in the March 26, 2004, letter[.]

A33.

D. Proceedings below

On April 12, 2005, the Burley Government filed its complaint in this case, naming the United States, the Department of the Interior, the Secretary of the Interior, and the Acting Assistant Secretary–Indian Affairs (collectively, the "United States") as defendants. A9. The complaint alleged that by declining to recognize the Burley Government, constitution, and other governing documents, the United States had violated 25 U.S.C. § 476(h) and the APA. The Burley Government sought declaratory judgment that

– the Tribe "retains inherent sovereign power to adopt governing documents under procedures other than those specified" in 25 U.S.C. § 476(a) through (g);

– the constitution and various resolutions of the Burley Government are "valid governing document[s] for the Tribe";

– the Tribe is lawfully organized pursuant to the IRA, 25 U.S.C. § 476; and

– the February 11, 2005 decision of the Principal Deputy, Acting Assistant Secretary–Indian Affairs is invalid.

A20-A21.

On August 5, 2005, the United States moved to dismiss. Dkt. 15; A35. On September 29, 2005, after briefing was completed on that motion, the Burley Government moved for leave to file a supplemental complaint under Federal Rule of Civil Procedure 15(d), alleging an additional claim based on events that occurred after the complaint was filed. The supplemental complaint alleged that BIA violated 25 U.S.C. § 450m-l, a provision of the Indian Self-Determination and Education Assistance Act (the "Self-Determination Act"), by allegedly modifying the Tribe's self-determination contract in July and August 2005 without the Tribe's consent. A131. On January 11, 2006, the Burley Government moved for leave to file a second supplemental complaint adding two more claims based on post-complaint events: specifically, that BIA violated (1) the Self-Determination Act by allegedly failing to approve the Tribe's 2006 budget proposal; and (2) the Indian Tribal Justice Act, 25 U.S.C. § 3601, by allegedly suspending government-to-government relations with the Tribe and declining to recognize the Tribe's inherent authority to establish a tribal justice system. A193-A194.

On March 30, 2006, the district court dismissed. Dkt. 36, 37; Supp. App. 31. The court reasoned that the Burley Government's claims were all predicated on the mistaken view that, under 25 U.S.C. § 476(h), the Secretary was required to

recognize the Burley Government and its government documents even though Burley was elected, and the governing documents were adopted, without the participation of the majority of the Tribe's potential membership. Supp. App. 41-42, Slip Op. 11-12. The court rejected that view, holding that while Section § 476(h) recognizes the power of Indian tribes "to adopt governing documents under procedures other than those specified" elsewhere in Section 476, its references to documents adopted by a tribe must be understood as references to documents that have been "ratified by a majority vote of the adult members," as required by Section 476(a). Supp. App. 43, Slip Op. 13. The court further reasoned that "[s]ubsection 476(h) did not repeal the provisions of subsection 476(a), nor will it be construed to repeal or water down the protections afforded by the IRA when tribes organize: notice, a defined process, and minimum levels of tribal participation." *Id.*

Accordingly, the court concluded that both the first count, alleging a violation of 25 U.S.C. § 476(h), and the second count, asserting arbitrary, capricious, or unlawful action under the APA, failed to state a claim upon which relief could be granted. Supp. App. 44, Slip Op. 14. In addition, the court found the second count was subject to summary judgment. Supp. App. 44, Slip Op. 14 and n.8. Finally, the court denied the Burley Government's motions for leave to

file supplemental complaints, reasoning that the proposed claims were "derivative of [the Burley Government's] subsection 476(h) theory and would also fail to state a claim if leave to file them were granted." Supp. App. 45, Slip Op. 15.

