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May 3, 2011

Our File Number: 26RJ-159149

VIA E-MAIL AND U.S. MAIL

Larry Echo Hawk
Assistant Secretary - Indian Affairs
United States Department of the Interior
Office of the Secretary
1849 C Street, N.W.
Washington, D.C. 20240

Re: California Valley Miwok Tribe – Response to April 8, 2011 Request for Briefing on Referral from Interior Board of Indian Appeals

Dear Assistant Secretary Echo Hawk:

We are responding to your request for briefing on various issues that are related to Silvia Burley's administrative appeal of a November 6, 2006 decision by Bureau of Indian Affairs ("BIA") Superintendent Troy Burdick ("2006 Decision"). The 2006 Decision concerned the BIA's offer to assist the California Valley Miwok Tribe ("Tribe")[1] with organization under the Indian Reorganization Act ("IRA"). On December 22, 2010, you issued a decision addressing an issue that the Interior Board of Indian Appeals ("Board") had referred to you from Ms. Burley's appeal (the "2010 Decision"). But on April 1, 2011, you set aside the 2010 Decision. On April 8, 2011, in a letter to Mr. Yakima Dixie and Ms. Silvia Burley, you requested briefing in connection with your reconsidered decision on Ms. Burley's appeal.

We are responding not only on behalf of Mr. Dixie, who is chief of the Tribe, but also on behalf of the Tribe's Tribal Council, the Tribe's 242 adult members and their 350 children. The Tribal Council consists of Chief Dixie, Velma Whitebear, Antone Azevedo, Shirley Wilson, Evelyn Wilson, Michael Mendibles, Iva Carsoner, and Antonia Lopez.

As you noted in setting aside the 2010 Decision, the status of the Tribe's organization needs to be promptly resolved. However, your 2010 Decision did not contribute to resolving the Tribe's organizational difficulties. Instead, it disenfranchised the Tribal community and erroneously turned control of the Tribe over to Ms. Burley and her two daughters. It did so

[1] The Tribe is also known as the Sheep Ranch Rancheria of Me-Wuk Indians of California.

in violation of the IRA and of a federal Court of Appeals decision which held that Ms. Burley's efforts to organize the Tribe were invalid because they did not involve the entire tribal community. Furthermore, the 2010 Decision arbitrarily reversed previous decisions by the BIA and the Department of the Interior ("Department") and addressed issues that were not properly before you under the terms of the Board's referral.

Your 2010 Decision greatly harmed the interests of the Tribe and its members, in violation of your trust responsibilities to them. It has affected, and continues to affect, their ability to carry out basic Tribal functions. It has forced the Tribe to devote enormous resources to addressing the injustice caused by your action. This injury is on top of the harm caused to the Tribe by the years of delay in bringing the Tribe's organization to a just and speedy resolution.

Among other things, the Department's actions have allowed Ms. Burley and her daughters to divert millions of dollars away from the Tribe's members, who would have used the funds to address the cultural, educational, social and economic needs of the Tribal community. Instead, the money has gone for the private benefit of Ms. Burley and her daughters. Moreover, Ms. Burley continues to seek improper access to Tribal assets, including approximately $7 million in California Revenue Sharing Trust Fund money held in trust for the Tribe. *See California Valley Miwok Tribe v. California Gambling Control Comm'n*, 2010 WL 1511744 (C.A.4 2010) (nonpublished) (remanding to trial court for further proceedings). Your reconsidered decision will help to determine whether that money goes exclusively to enrich the Burleys, or is used by the Tribe to provide essential benefits and services to more than 500 adults and children.

We submit this response in the hope that your reconsidered decision will facilitate a more fair and timely resolution of the Tribe's organizational issues. Our response answers the three specific questions that you asked in your April 8 letter. We also address a number of issues that are relevant to your reconsideration of Ms. Burley's appeal. Most important, we explain that in the four years that the Department has been considering the Burley appeal, the Tribe has proceeded with the process of organization under the IRA. The Tribal Council has involved the entire Tribal community in that effort and has successfully developed a Tribe that is serving its members' economic, cultural, educational and social needs. The Tribal community has developed and revised a constitution, and the only steps remaining to complete the organization process are to hold an election regarding adoption of the constitution, and to seek the Department's formal recognition of the Tribal government and the establishment of government-to-government relations. As a result, further action by the Department to implement the 2006 Decision is not needed.

Our response also addresses the disposition of the issue that the Board referred to you from Ms. Burley's appeal. We explain that the Board improperly characterized Ms. Burley's claim as an "enrollment issue" and that the referral was improper. We also explain why, even assuming for the sake of argument that the issue is properly before you, you are bound by the

previous decisions of the federal courts regarding this Tribe. Any decision that is contrary to those holdings would be arbitrary and capricious. Finally, we explain why the 2006 Decision was valid and why the 1998 tribal Resolution that you identified for the first time in your 2010 Decision cannot provide the basis for organizing the Tribe. For all of these reasons, we ask that you dismiss Ms. Burley's appeal in its entirety.

Overall, the path forward is very clear. The Tribe does not consist of Ms. Burley and her two daughters, who, prior to 1998, had no prior connection with the Tribe. The Tribe consists of the 242 adult members and their children who have established a vibrant, functioning Tribal community. Your decision in this case should dismiss Ms. Burley's appeal. You should separately direct the BIA to support the completion of the Tribe's long-overdue organization.

Thank you for the opportunity to submit this information.

Sincerely yours,

Robert J. Uram

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

W02-WEST:5JAR1\403502336.1

Attachment: Brief Dated May 3, 2011

cc: Troy Burdick, Superintendent, Bureau of Indian Affairs Central California Agency
Amy Dutschke, Director, Bureau of Indian Affairs Pacific Region
James Porter, Office of the Solicitor, Department of Interior
Brian Newland, Office of the Secretary, Department of Interior
Kenneth Rooney, U.S. Department of Justice, Environment and Natural Resources Division
Robert Rosette, attorney for Silvia Burley

BEFORE THE ASSISTANT SECRETARY – INDIAN AFFAIRS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR
On Referral from the Interior Board of Indian Appeals

CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, **Appellant** **v.** **PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,** **Appellee.** W02-WEST:5JAR1\403503600.3	**IBIA Docket No. 07-100-A** **In re 51 IBIA 103**

RESPONSE TO THE ASSISTANT SECRETARY'S APRIL 8, 2011 REQUEST FOR BRIEFING RE ORGANIZATION OF THE CALIFORNIA VALLEY MIWOK TRIBE

Response of interested parties Chief Yakima Dixie, the California Valley Miwok Tribe and its Tribal Council.

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Dated: May 3, 2011

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Exhibit 2: Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Yakima Dixie (Dec. 22, 2010) ("2010 Decision")

Exhibit 3: Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Yakima Dixie (April 1, 2011)

Exhibit 4: Letter from Larry Echo Hawk, Assistant Secretary - Indian Affairs, to Yakima Dixie (April 8, 2011)

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Exhibit 15: Letter from Yakima Dixie to Raymond Fry, BIA Tribal Operations Officer, Re Request for Secretarial Election (Sept. 28, 2003)

Exhibit 16: 2006 California Valley Miwok Tribe Constitution ("2006 Constitution")

Exhibit 17: Public Notice, Bureau of Indian Affairs, Amador Ledger Dispatch (Apr. 11, 2007) ("2007 Public Notice")

I. Introduction

This brief responds to your request for briefing on various issues that are related to Silvia Burley's administrative appeal of a November 6, 2006 decision by Bureau of Indian Affairs ("BIA") Superintendent Troy Burdick ("2006 Decision") (Exhibit 1). The 2006 Decision concerned the BIA's offer to assist the California Valley Miwok Tribe ("Tribe")[1] with organization under the Indian Reorganization Act ("IRA"). On December 22, 2010, you issued a decision addressing an issue that the Interior Board of Indian Appeals ("Board") had referred to you from Ms. Burley's appeal (the "2010 Decision") (Exhibit 2). But on April 1, 2011, you set aside the 2010 Decision (Exhibit 3). On April 8, 2011, in a letter to Mr. Yakima Dixie and Ms. Silvia Burley, you requested briefing in connection with your reconsidered decision on Ms. Burley's appeal (Exhibit 4).

We are responding not only on behalf of Mr. Dixie, who is chief of the Tribe, but also on behalf of the Tribe's Tribal Council, the Tribe's 242 adult members and their 350 children. The Tribal Council consists of Chief Dixie, Velma Whitebear, Antone Azevedo, Shirley Wilson, Evelyn Wilson, Michael Mendibles, Iva Carsoner, and Antonia Lopez.

