IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,	
v.	**C.A. No. 1:11-cv-00160-RWR**
KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.*	**Hon. Richard W. Roberts**

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs The California Valley Miwok Tribe, *et al.* ("Plaintiffs"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Court for summary judgment against Defendants on the Causes of Action stated in the Complaint. Among other claims, Plaintiffs allege that the August 31, 2011 decision of the Department of the Interior, finding that membership of the California Valley Miwok Tribe is limited to five people and recognizing a Tribal government based on a 1998 Resolution signed by only two people, is arbitrary, capricious, unsupported by substantial evidence in the record, an abuse of discretion and otherwise not in accordance with law. Plaintiffs request the Court enter judgment in accordance with the attached Proposed Order.

The grounds for this Motion are set forth in the accompanying Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment and all of the pleadings, records, and papers filed herein, deemed to be on file or of which this Court may take judicial notice at or before the time of the hearing of this Motion.

Dated: March 2, 2012

Respectfully submitted,

___/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I caused the forgoing Motion for Summary Judgment and proposed Order which were filed through the ECF system, to be sent electronically to all registered participants. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/ Roy Goldberg
Roy Goldberg

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THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, **v.** **KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, *et al.***	**C.A. No. 1:11-cv-00160-RWR** **Hon. Richard W. Roberts**

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND SUMMARY

In 1916, the United States purchased approximately one acre of land near Sheep Ranch, California, creating the Sheep Ranch Rancheria for the benefit of 12 named Indians who were all that remained of a larger Miwok Indian band. Since then, those 12 Indians and their descendants have lived on and around the Rancheria property as an Indian community governed by Miwok customs and traditions, without formal governing documents. The community, now known as the California Valley Miwok Tribe ("Tribe"), was and is a federally recognized Indian tribe.

Undisputed evidence shows that, as of April 2011, this community included 242 adult Indians who were lineal descendants of the 12 Tribe members named in 1915 or of other historical Tribe members named on Indian census documents, voter registration lists or rolls (collectively, the "Lineal Descendants"). Undisputed evidence shows that each of the individual Plaintiffs[1] is a Lineal Descendent. Plaintiff Tribal Council represents all of the Lineal Descendants and their children, who together make up the current citizenship of this Tribe.

Plaintiffs challenge an August 31, 2011 decision ("2011 Decision") of the Assistant Secretary – Indian Affairs ("AS-IA"). The 2011 Decision rules that, except for Yakima Dixie, *none* of the individual Plaintiffs or the other Lineal Descendants is a member of the Tribe. Instead, the Lineal Descendants and their children are only "potential citizens." The 2011 Decision concludes that the Tribe has only five "actual citizens": Plaintiff Yakima Dixie, and Silvia Burley, her two daughters and her granddaughter (collectively the "Burley Faction").

The 2011 Decision also accepts a 1998 document, signed only by Silvia Burley and Yakima Dixie, as establishing a valid government for the Tribe. The AS-IA accepts this

[1] Plaintiffs are the Tribe, and Tribal Council members Yakima Dixie, Velma Whitebear, Antonia Lopez, Michael Mendibles, and Evelyn Wilson, individually and as members of the Tribal Council. Antone Azevedo, a Tribal Council member who was one of the Plaintiffs at the inception of this action, is now deceased.

document, Resolution #GC-98-01 (the "1998 Resolution"), as expressing the will of the Tribe's "General Council" (*i.e.*, all adult members) even though it was adopted without the knowledge, participation or consent of Plaintiffs Velma WhiteBear, Antonia Lopez, Evelyn Wilson, Antone Azevedo and Michael Mendibles, or any of the other Lineal Descendants. The AS-IA also ignores the fact that the 1998 Resolution was not even signed by a majority of those whom the 2011 Decision would have recognized as Tribal members in 1998.

Based on the 1998 Resolution, the 2011 Decision recognizes a Tribal government controlled by the Burley Faction, openly disregarding a recent ruling by the Court of Appeals for the D.C. Circuit. Just four years ago, that court upheld the Secretary of the Interior's ("Secretary") *refusal* to recognize the Burley Faction as the Tribe's government, precisely because the Burley Faction and its governing documents did not represent the majority of the Tribe's members. Their claim to "govern the Tribe without so much as consulting its membership" violated the fundamental principle of majoritarian rule. *California Valley Miwok Tribe v. USA*, 515 F.3d 1262, 1263, 1267 (D.C. Cir. 2008) [*CVMT II*].