This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly dismissed the Burley Government's complaint for failure to state a claim. Section 476(h) does not impose a duty on BIA to recognize a tribal government or governing documents where, as here, they are adopted without the consent or participation of a majority of the tribal community. Nothing in Section 476(h) suggests that Congress intended to alter the substantive standards that apply when a tribe seeks to organize, including Section 476(a)(1)'s the requirement that governing documents be "ratified by a majority of adult members of the tribe." In addition, for an "Indian tribe" to organize under the IRA, action by the tribe as a whole is required; action by an unrepresentative faction is insufficient. Finally, nothing in Section 476(h) limits the Secretary's broad authority – independent of the IRA – to ensure the legitimacy of any purported tribal government that seeks to engage in that government-to-government relationship with the United States.

STANDARD OF REVIEW

This Court's review of the district court's order granting the motion to dismiss for failure to state a claim is *de novo*. *Trudeau v. Federal Trade Com'n.,* 456 F.3d 178, 183 (D.C. Cir. 2006). In determining whether a complaint fails to state a claim, this Court, like the district court, may consider only the facts alleged in the complaint, and documents either attached to or incorporated in the complaint and matters of which the court may take judicial notice. *Id.* While the Court must treat the complaint's factual allegations as true and grant plaintiff the benefit of all reasonable inferences from the facts alleged, it is "not bound to accept as true a legal conclusion couched as a factual allegation," or to "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Id.* at 193 (internal quotation marks and citations omitted).

The district court's alternative holding that the Burley Government's APA claim was subject to summary judgment is also reviewed *de novo*. *Brubaker v. Metropolitan Life Ins. Co.,* 482 F.3d 586, 588 (D.C. Cir. 2007).

The district court's denial of the Burley Government's motions for leave to file supplemental complaints is reviewed for abuse of discretion. *See Belizan v. Hershon,* 434 F.3d 579, 582 (D.C. Cir. 2006).

ARGUMENT

I. Section 476(h) does not require BIA to recognize a tribe as organized or to accept a tribal government or governing documents created without the participation of a majority of the tribal community.

The district court correctly concluded that the Burley Government's complaint fails to state a claim, because both counts [15] of the complaint are entirely dependent on a misreading of Section 476(h). Section 476(h) provides that "each Indian tribe shall retain inherent sovereign power to adopt governing documents

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[15] The first count purports to assert a claim under Section 476(h). A18. Section 476(h) does not create a private cause of action, however, so the Burley Government must rely on the "generic cause of action" supplied by the APA. *See Trudea,* 456 F.3d at 188. The second count is an APA claim. A19. Thus, both claims are subject to the APA's "final agency action" requirement, 5 U.S.C. § 704, which protects agencies from "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-149 (1967); *see also Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (action must be one by which rights or obligations have been determined, or from which legal consequences will flow); *IPAA v. Babbitt,* 235 F.3d 588, 594 (D.C. Cir. 2001). Furthermore, even final agency action may be unripe for judicial review if "consideration of the issue would benefit from a more concrete setting." *General Electric Co. v. EPA,* 290 F.3d 377, 380 (D.C. Cir. 2001) (quoting *Abbott Labs.,* 387 U.S. at 149).

The district court assumed, consistent with the standards applicable to a motion to dismiss for failure to state a claim, that BIA's March 26, 2004 letter and February 11, 2005 decision were final agency action. Supp. App. 40, Slip Op. 10 n.5; See *Trudea,* 456 F.3d at 193. That assumption remains appropriate for purposes of this appeal. In the event this Court declines to affirm the judgment of dismissal and remands for further proceedings, however, the United States believes the evidence would show that neither claim satisfies the final agency action requirement and that neither claim is ripe.

under *procedures* other than those specified in" the IRA. 25 U.S.C. § 476(h) (emphasis added). The term "procedures" in Section 476(h) is a reference to the Secretarial election procedures described in 25 U.S.C. §§ 476(a), (c) and (d), which include mandatory schedules for Secretarial elections and for the Secretary to approve or disapprove governing documents ratified in those elections. In addition, regulations promulgated by the Secretary pursuant to Section 476(a)(1) include detailed provisions on election notices, voter registration, voting procedures, and other matters. 25 C.F.R. Parts 81 and 82. In other words, Section 476(h) confirms that a tribe may adopt or revoke governing documents without following the IRA's Secretarial election procedures. But nothing is Section 476(h) suggests that Congress also intended to alter the substantive standards that apply when a tribe seeks to organize, including the requirement in Section 476(a)(1) that governing documents be "ratified by a majority of adult members of the tribe."