As you noted in setting aside the 2010 Decision, the status of the Tribe's organization needs to be promptly resolved. However, your 2010 Decision did not contribute to resolving the Tribe's organizational difficulties. Instead, it disenfranchised the Tribal community and erroneously turned control of the Tribe over to Ms. Burley and her two daughters. It did so in violation of the IRA and of a federal Court of Appeals decision which held that Ms. Burley's efforts to organize the Tribe were invalid because they did not involve the entire tribal community. Furthermore, the 2010 Decision arbitrarily reversed previous decisions by the BIA and the Department of the Interior ("Department") and addressed issues that were not properly before you under the terms of the Board's referral.

Your 2010 Decision greatly harmed the interests of the Tribe and its members, in violation of your trust responsibilities to them. It has affected, and continues to affect, their ability to carry out basic Tribal functions. It has forced the Tribe to devote enormous resources to addressing the injustice caused by your action. This injury is on top of the harm caused to the Tribe by the years of delay in bringing the Tribe's organization to a just and speedy resolution.

Among other things, the Department's actions have allowed Ms. Burley and her daughters to divert millions of dollars away from the Tribe's members, who would have used the funds to address the cultural, educational, social and economic needs of the Tribal community. Instead, the money has gone for the private benefit of Ms. Burley and her daughters. Moreover, Ms. Burley continues to seek improper access to Tribal assets, including approximately $7 million in California Revenue Sharing Trust Fund money held in trust for the Tribe. *See California Valley Miwok Tribe v. California Gambling Control Comm'n*, 2010 WL 1511744

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(C.A.4 2010) (nonpublished) (remanding to trial court for further proceedings). Your reconsidered decision will help to determine whether that money goes exclusively to enrich the Burleys, or is used by the Tribe to provide essential benefits and services to more than 500 adults and children.

We submit this response in the hope that your reconsidered decision will facilitate a more fair and timely resolution of the Tribe's organizational issues. Our response answers the three specific questions that you asked in your April 8 letter. We also address a number of issues that are relevant to your reconsideration of Ms. Burley's appeal. Most important, we explain that in the four years that the Department has been considering the Burley appeal, the Tribe has proceeded with the process of organization under the IRA. The Tribal Council has involved the entire Tribal community in that effort and has successfully developed a Tribe that is serving its members' economic, cultural, educational and social needs. The Tribal community has developed and revised a constitution, and the only steps remaining to complete the organization process are to hold an election regarding adoption of the constitution, and to seek the Department's formal recognition of the Tribal government and the establishment of government-to-government relations. As a result, further action by the Department to implement the 2006 Decision is not needed.

Our response also addresses the disposition of the issue that the Board referred to you from Ms. Burley's appeal. We explain that the Board improperly characterized Ms. Burley's claim as an "enrollment issue" and that the referral was improper. We also explain why, even assuming for the sake of argument that the issue is properly before you, you are bound by the previous decisions of the federal courts regarding this Tribe. Any decision that is contrary to those holdings would be arbitrary and capricious. Finally, we explain why the 2006 Decision was valid and why the 1998 tribal Resolution that you identified for the first time in your 2010 Decision cannot provide the basis for organizing the Tribe. For all of these reasons, we ask that you dismiss Ms. Burley's appeal in its entirety.

Overall, the path forward is very clear. The Tribe does not consist of Ms. Burley and her two daughters, who, prior to 1998, had no prior connection with the Tribe. The Tribe consists of the 242 adult members and their children who have established a vibrant, functioning Tribal community. Your decision in this case should dismiss Ms. Burley's appeal. You should separately direct the BIA to support the completion of the Tribe's long-overdue organization.

II. Background of 2006 Decision and Burley Appeal

The 2006 Decision stated that, in light of the ongoing leadership dispute between Chief Dixie and Ms. Burley, the Tribe "lacked an organized tribal government that represented the entire membership." It therefore stated that the BIA would assist the Tribe to "reorganize a formal governmental structure that is representative of all Miwok Indians who can establish a basis for their interest in the Tribe and is acceptable to the clear majority of those Indians." To

accomplish that, the BIA would publish a notice inviting the members of the Tribal community to a meeting to initiate the organization process.

Ms. Burley challenged the 2006 Decision before the BIA's Pacific Regional Director, who affirmed on April 2, 2007 ("2007 Decision") (Exhibit 5). The 2007 Decision stated that previous Tribal organization efforts had "failed to identify the whole community who are entitled to participate in the Tribe's efforts to organize." Therefore, the "main purpose [of the 2006 Decision] was to assist the Tribe in identifying the whole community, the 'putative' group, who would be entitled to participate in the Tribe's [organization]." The 2007 Decision did not attempt to define the Tribe's membership; rather, the Regional Director explicitly recognized that the Tribe was entitled to define its own membership and that "it is not the goal of the [BIA] to determine membership of the Tribe."

Ms. Burley then filed an appeal from the 2007 Decision with the Board. The Board decided Ms. Burley's appeal in January 2010, in *California Valley Miwok Tribe vs. Pacific Regional Director*, 51 IBIA 103 (2010) ("Board Decision").

A. The Board's Referral

Ms. Burley's appeal to the Board raised three claims. The Board dismissed the first and third claims on jurisdictional grounds, and those claims are no longer at issue.[2] Ms. Burley's second claim argued that the Tribe was "already organized" and therefore that the "BIA's proffered 'assistance' [in organizing the Tribe] constitute[d] an impermissible intrusion into tribal government and membership matters." *Id.* at 104.

With respect to Ms. Burley's second claim, the Board recognized that the Department had already finally determined that "the Department does not recognize the Tribe as being organized or as having any tribal government that represents the Tribe," and that a federal district court and the Court of Appeals for the D.C. Circuit had upheld that decision. 51 IBIA at 120, 105. *See also California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. 2006) (*"CVMT"*); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008) ("*CVMT*") [collectively, the "Burley Litigation"]. The Board also recognized that the Department had already finally determined, and the federal courts had confirmed, that:

> the Department does not recognize the Tribe as necessarily limited to Yakima [Dixie], Melvin [Dixie], Burley, her two daughters, and her granddaughter for purposes of who is

[2] Ms. Burley's first claim argued that the 2007 Decision violated, or illegally reassumed, a contract under the Indian Self-Determination and Education Assistance Act ("ISDA"). Board Decision, 51 IBIA at 104. The Board dismissed that claim because it lacks jurisdiction over ISDA claims. *Id.* Ms. Burley's third claim challenged the statement in the 2007 Decision that the Tribe was never terminated and thus is not a "restored" tribe. *Id.* The Board dismissed that claim for lack of standing. 51 IBIA at 105.

> entitled to organize the Tribe and determine membership criteria; and [that] the Department . . . has an obligation to ensure that a "greater tribal community" be allowed to participate in organizing the Tribe.

Board Decision, 51 IBIA at 120. To the extent that Burley's appeal attempted to relitigate those issues, the Board held that it had no jurisdiction over her claims. *Id.* at 105.

However, the Board found that the 2007 Decision "[went] beyond what was decided or confirmed by the Assistant Secretary [in previous decisions]," by "determining *who* BIA will recognize, individually and collectively, as members of the 'greater tribal community' that BIA believes must be allowed to participate in the general council meeting of the Tribe for organizational purposes." *Id.* at 105 (emphasis added). The Board characterized this issue as an "enrollment dispute." *Id.* at 122. Because 43 C.F.R. § 4.330(b)(2) specifically denies the Board jurisdiction over "enrollment disputes," the Board referred this issue to the Assistant Secretary for resolution. *Id.* at 123. As discussed further below, we believe that the Board incorrectly characterized Ms. Burley's claim as an enrollment dispute and that it should have dismissed her claims in their entirety.

B. The 2010 Decision

You issued your 2010 Decision in response to the Board's referral. Rather than addressing the referred issue, your 2010 Decision reversed longstanding, judicially approved decisions by the BIA and your office and concluded that the Tribe was already organized with a General Council form of government under tribal Resolution # GC-98-01 (the "1998 Resolution") (Exhibit 6). Based on your 2010 Decision, the BIA subsequently recognized Silvia Burley as the leader of the Tribe.

On January 4, 2011, we filed a complaint in federal district court, challenging the 2010 Decision as arbitrary, capricious, and otherwise not in accordance with law. *California Valley Miwok Tribe v. Salazar*, No. 1:11-cv-00160 (D.D.C. Jan. 24, 2011). The grounds for our challenge included the following: the 2010 Decision addressed issues not within the scope of the Board's referral; it failed to provide a reasoned analysis for reversing longstanding BIA and Departmental determinations regarding the status of the Tribe; its conclusions were inconsistent with the decisions made in the Burley Litigation and were precluded by the doctrine of *res judicata*; it was barred by the doctrine of judicial estoppel; it violated the Secretary's trust obligation to the Tribe and its members; and it was inconsistent with the IRA, among other reasons. We also filed a Motion for Preliminary Injunction on March 15, 2011. In response to the Complaint and Motion for Preliminary Injunction, you issued a decision on April 1, 2011, that set aside your 2010 Decision and informed the parties that you would be seeking further input before issuing a reconsidered decision on Ms. Burley's appeal.