The Secretary and his delegate, the AS-IA (collectively the "Government"), cannot evade their "responsibility to ensure that a tribe's representatives, with whom [they] must conduct government-to-government relations, are valid representatives of the tribe *as a whole*." *CVMT II*, 515 F.3d at 1267 (emphasis in original; citation omitted). Yet that is exactly what the 2011 Decision seeks to do. It endorses the Burley Faction's "antimajoritarian gambit," which the Court of Appeals disapproved, and allows "the will of tribal members [to be] thwarted by rogue leaders." *Id.* (citation omitted). In so doing, the 2011 Decision violates the Indian Reorganization Act and the United States' "unique trust obligation to Indian tribes." *Id.* (citation omitted).

In his 2011 Decision, the AS-IA acknowledges that he is making a "180 degree change of course from positions defended by this [Interior] Department in administrative and judicial proceedings over the past seven years." He describes this reversal as being "driven by a straightforward correction in the Department's understanding of the [Tribe's] citizenship and a different policy perspective . . . in light of those facts." The alleged "correction" to the Government's understanding is the AS-IA's novel conclusion that the Lineal Descendants are merely "potential" Tribal members and that the Government therefore has no obligation to them.

Plaintiffs will show that this "correction" lacks any legal or factual foundation and improperly usurps the Tribe's right to determine its own members. While the AS-IA claims that his predecessors "misapprehended their responsibility" and "fundamentally misunderstood the role of the Federal Government," the reverse is true. There is no proper basis for the AS-IA's conclusions that the Tribe has only five legitimate members, that the Lineal Descendants are only "potential" members, that the 1998 Resolution was validly adopted, or that it established a valid Tribal government controlled by the Burley Faction. In addition, the AS-IA is estopped from reaching those conclusions by the prior decisions of this Court in *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197 (D.D.C. 2006) [*CVMT I*], *affirmed*, 515 F.3d 1262, and of the Court of Appeals in *CVMT II,* and by the Government's own representations before this and other federal courts.

The AS-IA compounds these substantive errors with egregious procedural violations. The 2011 Decision stems from Silvia Burley's administrative appeal of a decision that the Bureau of Indian Affairs ("BIA") issued in 2007, seeking to facilitate a meeting of the Tribe's members. The appeal process is governed by binding regulations that limit the scope of the appeal to issues that were timely raised. The AS-IA did not limit his review to those issues. Instead, he expanded his

review to issues that were not before him and overturned final decisions that were not subject to further appeal. In addition, the appeal process was tainted by illegal *ex parte* contacts.

The stakes here are high. The 2011 Decision not only would disenfranchise hundreds of Tribal members, it also would prevent Plaintiffs' Tribal government from performing cultural, economic and social services that include protection of children under the Indian Child Welfare Act, economic development and job creation, and work with state and local agencies to protect cultural and environmental resources. Access to more than nine million dollars that the State of California holds in trust for the Tribe is also at stake. Depending on the result of this Court's decision, that money will go either to the four members of the Burley family or to the 242 Lineal Descendants and their children. Plaintiffs will suffer concrete and particularized injury if the 2011 Decision is allowed to stand.

Plaintiffs ask the Court to find that the 2011 Decision is arbitrary, capricious and not in accordance with law and to declare it invalid.

II. STATEMENT OF FACTS

A. The Tribe's Formal History Begins in 1915

In 1915, a United States Indian Service official discovered a cluster of approximately 12 Miwok Indians living in or near Sheep Ranch, California, which was a remnant of a once-larger band [AR 000003]. In 1916, the United States purchased approximately one acre of land near Sheep Ranch for the benefit of those Indians and created the Sheep Ranch Rancheria. The United States thereafter recognized the Tribe as an Indian tribe [AR 000006, 000009, 000063-000065]. The members of the Tribe at that time, as listed in the 1915 Sheep Ranch Indian census, were: Peter Hodge, Annie Hodge, Malida Hodge, Lena Hodge, Tom Hodge, Andy

Hodge, Jeff Davis, Betsey Davis, Mrs. Limpey, John Tecumchey, Pinkey Tecumchey and Mamy Duncan (collectively, the "1915 Members") [AR 000005].