In the guise of a "plain meaning" analysis (Br. at 12-15), the Burley Government attempts to expand Section 476(h) from what it is – a exception from the otherwise required procedures – into a complete repeal of the IRA's substantive standards and a mandate that the Secretary recognize any purported

tribal government or governing documents when Section 476(h) is invoked. This interpretation is without merit, for several reasons.

First, it ignores Congress's use of the word "procedures" in Section 476(h). Black's Law Dictionary (5th ed.) defines that term as "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right," and "the machinery, as distinguished from its product." Thus, the requirement in Section 476(a)(1) for "a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe," the requirement in Section 476(a)(2) for "approv[al] by the Secretary pursuant to [Section 476(d)]," and the timetables and default rules of Sections 476(c) and (d) are procedures, and are not mandatory when a tribe seeks to organize under Section 476(h).

In contrast, Section 476(a)'s basic requirement that governing documents be "ratified by a majority of adult members of the tribe" is not merely a "procedure" – it is also a substantive requirement that members of a tribe be allowed to vote on fundamental questions of tribal organization when the tribe seeks to organize under the IRA. See *Shays v. FEC,* 414 F.3d 76, 91 (D.C. Cir. 2005) (describing litigants' interests in fair administrative decisionmaking and fair elections as both procedural and substantive). This requirement that fundamental matters of tribal

organization under the IRA be ratified by majority vote is reflected in other sections of the IRA as well, such as the provisions governing a decision by a tribe or reservation to exclude itself from the Act's coverage. 25 U.S.C. § 478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary * * * shall vote against its application."); see also 25 U.S.C. 478a (requiring majority vote, and total vote of not less than 30 percent of those entitled to vote, on questions of adoption of a constitution, bylaws, or amendments). If, as the Burley Government contends, Congress had intended to alter the substantive standards by which tribes may organize under the IRA, Congress would not have used the word "procedures" in Section 476(h). Further, the Burley Government's reading of Section 476(h) would produce the anomalus result that a majority vote is required for a tribe to exclude itself from application of the IRA under Sections 478, while no majority vote is required for a tribe to adopt or amend a constitution under the IRA.

Second, the Burley Government's interpretation ignores the fact that Section 476(h) refers to the "inherent sovereign power" of an "Indian tribe" to adopt governing documents. 25 U.S.C. §§ 476(h)(1), (h)(2). Similarly, Section 476(a) addresses the right of "[a]ny Indian tribe" to organize. This requirement for action by the "tribe" means that action by a mere subset or faction of a tribe is not

enough, and is also consistent with a requirement for a majority vote, since such a vote is an obvious way in which a tribe can exercise its inherent sovereign power. See *Harjo v. Andrus,* 581 F.2d 949, 951-52 (D.C. Cir. 1978) (affirming district court remedial order requiring "a referendum among all Creek adults on certain issues raised by a recently drafted, proposed constitution for the tribe" so that "democratic self-government could be restored to the Creek Nation with maximum participation by tribal members and minimum intrusion by the court."); *Morris v. Watt,* 640 F.2d 404, 406, 415 (D.C. Cir. 1981) (referenda conducted by governments of the Choctaw and Chickasaw Nations of Indians were insufficient to "ensure fair elections that will accurately reflect the desires of the tribal members" because they did not "fully and fairly involve the tribal members in the proceedings leading to constitutional reform.").[16] Moreover – and even if Section 476(a)'s requirement for majority ratification were deemed a "procedure" for purposes of Section 476(h) – Section 476(h)'s reference to the "inherent sovereign power" of an "Indian tribe" would still require, at a minimum, action by a