C. The Scope of the Reconsidered Decision

An important issue in your reconsideration is the scope of the issues that the Board's referral presents. Among other things, the 2010 Decision:

- Rescinded a March 26, 2004 decision by Superintendent Burdick ("2004 Decision") (Exhibit 7) and a February 11, 2005 decision by the Assistant Secretary – Indian Affairs ("2005 Decision") (Exhibit 8), which were final for the Department and not subject to further review;

- Stated that the Tribe's membership is limited to five people;

- Found that the Tribe was already organized under the 1998 Resolution; and

- Ordered the BIA to conduct government-to-government relations with a Tribal government that represents only four people.

For the following reasons, each of those determinations was outside the proper scope of the issue referred by the Board and was not within the scope of your decision on reconsideration. First, the 2004 and 2005 Decisions were final for the Department and not subject to further appeal within the Department. The 2004 Decision became final when the time for filing an appeal expired without the filing of a notice of appeal. 25 C.F.R. § 2.6(b); 25 C.F.R. § 2.9(a). The 2005 Decision was final agency action immediately upon its issuance. 25 C.F.R. § 2.6(c). You are bound by those regulations and lacked authority to revisit the 2004 and 2005 Decisions in the context of Burley's appeal. *See Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 713 (1979). To the extent Burley's claim that the Tribe was already "organized" implicated the 2004 and 2005 Decisions, the Board recognized that the federal courts had already decided that issue, and therefore dismissed the claim. *CVMT*, 51 IBIA at 105.

Second, even if the 2004 and 2005 Decisions had been subject to further review, they were not within the scope of the Board's referral. The Board referred to you only a narrow issue pertaining to the 2007 Decision, "to the extent it [went] beyond what was decided or confirmed by the Assistant Secretary [in the 2005 Decision]." *Id.* The referred issue concerned the process for deciding "who BIA will recognize, individually and collectively, as members of the 'greater tribal community' that BIA believes must be allowed to participate in the general council meeting of the Tribe for organizational purposes." *Id.* The Board explicitly *dismissed* Burley's other claims, including her claims that the Tribe was already organized and that the BIA's efforts to assist with Tribal organization therefore interfered unduly in Tribal affairs. *Id.* at 104-105. Thus, the 2004 and 2005 Decisions were not properly before you.

Therefore, even assuming for the sake of argument that the process defined in the 2007 Decision was improper, the remedy would not be to revisit final, judicially approved decisions about the Tribe's organizational status, nor to recognize a Tribal government that represents only a small faction of the Tribal community. The appropriate remedy would be to limit the BIA's active involvement in the organization process and allow the Tribe to complete

the organization process itself. As we discuss in Section III of this briefing, the Tribe has already done exactly that, under the leadership of the Tribal Council. No further BIA action is needed, and therefore no relief is necessary even if you agree with Ms. Burley that the BIA's offer of assistance constituted an "impermissible interference into tribal government," 51 IBIA at 104.

III. BIA Assistance Is No Longer Needed Because Chief Dixie and the Tribal Council Have Undertaken the Actions Contemplated By the 2006 Decision

The goal of the 2006 and 2007 Decisions was to assist the Tribe in identifying the broader Tribal community and to bring that community together so that it could decide membership and organization issues. However, nothing in those Decisions precluded the Tribe itself from taking action to accomplish that goal, nor does the BIA have the authority to prevent the Tribe from doing so. Since the BIA issued the 2006 Decision, Chief Dixie has taken the steps necessary to involve the entire tribal community in the process of organization. We believe that the Tribe has accomplished the goals of the 2006 and 2007 Decisions and that BIA assistance is no longer needed.

A. Formation of the Tribal Council

By way of background, the Tribe began working in 2003 to involve the broader Tribal community in the organization process. In accordance with Tribal tradition, Chief Dixie selected elders in the community to form a Tribal Council and assist with organization. (Exhibit 9, Affidavit of Chief Dixie ¶ 14, 16 ("Dixie Affidavit"); Exhibit 10, Affidavit of Velma Whitebear ¶ 6, 8 ("Whitebear Affidavit".) Since 2003, the Tribal Council has held monthly meetings, which are open to all. The meetings are typically attended by 30 to 100 people and are recorded so that members of the community who do not attend can listen to the proceedings. (Dixie Affidavit ¶ 3; Whitebear Affidavit ¶ 3; Exhibit 11, Affidavit of Antonia Lopez ¶ 3; Exhibit 12, Affidavit of Michael Mendibles ¶ 3; Exhibit 13, Affidavit of Evelyn Wilson ¶ 3 ("Wilson Affidavit"); Exhibit 14, Affidavit of Antone Azevedo ¶ 3.)

Under the Council's leadership, the Tribe has sought to work cooperatively with the BIA and has repeatedly sought guidance and support from BIA officials. Among other things, the Tribe asked the BIA in 2003 to call an election under the IRA. (*See* Exhibit 15.) The BIA did not act on the Tribe's request, although it continued to meet regularly with the Tribe to discuss efforts to organize the Tribe. (Dixie Affidavit ¶ 15; Wilson Affidavit ¶ 7; Whitebear Affidavit ¶ 7.)

B. The 2006 Constitution

In February of 2006 the Tribal Council drafted and approved a Tribal constitution[3] ("2006 Constitution") (Exhibit 16). The 2006 Constitution defines criteria for Tribal membership. Those eligible for membership under the criteria include the lineal descendants of the original 12 members of the Tribe who were identified in the 1915 Sheep Ranch Indian census; lineal descendants and beneficiaries of distributees under the Plan for Distribution of the Assets of Sheep Ranch Rancheria; and individuals who lived on the Rancheria for two or more years, and their descendants. Membership by adoption is also permitted with the approval of the Tribal Council. The criteria cover all those individuals who would be defined as "putative members" under the BIA's April 2007 Public Notice (*See* Exhibit 17), as well as some additional individuals, to ensure that all members of the Tribal community are included.[4] These membership criteria are consistent with the BIA's recommendations in its 2004, 2005, 2006 and 2007 Decisions, and with the Court of Appeals' opinion in the Burley Litigation.

C. Identification of the Tribal Community

The 2006 Constitution defines the first priority of the Tribe as "the identification of the broader membership community according to the above criteria and the enrollment of qualified individuals." 2006 Constitution, Part 8. Consistent with that directive, the Tribe has worked diligently to seek out the broader membership community and invite full participation by all its members. In addition to its own outreach efforts within the Indian community, the Tribe has taken full advantage of the limited assistance that the BIA was able to provide (in light of Ms. Burley's endless administrative appeals and litigation seeking to obstruct the organization process). For example, when the BIA published its 2007 Public Notice, requesting that "putative members" submit documentation of their membership claims to the BIA, the Tribe requested that individuals responding to the BIA also submit the same documentation to the Tribe. (*See* Exhibit 18).

[3] In the spirit of inclusiveness, the 2006 Constitution named Ms. Burley as a member of the Tribe and of the initial 12-person Tribal Council formed under the Constitution. Ms. Burley declined to approve the Constitution or participate with the Tribal community, making it clear that she was not part of the Tribe. Accordingly, she is no longer on the Tribal Council and is not included on the Tribe's membership roster. In addition, several other members of the Tribal Council have been removed due to death or failure to participate, leaving the current Council with eight members.

[4] The 2006 Constitution does not specifically mention the 1935 IRA voter list that is one of the bases for membership under the BIA's 2007 Public Notice. However, that list contains only one person, Jeff Davis, who we believe is a descendant of one of the original 1915 census members, or possibly one of those same twelve members. Thus, omitting the 1935 voter list from the criteria does not affect the pool of eligible members.

Based on applications received as a result of the Tribe's own outreach efforts since 2003, and in connection with the 2007 Public Notice, the Tribe has identified and enrolled several hundred members. The Tribe's current roster includes 242 adult members (*see* Exhibit 19.) The full roster also includes approximately 350 children under the age of 18 (not included with this briefing for privacy reasons). The BIA has not released the results of its own review of the information it received in response to the 2007 Public Notice, but the Tribe believes it has identified all of the individuals who meet its membership criteria. Still, it remains open to receiving additional applications.