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), P.L. 73-383, as amended, codified at 25 U.S.C. § 461 *et seq.* The IRA allowed Indian tribes to formally "organize" for the purpose of self-government, through the adoption of written governing documents such as a constitution and bylaws. *See* 25 U.S.C. § 476. The Tribe accepted the IRA in 1935 [AR 000021], but it did not take action to "organize" under the IRA [*e.g.*, AR 000048 (unorganized as of 1966)]. Instead, the Tribe continued to exist as a loose-knit community of families living on or near the Rancheria in Calaveras County, with only an informal governmental structure and no formal governing documents [AR 000507, 000510].

In 1965, the BIA began proceedings aimed at terminating the federal government's trust relationship with the Tribe pursuant to the California Rancheria Act, P.L. 85-671, as amended, by distributing the assets of the Rancheria [AR 000039]. As required by regulations in effect at that time, the BIA prepared a list of people entitled to vote on a "distribution plan" for the Rancheria [AR 000034-000035, 000038]. Because the Tribe was still unorganized, the regulations required the list to be based on who was currently using Rancheria lands through formal or informal allotments, and not on membership in the Tribe. *Compare* 25 C.F.R. §§ 242.3(a), 242.3(b) (1965) [AR 000035].

The distribution plan for the Rancheria's assets named Mabel Hodge Dixie (Yakima Dixie's mother) as the sole distributee, because she was the only Indian then living on the Rancheria [AR 000048-000051]. But the BIA never completed the steps necessary for termination under the Rancheria Act, and all parties agree that the Tribe was never terminated

[*e.g.*, AR 000509, 000517].[2] The United States continued to recognize the Tribe [*see* AR 000505, 000063-000064] and has done so ever since. *See* 75 Fed. Reg. 60810 (Oct. 1, 2010).

For unorganized tribes, the BIA has a practice of identifying a spokesperson through whom the BIA can maintain contact with the tribe until formal organization occurs [AR 001083]. After Ms. Dixie's death, Yakima Dixie eventually came to live on the Rancheria, and the BIA identified Mr. Dixie as a spokesperson for the Tribe [AR 000235].

B. The Initial Effort to Organize The Tribe With a Formal Government Began In 1998

In 1998, a tribeless part-Indian woman named Silvia Burley sought the BIA's assistance in becoming a member of a recognized tribe. BIA official Raymond Fry advised Ms. Burley to contact Yakima Dixie, and she did so [AR 000110]. Around August 1998, based on the BIA's advice, Mr. Dixie agreed to "adopt" Ms. Burley, her two daughters, and her granddaughter into the Tribe [AR 000110]. Based on the BIA's advice, Mr. Dixie did not consult other Tribal members about the adoption or seek their approval. The BIA accepted the Burleys as members of the Tribe, apparently based on the authority it had imputed to Yakima Dixie as spokesperson [AR 000173]. Nothing in the record supports the view that Mr. Dixie had the authority to adopt the Burleys into the Tribe without the consent of other Tribal members.

In September 1998, two BIA officials met with Yakima Dixie and Ms. Burley and discussed the process of formally organizing the Tribe [AR 000127-000171]. The BIA informed Mr. Dixie and Ms. Burley that the BIA could make federal funds available for the process of organization, including identifying the Tribe's full membership, drafting a constitution, and establishing a government [AR 000119].

[2] Silvia Burley unsuccessfully filed suit in federal court in 2002, seeking a determination that the Tribe had in fact been terminated and later restored [AR 000298]. Her suit was dismissed on statute of limitations and jurisdictional grounds [AR 000534-000557].

The BIA was aware at this time that the Tribe's membership included far more people than Yakima Dixie and (arguably) the Burleys. For example, BIA official Raymond Fry told Mr. Dixie during the meeting, "[W]e've done an awful lot of research on the Rancheria, or I have, and conceivably, it could be a pretty good size tribe, depending on what you're comfortable with" [AR 000119]. Brian Golding, the other BIA official present at the meeting, later testified that the BIA knew in November 1997 that the Tribe "consisted of a loosely knit community of Indians in Calaveras County," even though the Tribe "kept to itself" at that time [AR 000507]. The BIA also knew, specifically, that Yakima Dixie's brother Melvin Dixie was still alive and living nearby in Sacramento, California [AR 000127].