[16] The right to vote is a fundamental attribute of self-government that is protected under the equal protection clauses of the U.S. Constitution, see *Reynolds v. Sims,* 377 U.S. 533, 555 (1964) and the Indian Civil Rights Act, 25 U.S.C. § 1302(8) ("No Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws").

legitimate tribal government that is authorized to act on behalf of the tribe, because anything less would render those terms meaningless.[17]

Third and more broadly, nothing in Section 476(h) suggests that Congress intended to limit the Secretary's authority – independent of the IRA – to ensure the legitimacy of any purported tribal government that seeks to engage in that government-to-government relationship with the United States. The federal-tribal relationship is a government-to-government relationship, and the right of tribal self-government is a fundamental aspect of that relationship. See, *e.g., United States v. Lara,* 541 U.S. 193, 202 (2004); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-45 (1980). While deference to principles of self governance typically weighs against federal involvement in internal tribal matters, "courts have recognized that the Secretary of the Interior occasionally is forced to identify which of two or more competing tribal political groups to recognize as the proper representative of the tribe." Felix Cohen, *Handbook of Federal Indian Law*

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[17] The Burley Government attempts to buttress its "plain meaning" argument by relying on the canon of statutory construction that requires that ambiguities be resolved in the Indians' favor. Br. at 20-21; see, *e.g., Bryan v. Itasca County,* 426 U.S. 373, 392 (1976). That canon has no application here, in the context of a leadership dispute when Indians are on all sides of an issue. Nor does the Burley Government explain how BIA's refusal to recognize governing documents adopted without the participation of the majority of the potential Tribal membership could be contrary to the canon. See *Shakopee Mdewakanton v. Babbitt,* 107 F.3d 667, 670 (8th Cir. 1997).

290 (2005 ed.). See, *e.g., Wheeler v. U.S. Dept' of Int.,* 811 F.2d 549, 552 (10th Cir. 1987); *Goodface v. Grassrope,* 708 F.2d 335, 339 (8th Cir. 1983) (" BIA, in its responsibility for carrying on government to government relations with the Tribe, is obliged to recognize and deal with some tribal governing body"); *Seminole Nation v. Norton,* 223 F. Supp. 2d 122, 140 (D.D.C. 2002) ("DOI has the authority and the responsibility to ensure that the Nations's representatives, with whom it must conduct government-to-government relations, are valid representatives of the Nation as a whole").

BIA's refusal to recognize the Burley Government is consistent with the foregoing principles, particularly given the unusual facts of the case and the history of the Sheep Ranch Rancheria. As the Interior Board of Indian Appeals explained in another case involving the efforts of competing factions to organize a California Rancheria, "[t]his is not an ordinary tribal government dispute, arising * * * in an already existing tribal entity. * * * Rather, this case concerns, in essence, the creating of a tribal entity from a previously unorganized group. In such a case, BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so." *Jeffrey Alan-Wilson, Sr., v. Sacremento Area Director,* 30 I.B.I.A. 241, 252 (1997). See also *Ransom v. Babbitt,* 69 F. Supp. 2d 141, 150 (D.D.C. 1999) ("In

situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination.")

Thus, the issue in this case is not, as the Burley Government would have it (see, *e.g.,* Br. at 8, 14,21), whether the California Valley Miwok Tribe has the sovereign power to adopt governing documents without employing the IRA's procedures. The Tribe plainly has that power. Rather, the issue is whether the Burley Government in fact speaks for the Tribe in the exercise of that sovereign power. The answer to that question is no, because the undisputed facts show that the Burley Government was elected, and its governing documents adopted, by just three people and without the participation of the vast majority of the potential members of the Tribe.