D. The Council Has Restored a Functioning Tribal Community

With the identification and enrollment of the larger Tribal community, the Tribal Council has addressed the deficiencies in the organization process that caused the Department to reject previous tribal constitutions submitted by Ms. Burley. The whole community that is entitled to participate in the Tribe's organization has been clearly established through an open process. The Tribal Council has welcomed all members of that community to participate in the organization of the Tribe, to be recognized as members, and to take part in the Tribe's cultural and economic life. It will continue to do so. Notably, the Council has specifically invited Ms. Burley to participate with the Tribe, but she has never done so. (*See* Exhibit 20; Whitebear Affidavit ¶ 8; Dixie Affidavit ¶ 16).

Moreover, the Council has made great strides in rebuilding a functioning Tribe. Since at least 2004 the Tribe and its members have engaged in a variety of cultural, religious, economic and social activities, including the following:

1. Child Custody Proceedings

Since 2004, the Tribe has interceded in a number of child custody proceedings under the Indian Child Welfare Act, on behalf of children of Tribe members. In those cases where a child is removed from its family, the Tribe seeks to have the child placed with an Indian family or a family with ties to Indian traditions, so that the child is not deprived of its cultural heritage and place in the Indian community. (Whitebear Affidavit ¶ 10-12.)

2. Cultural Resources Consultations

The Tribe's Cultural Preservation Committee has been recognized by the California Native American Heritage Commission. Several Tribe members have been trained to serve as cultural monitors on behalf of the Tribe and have performed monitoring at construction sites that may affect Native American cultural and religious artifacts. (Exhibit 21, Affidavit of Pete Ramirez ¶ 13-14 ("P. Ramirez Affidavit").] [Exhibit 22, Affidavit of Briana Creekmore ¶ 7-9 ("Creekmore Affidavit").)

3. Cultural Preservation and Religious Rituals

The Tribe is represented by a ceremonial Indian dance and cultural preservation group, the Sheep Ranch Rancheria Me-wuk Dancers ("Me-wuk Dancers"), at tribal events throughout California. The Me-wuk Dancers group was organized by tribe members Gilbert Ramirez and his son Pete Ramirez at the request of Tribal elders. The Me-wuk Dancers play an important role in preserving the language, cultural identity and religious traditions of the Tribe. (Exhibit 23, Affidavit of Gilbert Ramirez ¶ 7-12 ("G. Ramirez Affidavit"); P. Ramirez Affidavit ¶ 7-12.)

4. Language Preservation

The Tribe participates, with other Miwok tribes, in an intertribal Miwok Language Restoration Group that teaches the Miwok language to younger tribe members so that the language and the tribal traditions are not lost. Council Member Evelyn Wilson represents the Tribe in the group. (Whitebear Affidavit ¶ 13; Wilson Affidavit ¶ 12.)

5. Gathering of Religious Materials, and Traditional Crafts

Tribe members gather certain materials, such as raptor feathers, that are needed for cultural and religious ceremonies. These materials can only be legally possessed by members of Indian tribes. (P. Ramirez Affidavit ¶ 15; G. Ramirez Affidavit ¶ 13.) Tribe members also gather materials, such as willow roots, used in traditional crafts, and offer classes in those crafts to ensure that the skills are not lost. (Whitebear Affidavit ¶ 16.)

6. Food Distribution Programs

The Tribe participates in the annual Salmon Distribution Project in which it obtains several tons of fresh salmon from the Oroville Dam hatchery and distributes it to Tribe members. (Whitebear Affidavit ¶ 17.)

7. Construction of Ceremonial Buildings

The Tribe has been negotiating with the United States Forest Service ("USFS") regarding construction of a traditional Indian "brush house" on USFS land near the Tribe's ancestral village. A brush house is an open-roofed building for conducting dances and other traditional ceremonies. It is a key element in Indian cultural and religious traditions, equivalent to a tribe's church. (P. Ramirez Affidavit ¶ 16; G. Ramirez Affidavit ¶ 14; Creekmore Affidavit ¶ 15.)

8. Community Development and Environmental Restoration Programs

Since 2004, the Tribe has been participating in the Calaveras Healthy Impact Products Solutions project ("CHIPS"), a community supported project that seeks to reduce wildfire hazards to local communities while providing economic opportunity for local workers. CHIPS received a grant from the United States Department of Agriculture in 2007 to support

retraining for workers to participate in new jobs within the forestry and vegetation control industry. Among other things, CHIPS has trained Native American workers, including Tribe members, to perform restoration work on federal lands that contain sensitive Native American heritage resources. (Creekmore Affidavit ¶ 10-12, 14.)

Through CHIPS and the Amador-Calaveras Consensus Group ("ACCG"), a community coalition, the Tribe has been engaged in efforts to participate in the USFS Collaborative Forest Landscape Restoration Program ("CFLRP"). Participation in the CFLRP would allow local workers to work with the USFS and Bureau of Land Management ("BLM") on landscape restoration and forest stewardship projects. In particular, the USFS is seeking Native American crews (such as those trained by CHIPS) to participate in programs to reintroduce fire as a management technique on federal lands with sensitive Native American heritage resources. The participation of the Tribe is important to the success of the community's CFLRP proposal. (Creekmore Affidavit ¶ 11-14.)

E. The Revised Constitution and Completion of the Organization Process

The 2006 Constitution provides a process for completing those final steps in the organization process. The 2006 Constitution, Part 10, calls for the Tribe to review the 2006 Constitution and adopt an amended version.[5] The Tribe has devoted countless hours to this process. Potential amendments have been read and debated in many Tribal meetings, including special meetings called specifically for that purpose. (*See* Exhibit 24.) All such meetings were open to the entire Tribal community. The most recent version of the proposed amended constitution ("Amended Constitution") is includes with this briefing (Exhibit 25).

The only action that remains to complete the Tribal organization process under the IRA is final ratification and adoption of the Amended Constitution by the entire Tribal membership. The Tribe plans on holding an election for that purpose. Upon adoption of the Amended Constitution, the Tribe will request acknowledgement from the Department that the Tribe is organized pursuant to the IRA and will seek reestablishment of government-to-government relations with the United States.

In light of these developments, the BIA's assistance in the Tribal organization process is no longer needed, and Burleys' challenge to the 2007 Decision is moot. Although there is no need for the BIA to take any further action to implement the 2007 Decision, the Tribe does seek to ensure that all eligible individuals are recognized as members. Therefore, if the BIA has identified any potential members that the Tribe does not have on its current Tribal Roster, the Tribe requests that the BIA provide that information to the Tribal Council. The Tribe will contact them and encourage them to request membership.

[5] The 2006 Constitution, Part 9, requires any changes to the constitution to be approved by two-thirds of the Tribe's members.

IV. The April 8, 2011 Request for Briefing

On April 8, 2011, you requested that we provide you with input on three specific issues, as well as whatever other information we wished to present. The three issues on which you requested briefing were:

(1) Whether the Secretary has an obligation to ensure that potential tribal members participate in an election to organize the Tribe;[6]

(2) The status of the Tribe's organization and the Federal Government's duty to assist the Tribe in organizing; and

(3) What the Secretary's role is in determining whether a tribe has properly organized itself.

We address your questions below, and explain our views regarding the proper disposition of Ms. Burley's appeal.

V. Responses to the Request for Briefing

Our responses to the request for briefing are founded on the bedrock principle, recognized by the Department and recently affirmed by the federal courts, that the Secretary has a duty to ensure that Tribal organization meets the minimum requirements of the IRA, including the participation of the entire tribal community.

A. Issue Number One

You asked whether the Secretary has an obligation to ensure that potential Tribal members participate in an election to organize the Tribe.

1. Controlling Law Requires the Secretary to Ensure that the Entire Tribal Community Has the Opportunity to Participate In the Organizational Process

The federal Court of Appeals for the D.C. Circuit recently held, in a case involving the organization of this very Tribe, that all members of the Tribal community must be allowed to participate in the organization process, regardless of whether they are currently recognized as Tribal members by the federal government. In upholding the Department's decision to reject Ms. Burley's proposed constitution, the court wrote, "Although [the Tribe], by its own admission, has a *potential* membership of 250, only Burley and her small group of

[6] The first question posed in your April 8 letter also states that it is undisputed that the Department currently recognizes five people as members of the Tribe. As explained below, this assertion is not only disputed but is clearly incorrect.

supporters had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary." *CVMT*, 515 F.3d at 1267 (emphasis added).