Despite this knowledge, the BIA told Yakima Dixie in 1998 that he, Ms. Burley and her adult daughter were the "golden members" of the Tribe [AR 000144] and that they could "pretty much determine the criteria for membership" and participation in Tribal organization. [AR 000136]. The advice was erroneous and violated the rights of the Lineal Descendants, including Plaintiffs. The BIA position was based on the BIA's erroneous assumption that membership and participation were limited to those persons named on the distribution plan prepared for the Rancheria, even though that standard applies only to certain tribes that were terminated and later restored to recognition through litigation [AR 000144, 000172-000173 (September 24, 1998 letter from BIA to Yakima Dixie re participation in Tribal organization process)[3]].

As a first step toward organization, the BIA suggested that Yakima Dixie and the Burleys adopt a draft resolution provided by the BIA, establishing a "general council" [AR 000173-000174]. A general council is a form of government that consists of all of the members of a Tribe acting jointly. This "interim tribal government" [AR 000770] would then adopt resolutions

[3] Note that the BIA's letter to Mr. Dixie uses the confusing term "unterminated" to refer to tribes that *were* terminated but later restored to recognition [AR 000172].

(also provided by the BIA) requesting federal funds to defray the costs of organizing [AR 000174-000175]. The BIA described the general council resolution as "an initial document to get started from" which would facilitate the organization process [AR 000145]. After taking this initial step, the BIA expected Mr. Dixie and the Burleys to "identify other persons eligible to participate in the initial organization of the Tribe" and eventually, with the participation of those other members, to draft a constitution, hold elections and adopt a government [AR 000173-174].

Ms. Burley and Mr. Dixie apparently signed the draft resolution provided by the BIA to establish a general council, Resolution #CG-98-01 (the "1998 Resolution" discussed in the introduction) [AR 000177-000179]. The 1998 Resolution bore only Ms. Burley's and Yakima Dixie's signatures and was not signed by Ms. Burley's adult daughter Rashel Reznor, Mr. Dixie's brother Melvin, or any other member of the Tribe. No one made any effort to give Melvin Dixie or any of the Lineal Descendants any notice or opportunity to participate in the adoption of the 1998 Resolution. As discussed more fully below, the 1998 Resolution was invalid by its own terms since it was not adopted by a majority of the Tribe's members, or even by a majority of the four people whom the BIA believed at that time were entitled to participate.

C. The BIA Rejects the Burley Faction's Claim that They Control the Tribe and That Membership Is Limited to Five People

In April 1999, a leadership dispute erupted when Ms. Burley filed a document with the BIA purporting to be Yakima Dixie's resignation from the position of Tribal chairperson, along with a resolution appointing her as chairperson [AR 000180-000181]. Mr. Dixie denied the validity of the documents and challenged Ms. Burley's claims to leadership [AR 000182, 000205, 000241-000246]. The reason for the leadership dispute is clear. Ms. Burley hoped to limit Tribal membership to her family and to deprive the Lineal Descendants of membership.

The BIA at first took the position that the leadership dispute was an "internal matter" to be resolved within the Tribe [AR 000237]. The BIA improperly recognized Ms. Burley as the Tribal chairperson pending resolution of the dispute[4] and even provided substantial annual funding to Ms. Burley to assist with Tribal organization. Contrary to the BIA's expectations, Ms. Burley did not use the funds to organize the Tribal community and in fact never spent a penny of the federal funds on any programs or services that benefited anyone outside of her immediate family [AR 002198, 002209, 002221, 002229, 002235, 002243].

Between 2000 and 2004 Ms. Burley submitted a series of tribal constitutions, signed only by herself and her daughters, which would have limited membership in the Tribe to the Burleys, their descendants and, in some cases, Yakima Dixie (who would have been outvoted and powerless and whom the Burley Faction purported to "disenroll" in 2005) [*see, e.g.,* AR 000255, 000261, 000864]. The BIA rejected or declined to act on each of these documents, growing increasingly concerned by Ms. Burley's failure to involve the rest of the Tribe [*see*, *e.g.*, AR 000261-000262 (2001 letter rejecting Burley constitution)].