The Burley Government implies that its legitimacy is beyond question because BIA has on several occasions recognized Burley as chairperson of the Tribe and has continued to fund the Tribe's self-determination contract. See Br. at 3-5. The Burley Government's brief mischaracterizes BIA's actions, however. BIA's initial recognition of Burley as Chairperson occurred in 1999 and 2000, before the problematic nature of the Burley Government and its proposed constitution were fully apparent. See A12-A13. In October, 2001, in response to

those issues, BIA announced that it would "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." A15. Thereafter, consistent with the Self-Determination Act's strong policy in favor of self-determination funding, BIA continued to acknowledge Burley as Chairperson and continued to fund the Tribe's self-determination contract – awarded to support the organization of the tribe – in order to encourage the organization process. See 25 U.S.C. § 450a; A30 (BIA March 26, 2004 letter to Burley Government stating "the importance of the participation of the greater tribal community" in the tribal organization process, and that the agency's Public Law 93-638 contracts are "intended to facilitate organization or reorganization of the tribal community"). When, after several more years of this funding, the Burley Government submitted a purported tribal constitution that was developed by Burley and her two daughters without the participation of the many persons with documented connections to the Sheep Ranch Rancheria, BIA on March 26, 2004 reaffirmed its view that the Tribe was unorganized. A28-A29. This conclusion was repeated in the Principal Deputy, Acting Assistant Secretary's February 11, 2005 decision in Dixie's administrative appeal. A33-A34. Thus, far from demonstrating the legitimacy of

the Burley Government, this course of events confirms that it is not representative of the majority of the potential membership of the Tribe.

In sum, the district court correctly dismissed the second count of the Burley Government's complaint for failure to state a claim. Section 476(h) does not impose a duty on BIA to recognize a tribal government or governing documents where, as here, they are adopted without the consent or participation of a majority of the tribal community.

II. The district court did not abuse its discretion when it denied the Burley Government's motions for leave to file supplemental complaints.

Federal Rule of Civil Procedure 15(d) provides, in relevant part:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Fed. R. Civ. P. 15(d).

The Burley Government's proposed third claim for relief, filed September 29, 2005, alleged that BIA violated the Self-Determination Act, 25 U.S.C. § 450m-l, by modifying the Tribe's self-determination contract in July and August 2005 without the Tribe's consent. A131. The proposed fourth and fifth claims, filed January 11, 2006, alleged that BIA violated (1) the Self-Determination Act by allegedly failing to approve the Tribe's 2006 budget proposal; and (2) the

Indian Tribal Justice Act, 25 U.S.C. § 3601, by allegedly suspending government-to-government relations with the Tribe and declining to recognize the Tribe's inherent authority to establish a tribal justice system. A193-A194. The district court denied leave to supplement on the ground that the new claims in the Burley Government's proposed supplemental complaints were "derivative of plaintiffs' subsection (h) theory" and would, like the claims in the original complaint, "fail to state a claim if leave to file them were granted." Supp. App. 44-45, Slip Op. 14-15.

We disagree with the district court's rationale for denying leave to supplement. In our view, the standards for organization under the IRA are distinct from the standards applicable to the Burley Government's proposed supplemental claims under the Self-Determination Act and Indian Tribal Justice Act.[18] Nevertheless, the district court would have been justified in denying leave to supplement on the ground that the supplemental claims could be the subject of a separate action, because they are based on events that post-date the original complaint. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure;* Civil 2D § 1509 (1990); *Planned Parenthood of Southern Arizona v. Neely,* 130 F.3d 400, 402 (9th Cir. 1997). And in any event,

[18] The United States did not oppose the Burley Government's motions for leave to file the supplemental complaints.

even if it were error for the district court to deny leave to supplement, that error would be harmless, because the district court's denial does not prevent the Burley Government from bringing the supplemental claims as a separate action. *See Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.,* 750 F.2d 731, 739 (9th Cir. 1984) (for purposes of *res judicata,* "[t]he scope of litigation is framed by the complaint at the time it is filed"); *Computer Associates International, Inc., v. Altai, Inc.,* 126 F.3d 365, 369-70 (2d Cir. 1997) (the filing of a supplemental complaint based on events occurring after filing of the original complaint is not mandatory, and *res judicata* "does not apply to new rights acquired during the action which might have been, but which were not, litigated.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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