The Court of Appeals' holding is the controlling law. It establishes that, "[a]s Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values." *CVMT*, 515 F.3d at 1267-1268. This is true whether the tribe chooses to organize under the procedures defined in Section 476(a) of the IRA, or to exercise its sovereign powers under "non-IRA" procedures as permitted by Section 476(h). *Id.* at 1265, 1267-1268; *accord*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04(3)(b) n. 398 (2005 ed.) [2009 supplement] (citing the Court of Appeals' opinion in *CVMT*). As the federal district court wrote in affirming the Department's 2005 rejection of Ms. Burley's proposed constitution, the Secretary has an obligation to ensue that "tribal actions reflect the will of a majority of the tribal community—whether or not they choose to organize under the IRA [subsection 476(a)] procedures." *CVMT*, 424 F.Supp.2d at 201-202.

Other federal courts also have recognized the Department's obligation to ensure full participation in Tribal elections. For example, in *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 133 (D.D.C. 2002), the court held that the Department had acted properly in refusing to recognize the results of tribal elections from which minority members had been excluded. This duty stems not only from the specific statutory provisions of the IRA, but also from "the federal government's unique trust obligation to Indian tribes." *CVMT*, 515 F.3d at 1267 (citing *Seminole Nation v. United States*, 316 US 286, 297 (1942)). "A cornerstone of this obligation is to promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue members when it comes to decisions affecting federal benefits." *Id.* Any action that does not follow this principle is arbitrary and capricious.

2. *Res Judicata* Bars Further Litigation of the Need for the Entire Tribal Community to Participate In the Organization Process

As the Board recognized in deciding Ms. Burley's appeal, the federal court decisions in the Burley Litigation not only established the controlling law regarding tribal organization generally; they also represent a final, binding determination of the Department's obligation to ensure that a "greater tribal community" is allowed to participate in organizing *this* Tribe. *CVMT*, 51 IBIA at 120-121. Under the doctrine of *res judicata*, that determination is not subject to further adjudication in an administrative forum. *Deerfield v. F.C.C.*, 992 F.2d 420, 424-428 (2d Cir. 1993) (a federal court decision precluded the FCC's administrative finding that an FCC regulation preempted local law); *Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission*, 75 F.3d 63, 64-66 (1st Cir. 1996) (Federal Marine Commission could not reverse determination made by federal court); *Spawr Optical Research, Inc. v. Baldrige*, 649 F. Supp. 1366, 1369 (D.D.C. 1986) (issue determined in judicial proceeding "accorded preclusive effect at a later administrative proceeding"). Any decision that is inconsistent with the courts' determinations would be arbitrary and capricious.

3. The Department Cannot Repudiate Its Obligation to the Tribal Community

The Department itself has previously recognized its obligation to ensure full participation in the organization process. As stated in the 2004 Decision:

> 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. . . . It 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.

Acting Assistant Secretary Olson confirmed this obligation in the 2005 Decision. He also made clear that "[t]he first step in organizing the Tribe is identifying putative tribal members."

Likewise, in briefs submitted to the Court of Appeals in the Burley litigation, the Secretary asserted that, "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." The Secretary argued that she could not recognize Burley's purported tribal government, or its constitution, 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*." Brief and Supplemental Appendix of Appellees, *California Valley Miwok Tribe v. U.S.*, 2007 WL 1700313, 12, 14-15 (D.C. Cir.) (emphasis added). For the Department to abandon its position now would not only violate the law, it would also represent a "quintessentially arbitrary and capricious" reversal of agency position. *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 18 (D.D.C. 2009) (internal quotation and citation omitted). Moreover, any attempt to defend such a reversal in federal court would be precluded by the doctrine of judicial estoppel. *See*, *e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001); *Valentine-Johnson v. Roche*, 386 F.3d 800, 810-812 (6th Cir. 2004) (judicial estoppel applies to government entities).

This does not mean that the BIA must ensure that Tribal organization is conducted under any particular procedures. At least under IRA subsection 476(h), how to organize itself is a question for the Tribe to decide. Nor is the BIA required to determine who may participate in the organization process. But when a tribe seeks federal acknowledgment as being "organized," based on the adoption of particular governing documents and a particular government structure, the Secretary may not grant that acknowledgment unless the organization process involved the entire tribal community. Any federal action that does not follow this principle is arbitrary and capricious.

4. The Tribe's Membership Is Not Limited to Five People

In the prefatory remarks to your first question, you stated that it is undisputed that the federal government currently recognizes five people as the members of the Tribe. This statement is irrelevant, because the law clearly requires that the entire Tribal community

participate in the organization process, regardless of whether they are currently regarded by the federal government as existing members or as "potential" members. *CVMT*, 515 F.3d at 1267-1268. Nonetheless, this characterization of the Tribe's membership is also incorrect.

First, the federal government does not determine the membership of the Tribe. In addition, numerous decisions of BIA officials and the Board have made it clear that the Tribe is not limited to five members, and that the Tribe's membership has not been determined and will not be determined until there is an appropriate meeting of the entire Tribal community. As stated in the 2004 Decision, "it 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.* The participation of the greater tribal community is essential to this effort" (emphasis added). Further, the 2004 Decision explains that:

> We are very concerned about the designated "base roll" for the tribe as identified in the submitted [Burley] constitution; this "base roll" contains only the names of five living members all but one [of] whom were born between 1960 and 1996, and therefore would imply that there was never any tribal community in and around Sheep Ranch Rancheria until you [Ms. Burley] met with Yakima Dixie, asking for his assistance to admit you as a member. The base roll, thus, suggests that this tribe did not exist until the 1990s, with the exception of Yakima Dixie. However, BIA's records indicate with the exception notwithstanding, otherwise.

The 2004 Decision goes on to explain that, in Miwok tradition, base membership rolls would "normally contain the names of individuals listed on historical documents which confirm Native American tribal relationships in a specific geographic region." It cites, among other documents, Indian census rolls and IRA voter rolls. We concur that these are fair and reasonable criteria to use to describe the community that should be involved in Tribal organization.

Similarly, the 2006 Decision notes that the Tribe "needs to agree to the census or other documents that establishes [sic] the original members of the Rancheria [and which] should be the starting point from which the tribe develops membership criteria. The immediate goal is determining membership of the Tribe." The Tribal roster attached to this response shows that the Tribe consists of 242 adult members who are descended from the known historical Tribe members. In light of these facts, it would be arbitrary and capricious to say that the membership of the Tribe consists of five people.

B. Issue Number Two

You asked us to explain our position regarding the status of the Tribe's organization and the federal government's duty to assist the Tribe in organizing.

1. The Tribe Is Not Yet Organized

In 2005, Ms. Burley initiated the Burley Litigation in federal district court, seeking a determination that the Tribe was organized under the IRA and that the Department was required to recognize her Tribal constitution and government. The district court dismissed her claims, holding that the Department had properly rejected her antimajoritarian constitution and that the Department properly determined that the Tribe was not organized. *CVMT*, 424 F.Supp.2d at 201, 203. The Court of Appeals affirmed. *CVMT*, 515 F.3d at 1267-1268. Any action that contradicts those decisions is necessarily arbitrary and capricious.

a. *Res Judicata* Precludes Ms. Burley's Argument that the Tribe is Already Organized

In dismissing Ms. Burley's complaint for failure to state a claim, the district court necessarily determined that the Tribe was not organized in 2005 when the complaint was filed. *See CVMT*, 424 F.Supp.2d at 203. That judicial determination is binding on Ms. Burley and the Department and, under the doctrine of *res judicata,* precludes any further litigation regarding the issue of whether the Tribe was already organized. *See* Memorandum and Order, *California Valley Miwok Tribe v. Kempthorne*, No. S-08-3164, *3-6 (E.D. Cal. Feb. 23, 2009) (upholding the Department's refusal to renew Ms. Burley's contract under the Indian Self-Determination and Education Assistance Act, on the grounds that the Burley Litigation had already determined that the Tribe was not organized and lacked a governing body with which to contract).

The court's determination precludes both the particular arguments raised in the Burley Litigation, and *any other* arguments that Ms. Burley might advance in support of her appeal. *See*, *e.g.*, *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) ("once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case") (internal quotations and citations omitted; emphasis in original). This includes the argument that the Tribe was organized under the 1998 Resolution that you identified in your 2010 Decision. See *Seminole Nation v. Norton*, 223 F.Supp.2d 122, 133-134, 133 n.14 (D.D.C. 2002) (giving preclusive effect to a prior determination that the Department acted properly in refusing to recognize the results of tribal elections from which minority tribal members were excluded, even though the prior court decision involved a different election).

b. The 1998 Resolution Is Not a Valid Basis for Tribal Organization

Even if *res judicata* did not apply, there is no basis to determine that the Tribe is already organized under the 1998 Resolution or any other document submitted by Ms. Burley. As explained above, organization requires the participation of the entire Tribal community. Ms. Burley has never submitted a tribal document that was the product of a majoritarian process. *See CVMT*, 515 F.3d at 1267 (rejecting the Burley constitution, which "only Burley and her small group of supporters had a hand in adopting").