In March 2004, Ms. Burley submitted another constitution for "informational purposes," claiming that she did not need the BIA's approval because the Tribe had the inherent authority to organize without regard to any requirements under the IRA [AR 001574]. The BIA responded by letter on March 26, 2004 (the "2004 Decision"), which informed Ms. Burley that Tribal organization must involve the entire Tribal community, and identified some members of the Tribal community who should be involved [AR 000499-000502]. The 2004 Decision also stated

[4] Recognition of Ms. Burley violated the BIA's stated policy of "continu[ing] to recognize the Tribal government as constituted prior to the [contested] appointment or election," which in this case would have been Mr. Dixie [AR 000237].

that "the BIA does not yet view your tribe to be an 'organized' Indian Tribe" and that, as a result, the BIA could not recognize Burley as the Tribe's Chairperson [AR 000499].

A Sacramento BIA official explained the 2004 Decision during testimony in 2005: "[T]his office [was] troubled by the apparent creation of this Tribe solely for Ms. Burley's family. . . . [T]his office determined it was inappropriate to continue to acknowledge Ms. Burley as a tribal chairperson who leads an organized tribe or to acknowledge a governing council for the Tribe" [AR 000762-000763]. Ms. Burley did not timely appeal the 2004 Decision [AR 000763].

During this same time period, Yakima Dixie was separately pursuing Tribal organization. As early as 1999, he contacted other members of the Tribe, including Melvin Dixie, and attempted to create a constitution and government [AR 000210-000231]. The BIA disregarded these efforts [AR 000245] or simply ignored them, even when Yakima Dixie and other members formally requested in 2003 that a Secretarial election be called, as provided by the IRA, to allow the Tribe to vote on a constitution [AR 002245].

Simultaneously, Yakima Dixie pursued a series of administrative and judicial challenges to the BIA's recognition of Ms. Burley's Tribal government. Those challenges continued until 2005, when the AS-IA determined that the 2004 Decision had rendered Mr. Dixie's appeal moot because the BIA no longer recognized Ms. Burley's tribal government [AR 000610-000611]. In a decision dated February 11, 2005 (the "2005 Decision"), the AS-IA stated:

> In [the 2004 Decision], the BIA made clear that the Federal government did not recognize Ms. Burley as the tribal Chairman. . . . Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal Chairman. I encourage you . . . to continue your efforts to organize the Tribe along the lines outlined in the March 26, 2004 letter so that the Tribe can become organized and enjoy the full benefits of Federal recognition. The first step in organizing the Tribe is identifying putative tribal members.

[AR 000610-000611.] Ms. Burley responded by challenging the 2005 Decision in federal court.

D. *CVMT I* and *II*: This Court and the Court of Appeals Uphold the Government's Decisions That Rejected Burley's 'Antimajoritarian Gambit'

In April 2005, Ms. Burley filed suit in this Court. *CVMT I*, 424 F.Supp.2d 197. Her suit challenged the Government's refusal to approve her governing documents and to recognize her purported Tribal government, and sought a judgment that the Tribe was organized pursuant to its inherent authority under IRA § 476(h), despite Burley's failure to involve the full Tribal community. *Id.* at 201. This Court dismissed Ms. Burley's claims and held that the Secretary has "a responsibility to ensure that [she] deals only with a tribal government that actually represents the members of a tribe." *Id.* The Court held that the Government's refusal to recognize the Burley government was consistent with its "duty to 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." *Id.* at 202-203.

The Court noted that the Burleys' constitution "conferred tribal membership only upon them and their descendants . . . [but] the [U.S.] government estimates that the greater tribal community, which should be included in the organization process, may exceed 250 members." *Id.* at 203 n. 7. Since the Tribe was eligible to receive approximately $1.5 million per year in state and federal funds, the Court concluded that Ms. Burley's motivation for restricting membership was self-evident. *Id.*

Ms. Burley appealed this Court's decision. The Court of Appeals affirmed, stating that the 2005 Decision fulfilled a cornerstone of the Government's trust obligation to Indian tribes: to "promote a tribe's political integrity, which includes ensuring that the will of tribal members is not thwarted by rogue leaders when it comes to decisions affecting federal benefits." *CVMT II*, 515 F.3d. at 1267. The Court of Appeals further explained, "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." *Id*. at 1267.