The 1998 Resolution, in particular, cannot possibly be the basis for Tribal organization. First, the validity of the document itself is called into question by allegations of

fraud, misrepresentation and betrayal regarding the initial dealings between Chief Dixie and Ms. Burley. We will leave aside the specific allegations and counter-claims between the two and the problems with certain key documents upon which Ms. Burley's claims to Tribal membership and authority rest, as those details have already been presented to the BIA.[7] It is sufficient to say here that, shortly after Chief Dixie granted Ms. Burley's request to be accepted into the Tribe in 1998, Ms. Burley betrayed his generosity and attempted to wrest control of the Tribe from Chief Dixie. Since that time, Chief Dixie has repeatedly made it clear that he has no intention of stepping aside as Chief, that he does not agree that Ms. Burley and her daughters are entitled to control the Tribe, and that he is committed to involving the larger Tribal community in the Tribe's organization. Viewed in light of those facts, it would be unconscionable to give any credence to the 1998 Resolution or any actions taken under it.

Moreover, the Tribe could not be organized under the 1998 Resolution, even if that document were valid on its face. The 1998 Resolution does not comply with the requirements of the IRA, under either subsection 476(a) or subsection 476(h). Subsection 476(a) requires that a tribal constitution and bylaws shall be effective only after they are ratified by a majority vote of the adult members of a Tribe, at a special election authorized and called by the Secretary, and approved by the Secretary pursuant to subsection 476(d). 25 U.S.C. § 476(a). Ms. Burley does not even claim that the 1998 Resolution complied with those requirements. Moreover, the 1998 Resolution is not a constitution or bylaws, which under the plain language of the IRA are required to organize a Tribe. *See* 25 U.S.C. § 476(a).

IRA subsection 476(h) allows Tribes to enact governing documents without observing the specific procedures set forth in subsection 476(a). *See* 25 U.S.C. § 476(h); *CVMT*, 515 F.3d at 1267. But the 1998 Resolution cannot have been enacted under 476(h), for two reasons. First, *subsection 476(h) did not exist in 1998*. It was added in 2004 by the Native American Technical Corrections Act of 2004. *See* 25 U.S.C.A. § 476 (West 2011); *CVMT*, 424 F.Supp.2d at 200. Second, and most important, the 1998 Resolution does not satisfy the *substantive* requirements of the IRA—namely, adherence to majoritarian principles. The 1998 Resolution was signed by at most two people,[8] while the Tribal community numbers in the

[7] *But see*, *e.g.*, Exhibit 26 (unwitnessed document purporting to accept Ms. Burley and her daughters into the Tribe); Exhibit 27 (letter from Chief Dixie to Ms. Burley, stating that he had not and would not resign as Chairman); Exhibit 28 (letter from Associate Solicitor, Indian Affairs stating that Chief Dixie disputed the validity of his alleged resignation as chairperson).

[8] One of the signatures purports to be that of Chief Dixie, who disputes the veracity of the signature. The other signature is that of Ms. Burley.

hundreds.[9] Like the constitution that Ms. Burley submitted in 2004, "this antimajoritarian gambit deserves no stamp of approval from the Secretary." *CVMT*, 515 F.3d at 1267.

As noted above, the Department took the position in the Burley Litigation that it could not recognize the Tribe as organized under governing documents developed by just three people. To assert now that the Tribe is organized under a resolution signed by one or two people would be inconsistent with that position. There has been no change in the facts or law upon which the Burley Litigation was decided, nor is there any "broad interest of public policy," to justify a change in the Department's position. *See New Hampshire*, 532 U.S. at 755-756. Thus, judicial estoppel would prevent the Department from defending such a decision in federal court.

2. The Tribe Requires No Further Assistance With Organization

Since the BIA issued the 2006 Decision, offering to assist the Tribe with organizing, Ms. Burley and Chief Dixie have pursued different paths. Ms. Burley has clung to the view that she and her daughters are the only Tribal members (disenrolling and reenrolling Chief Dixie from time to time as it suits her changing litigation strategies). Chief Dixie, on the other hand, has taken action to accomplish the organizational steps identified in the 2006 Decision.

As previously discussed, Chief Dixie and the Tribal Council have identified the members of the Tribal community and involved those members in an inclusive organization process that complies with the IRA, the Department's 2004 and 2005 Decisions, and the Court of Appeals' holding in the Burley Litigation. The organization process is nearly complete, and in fact it could have been completed several years ago had the BIA responded to the Tribe's requests for acknowledgment of the Tribal Council and of the governing documents they developed. If the BIA had done so, we believe the Tribe and its members would have been spared much of the emotional and economic hardship that they have endured since 2006.

The Tribe recognizes that the BIA may have a role in assisting with tribal organization under some circumstances. It welcomes any guidance the BIA may offer and any financial assistance that may be available to support the Tribal government. But the Tribe needs no assistance to complete the process it started in 2006.

C. Issue Number Three

You requested that we brief our views on what the Secretary's role is in "determining whether a tribe has properly organized itself."

[9] The two signatures on the 1998 Resolution would not even represent a majority of the adult members of the Tribe that the *BIA* recognized at that time—which included Melvin Dixie, among others—much less a majority of the entire Tribal community.

1. The Secretary Has a Responsibility to Ensure that the Tribe's Representatives Are Valid Representatives of the Tribal Community As a Whole

In the Burley Litigation, both the district court and the Court of Appeals held that the Secretary's plenary power over Indian affairs includes the power—and the responsibility—to ensure that organization reflects the will of a majority of the tribal community. *CVMT*, 515 F.3d at 1267 ("the Secretary has the responsibility to ensure that a tribe's representatives, with whom she must conduct government-to-government relations, are valid representatives of the tribe *as a whole*") (quotations and citation omitted; emphasis in original). This is a mandatory requirement and not one that you may disregard.

The Court of Appeals held that the Secretary's responsibility stems not only from the IRA itself, but also from the Secretary's "unique trust obligation to Indian tribes," and it applies regardless of whether organization occurs under the procedures of IRA subsection 476(a), or under "non-IRA" procedures as allowed by subsection 476(h). *CVMT*, 515 F.3d at 1267 (quotations and citation omitted). In doing so, the court flatly rejected Ms. Burley's "assert[ion] that § 476(h) unambiguously requires the Secretary to approve any constitution adopted under that provision." *Id.* As the Court of Appeals wrote:

> "The Secretary has the power to manage all Indian affairs and all matters arising out of Indian relations. . . . *The exercise of this authority is especially vital when, as is the case here, the government is determining whether a Tribe is organized* and the receipt of significant federal benefits turns on the decision. The Secretary suggests that her authority under § 476(h) includes the power to reject a proposed constitution that does not enjoy sufficient support from a tribe's membership. Her suggestion is reasonable, particularly in light of the federal government's unique trust obligation to Indian Tribes. . . . The sensibility of the Secretary's understanding of § 476(h) is especially apparent in a case like this one. Although [the Tribe], by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting her proposed constitution. *This antimajoritarian gambit deserves no stamp of approval from the Secretary. As Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values*.

CVMT, 515 F.3d at 1267-1268 (internal quotations and citations omitted; emphasis added). The determinations in the Burley Litigation are both controlling law and binding on the Department and Ms. Burley, who were parties to that litigation.

The holdings in the Burley Litigation are also supported by the holdings of other federal courts. Those courts have held that the Department has the "authority *and the responsibility* to ensure that the [tribe's] representatives, with whom it must conduct government-to-government relations, are the valid representatives of the [tribe] as a whole." *Seminole Nation*, 223 F.Supp.2d at 140 (emphasis added) (holding that the BIA properly refused to

recognize a tribal council chosen in an election from which certain classes of tribe members had been excluded). For the Secretary to approve a constitution that was adopted without the support of a majority of a tribe's membership "would be inconsistent with the IRA's broad purpose, which charges the Secretary with supervising [constitutional] elections and ensuring their fundamental integrity." *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667, 669-670 (8th Cir. 1997) (upholding the Secretary's disapproval of amendments to a tribal constitution, where possible errors in voter eligibility determinations raised doubts about the "fundamental integrity and fairness" of tribal elections). Thus, the Secretary has a duty to "review tribal political procedures when it is forced to recognize a person or an entity as a tribe's legitimate representative in relations with the United States." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 151 (D.D.C. 1999) (finding that the BIA violated the Administrative Procedure Act by recognizing a tribal government based on a constitution that was not validly adopted). *See also Morris v. Watt*, 640 F.2d 404, 414-416 (D.C. Cir. 1981) (rejecting results of constitutional referenda held by tribes, based on lack of meaningful opportunity for tribal members to "decide basic questions concerning any fundamental changes in the proposed new Constitutions").

Although some case law suggests that the Department should avoid intervening in matters related to tribal self-government, those cases do not deal with tribal *organization*, where the Secretary must decide whether to recognize a tribal government as legitimate. Instead, they deal with the very different situation where a tribe is *already organized* under a government that represents the full tribal community. *See*, *e.g.*, *Smith v. Babbitt*, 857 F.Supp. 1353, 1357, 1360-1361 (D. Minn. 1995), *affirmed*, 100 F.3d 556 (8th Cir. 1996) (deferring to membership determinations made by an *already organized* tribe pursuant to its constitution and bylaws); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52, 66 n. 22 (1978) (the federal courts lacked jurisdiction over a challenge to a tribal membership ordinance validly enacted by an *already organized* tribe).[10] Where an organized tribe has established a legitimate tribal forum for the resolution of intratribal disputes, which is operating within the scope of its proper authority, it may be appropriate to defer to the tribal forum. *See*, *e.g.*, *Goodface v. Grassrope*, 708 F.2d 335, 337, 339 (8th Cir. 1983) (finding it appropriate to defer to a tribal court, established by an *organized tribe*, for final resolution of a tribal election dispute, where both parties recognized the tribal court as a competent forum to resolve the dispute).

Similarly, some cases have involved tribes that are not subject to the IRA but have nonetheless established a recognized government that represents the entire tribal community. For example, in *Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 550, 552-553 (10th Cir. 1987), the federal court deferred to a tribal forum established by the Cherokee Nation for resolution of an election dispute. The Cherokee Nation is not subject to the IRA, *see* 25 U.S.C. § 473, but the Nation had established a "legally constituted tribal government [that] was functioning within the scope of its power," pursuant to a tribal constitution and election laws that

[10] Stated in more precise terms, *Santa Clara Pueblo* holds only that the Indian Civil Rights Act does not authorize civil suits for declaratory equitable relief against a tribe or its officers in federal court. *See* 436 U.S. at 58-61, 72.

had been *approved by the Department*. *Id.* at 550, 552. The court therefore deferred to the tribal forum for resolution of what it called an internal tribal matter. However, the court also cautioned that "since the Department is sometimes required to interact with tribal governments, it may [sometimes] need to determine which tribal government to recognize." *Id.* at 552. *See also Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987) (deferring to an "available tribal forum" to resolve a Cherokee Nation election dispute).

Here, in contrast to those cases, the Tribe *is* subject to the IRA, and it is *not* yet organized. Thus, cases involving tribes already organized under the IRA, or not subject to the IRA's requirements at all, do not control and do not relieve the Secretary of his duty to uphold majoritarian values in the organization process. As the Board has recognized in a case involving the organization of a terminated and restored rancheria tribe:

> This is not an ordinary tribal government dispute, arising from an internal dispute in an already existing tribal entity. In such cases, BIA and this Board must exercise caution to avoid infringing upon tribal sovereignty. Rather, this case concerns, in essence, the creation 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. Sacramento Area Director, Bureau of Indian Affairs, 30 IBIA 241, 252 (1997).[11]

In summary, matters of tribal government and membership may lie primarily within the domain of tribal sovereignty for organized tribes. But the Secretary has an important, though limited, role to play in determining whether to recognize a tribe as organized for purposes of conducting government-to-government relations with the United States. "The [IRA] authorizes tribal organization and adoption of a tribal constitution, but places the Secretary of Interior in a regulatory position over these processes." *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087 (8th Cir. 1977). The Secretary's "regulatory position" requires that he "ensure that the interests of all tribe members are protected during organization and that governing documents reflect the will of a majority of the Tribe's members." *CVMT*, 424 F.Supp.2d at 202. In the context of this case, a decision to turn this Tribe over to Ms. Burley and her two daughters, at the expense of hundreds of legitimate Tribal members, would violate the Secretary's responsibility and would be arbitrary and capricious.

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[11] The *Alan-Wilson, Sr.* case involved the Cloverdale Rancheria. The stipulated judgment in *Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. Dec. 22, 1983), defined the class of individuals entitled to participate in the reorganization of that tribe. Because this Tribe is not a restored tribe and is not subject to any court order defining its membership, the *Alan-Wilson, Sr.* decision does not determine the identities of the individuals entitled to participate in the organization of this Tribe. *See CVMT,* 51 IBIA at 108.

VI. Disposition of Ms. Burley's Appeal

As mentioned above, the Tribal Council has taken action since 2006 to identify the Tribal community and complete the other steps toward organization that were identified in the 2006 and 2007 Decisions. Those actions have rendered the BIA's assistance unnecessary and effectively rendered Ms. Burley's appeal moot. Even if the appeal were not moot, it should be dismissed because Ms. Burley's claims are without merit: the Tribe is not already organized, and the 2007 Decision was consistent with controlling law. Therefore, we request that you dismiss Ms. Burley's appeal in its entirety.

A. Ms. Burley's Appeal Should Be Dismissed Because the Tribe Is Not Already Organized

Even if you do not recognize that Ms. Burley's appeal of the 2007 Decision is rendered moot by the Tribe's implementation of the organization process, you should still dismiss the appeal because it does not raise any issues that have not already been finally decided by the Department and the federal courts. As described in Section II of this briefing, Ms. Burley's second claim argued that the Tribe was "already organized" and therefore that the "BIA's proffered 'assistance' [in organizing the Tribe] constitute[d] an impermissible intrusion into tribal government and membership matters." *Board Decision*, 51 IBIA at 104. The Board recognized that the Department had already finally determined that the Tribe was *not* organized, and the federal courts had upheld that determination in the Burley Litigation. *Id.* at 120, 105. Therefore, the issue of the Tribe's organization was not subject to further appeal. *Id.* That conclusion should have ended the Board's consideration of Ms. Burley's claim.

However, the Board found that the 2007 Decision "[went] beyond what was decided or confirmed by the Assistant Secretary [in previous decisions]," by "determining *who* BIA will recognize, individually and collectively, as members of the 'greater tribal community' that BIA believes must be allowed to participate in the general council meeting of the Tribe for organizational purposes." *Id.* at 105 (emphasis added). The Board characterized this issue as an "enrollment dispute," over which it lacks jurisdiction, and referred it to you for resolution. *Id.*

We do not agree that Ms. Burley's appeal concerned an "enrollment" dispute. The federal regulations at 25 C.F.R. Part 62[12] define adverse enrollment actions subject to appeal as including: (1) actions by BIA officials that relate to the preparation of a "*tribal roll that is subject to Secretary approval*";[13] (2) a change in the degree of Indian blood or certification of degree of

[12] "Tribal enrollment issues, insofar as they are within the jurisdiction of the Department of the Interior, are appealed under 25 C.F.R. Part 62, rather than 25 C.F.R., Part 2." *King vs. Portland Area Director, Bureau of Indian Affairs*, 31 IBIA 56, 56 (1997).

[13] Tribal rolls are subject to secretarial approval only in cases where Congress has authorized the Secretary to prepare such rolls for specific tribes. *See* 25 C.F.R. Part 61. The Secretary is not authorized to prepare a roll for this Tribe.

Indian blood by a BIA official that affects an individual; or (3) certain enrollment actions by tribal committees.[14] *See* 25 C.F.R. §§ 62.2, 62.4(a) (emphasis added).

The 2007 Decision clearly did not involve any enrollment action as defined in Part 62. Nor did the 2007 Decision address the Tribe's membership at all. In fact, the 2007 Decision did not even identify the "putative members" whom the BIA believed were entitled to participate in the organization process. The 2007 Decision recognized that membership and enrollment decisions are made by the Tribe, not the BIA. The Decision stated, "It is our belief that, until *the Tribe has identified the "putative" group*, the Tribe will not have a solid foundation upon which to build a stable government" (emphasis added).

Rather than dealing with enrollment, the 2007 Decision dealt with tribal organization, where the BIA has an important, albeit limited, role to play in protecting majoritarian values. As a result, the Board's referral was improper. As described in Section V(B) of this briefing, the issue of Tribal organization raised in Ms. Burley's appeal was already finally decided and is not subject to further adjudication. *See CVMT*, 515 F.3d at 1267-1268 (holding that the Tribe could not be organized under Burley's "antimajoritarian" government). The Board should have dismissed Ms. Burley's claims in their entirety.

B. The 2007 Decision Was Consistent With Controlling Law

As stated above, Burley's second claim should be dismissed in its entirety because it is premised on the argument that the Tribe is already organized. But even if you reach the issue of whether the process that the BIA followed to assist the Tribe in organizing was proper, you should conclude that the process was consistent with the law and should still dismiss Burley's claims.

1. Organization Must Involve the Entire Tribal Community

As explained in Section V(A) of this briefing, any organization of the Tribe must include the participation of the entire Tribal community, whether or not those individuals happen to be recognized by the BIA as Tribal members. *See*, *e.g.*, *CVMT*, 515 F.3d at 1267.

2. The Tribal Community, at a Minimum, Includes All Lineal Descendants of Historical Tribe Members

It is well settled that a validly organized tribe has the power to define its own membership. *See*, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 52, 66 n. 22. But where a tribe has not

[14] Enrollment actions by tribal committees are subject to administrative appeal only where the enrollment action is incident to the preparation of a tribal roll subject to Secretarial approval, or where an appeal to the Secretary is provided for in governing documents. 25 C.F.R. §§ 62.2, 62.4(a).

yet organized and has no governing body to make such decisions, the first task is to identify the tribal community that is entitled to constitute a government and decide membership and organization issues. In other words, the task of *constituting* the tribal body politic must precede any decisions *by* the body politic. The BIA recognized this fundamental principle in its 2006 and 2007 Decisions, as well as the earlier 2004 and 2005 Decisions regarding the Tribe. *See*, *e.g.*, 2007 Decision p. 2; 2004 Decision p. 2 ("It 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").

In seeking to identify the tribal community, it is helpful to consider general principles of Indian law, as well as the traditions of the tribe itself and other similarly situated tribes. In general:

> tribal membership or citizenship typically turns on *descent from an individual on a base list or roll*, possession of a specified degree of ancestry from such an individual, domicile at the time of one's birth, or some combination of these criteria. . . . Some tribal provisions call for a minimum of one-fourth degree of ancestry of the tribe in question . . .. Other tribes permit any *descendant of a tribal member* to be enrolled regardless of blood quantum.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03(2) (2005 ed.) (emphasis added). *See also*, *e.g.*, *Smith v. Babbitt*, 100 F.3d at 558 (tribal constitution defining membership based on parentage or descent from tribal ancestors); *Lewis v. Norton*, 424 F.3d 959, 960 (9th Cir. 2005) (tribal constitution defining members as lineal descendants of persons named on base roll, with added requirement of one-quarter degree California Indian blood). Thus it is common practice, in the initial organization process, for tribes to trace the tribal community back to reliable historical documents that identify historical members. *See*, *e.g.*, *Jeffrey Alan-Wilson, Sr.,* 30 IBIA at 250 ("Unorganized Federally recognized tribes would look to historical records and rolls to determine recognized membership for organizational purposes") (quotations and citations omitted). In the case of Miwok tribes specifically, the BIA has noted that tribes typically use as their base rolls government documents such as the 1915 or 1916 Indian census rolls, or the 1934 IRA Indian voter lists. 2004 Decision p. 2.

In this case, the Tribe was created in 1916 by the purchase of the Sheep Ranch Rancheria for the benefit of twelve Indians who were identified in the 1915 federal Indian census of Sheep Ranch. 2007 Decision pp. 1-2. Therefore, the 1915 census provides definitive information about the original members of the Tribe. The 1935 IRA voter list for the Rancheria and the 1964 distribution plan for Rancheria assets establish the identities of additional historical

Tribe members. These groups, and their descendants, form the basis for the membership criteria in the 2006 Constitution.[15]

Because membership is defined by descent from known Tribe members, all of the descendants of these individuals have a legitimate claim to Tribal membership and are entitled to participate in the initial organization of the Tribe. There is no basis for restricting participation to any subset of these descendants. Unlike some rancheria tribes, this Tribe is not a "terminated and restored" tribe wherein membership or organization rights are defined by a court decree or judicially approved settlement. *See CVMT*, 51 IBIA at 108. *See also Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. Dec. 22, 1983) (stipulated judgment defining the class of individuals entitled to participate in the reorganization of restored tribes); *Williams v. Gover*, 490 F.3d 785, 788 (9th Cir. 2007) (dealing with the Mooretown Rancheria, which was terminated and then restored by the *Hardwick* judgment).[16] Although the federal government did take some initial steps toward termination of this Tribe under the California Rancheria Act, the process of termination was never completed.[17]

Moreover, the rationale for limiting the membership in restored tribes to distributees and their descendants does not apply here. When rancheria tribes were terminated, the distributees *gave up their tribal membership*, and the federal benefits of Indian status, by accepting a distribution of rancheria assets. Act of August 18, 1958, 72 Stat. 619, § 10, *as amended by* the Act of August 11, 1964, 78 Stat. 390 ("Rancheria Act"). *See also Williams*, 490 F.3d at 788; *Jeffrey Alan-Wilson, Sr.,* 30 IBIA at 244. Because this Tribe was never terminated, its members never gave up their membership or Indian status and are still entitled to participate in the Tribe's organization.

3. The 2007 Decision Properly Identifies the Core of the Tribal Community

[15] As noted above, the 2006 Constitution does not specifically mention the 1934 IRA voter list, but this has no effect on the pool of eligible members. In addition, the 2006 Constitution grants membership to descendants of other individuals who can show they lived on the Rancheria for two or more years, ensuring that members are not excluded because of incomplete government census records.

[16] *Williams* is also distinguishable because the Mooretown Rancheria involved in that case was not subject to the IRA; its members rejected the IRA in 1935. Opening Brief of Plaintiff-Appellant Danny L. Williams, et al, *Williams v. United States*, 2005 WL 1789464 *3 (9th Cir. Apr. 18, 2005).

[17] The federal government never published a Notice of Termination or other official statement of intention to termination relations with the Tribe, and the Tribe has always appeared on the list of recognized tribes since its initial recognition in the early 1900s. *See* 2007 Decision p. 2.

The 2007 Decision stated that the BIA would assist the Tribe in identifying the "putative members" of the Tribe—i.e., those individuals "who believe that they have the right to participate in the organization of the Tribe." The 2007 Decision did not actually identify those individuals, but the 2006 Decision referred to them as the descendants of the "original members of the Rancheria." The 2007 Public Notice that the BIA issued in April 2007, implementing the 2007 Decision, defined the Putative Members more specifically as lineal descendants of: the 12 original Tribal members named in the 1915 Indian Census of Sheep Ranch; Jeff Davis, the sole Indian appearing on the 1935 IRA Indian voter list for the Rancheria; and Mabel Hodge Dixie, the sole distributee under the 1964 distribution plan for the Rancheria. As discussed above, those criteria are fully consistent with the general principles of Indian law that relate to tribal membership, and with the traditions of other Miwok tribes. The 2007 Decision, as implemented, therefore complies with the minimum requirements for identifying the greater tribal community that must participate in any valid Tribal organization effort.

VII. Conclusion

Since 2003, Chief Dixie and the Tribal Council have worked diligently to identify the members of the entire Tribal community and involve them in the organization process as required by federal law. Ms. Burley not only has refused to participate in that process, she has actively opposed it. She and her daughters have, instead, clung to the unsupportable position that they are the only members of the Tribe (sometimes including Chief Dixie when it suits their purposes) and are the only people entitled to participate in its organization and governance. This despite admitting that the Tribal community numbers in the hundreds, *CVMT*, 515 F.3d at 1265 n. 5, and despite the fact that the current Tribal Roster contains 242 adults and their children.

Although the BIA initially recognized Ms. Burley as a person of authority within the Tribe, it has repeatedly refused to recognize the Tribe as organized under various antimajoritarian constitutions submitted by Ms. Burley. The federal district court for the District of Columbia and the Court of Appeals for the D.C. Circuit have upheld the BIA's decisions and stated with perfect clarity that Tribal organization must involve the entire Tribal community.

Despite those unequivocal decisions, Ms. Burley continues to resist all efforts to include the broader Tribal community in the organization process. Her appeal of the 2007 Decision represents yet another attempt to advance her position that she and her daughters are entitled to control the Tribe for their own, exclusive benefit. The Department and the courts have already recognized that this position has no merit.

Ms. Burley has caused enough harm to this Tribe. The Department has contributed to that harm by failing to recognize or act on the Tribe's lawful organization efforts, and by allowing Ms. Burley to continue to represent herself as a Tribal authority. Ms. Burley has exploited that authority to deny important benefits to many Tribal members, and to obstruct the

organization process. Your 2010 Decision, though now rescinded, compounded that harm. It is past time for the Department to fulfill its responsibility to the Tribe and its members.

For the reasons set forth in this briefing, we ask that you dismiss Ms. Burley's appeal as moot or, in the alternative, as failing to state a valid claim. In the near future, the Tribe will convene a meeting of the Tribal community, vote on the Amended Constitution, and petition the Department to acknowledge the Tribe as organized.

Respectfully submitted,

___/s/_Robert J. Uram_____
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