E. The BIA Attempts to Assist the Tribe By Gathering Genealogies to Document Tribal Membership

On November 6, 2006, after this Court had dismissed Ms. Burley's claims, the BIA wrote to Burley and Yakima Dixie that the BIA "remains committed to assist the [Tribe] in its efforts to reorganize a formal governmental structure that is representative of all Miwok Indians" (the "2006 Decision") [AR 001261-001262]. The BIA offered to facilitate a public meeting of those with a legitimate claim to Tribal membership, and asked both Ms. Burley and Mr. Dixie to participate [AR 001261-001262]. Mr. Dixie agreed, but Ms. Burley refused and appealed the 2006 Decision to the BIA's Regional Director, who affirmed in a decision dated April 2, 2007 (the "2007 Decision") [AR 001494-001500].

The BIA then published a public notice requesting that "putative members"[5] submit documentation of their membership to the BIA (*e.g.*, personal genealogies). The public notice defined the putative members as lineal descendants of known historical members: (1) individuals listed on the 1915 Indian Census of Sheep-ranch Indians; (2) eligible voters listed on the federal government's 1935 IRA voting list for the Rancheria; and (3) distributees under the Rancheria distribution plan prepared in 1966 [AR 001501].

According to the BIA, 503 persons submitted genealogies in response to the public notice [AR 002105]. The BIA reviewed all of the submissions and prepared a letter to each person,

[5] First the Burleys, and now the AS-IA, have attempted to equate the term "putative member" with "potential member," to argue that these individuals are not current members of the Tribe and have no rights as citizens. "Putative" does not mean "potential." It means "generally accepted or deemed such; reputed [a putative ancestor]." Webster's New World Dictionary (bracketed language in quoted text). "Putative members" refers to persons who are accepted as Tribal members, not to people who merely have the potential to become members.

verifying their degree of Indian blood and lineage based on the BIA's genealogical research [AR 002105]. But the BIA has never released that information and refuses to acknowledge that the genealogies are part of the record in this case [Affidavit of Robert J. Uram, attached as Exhibit 1 to Plaintiffs' Motion to Supplement the Administrative Record).

F. The Burley Faction Attempts to Relitigate Its Claims to Control the Tribe, Before the Interior Board of Indian Appeals

Burley appealed the Regional Director's 2007 Decision to the Interior Board of Indian Appeals ("Board") [AR 001502]. Among other claims not relevant here,[6] Burley claimed that the BIA's decision to involve the Tribal community in organization impermissibly intruded into Tribal affairs, because the Tribe was *already* organized under her leadership. *California Valley Miwok Tribe v. Pacific Regional Director*, 51 IBIA 103, 104 (2010) [*CVMT III*].

The Board held that the Government's 2005 Decision and *CVMT I* and *CVMT II* had already *finally* determined that: (1) the Government did not recognize the Tribe as being organized; (2) the Government did not recognize any tribal government that represents the Tribe; (3) the Tribe's membership was not necessarily limited to the Burley Faction and Yakima Dixie; and (4) the Government had an obligation to ensure that a "greater tribal community" was allowed to participate in organizing the Tribe. *Id.* at 120-121. The Board held that, to the extent Burley's appeal attempted to relitigate those issues, it had no jurisdiction over her claims. *Id.* at 104-105. The Board therefore dismissed all of Burley's claims except for a single, narrow issue.

According to the Board, Ms. Burley's appeal only raised new issues to the extent the 2007 Decision went beyond what was already decided and determined "more specifically what BIA would do to *implement* those [2004 and 2005] determinations." *CVMT III*, 51 IBIA at 121

[6] Ms. Burley also claimed that the 2007 Decision violated a federal contract with the Tribe and that the Decision erroneously stated that the Tribe was never terminated. 51 IBIA at 104.

(emphasis added). Thus, the only issue properly raised by Ms. Burley's appeal concerned the BIA's authority to determine "who would constitute the 'greater tribal community,' or class of 'putative members,'" and to call a meeting of those members for organizational purposes. *Id.* The Board characterized this as a "tribal enrollment dispute." Because the Board lacks jurisdiction over enrollment questions, it referred this issue to the AS-IA for resolution. *Id.* The referral was improper, because the Board failed to recognize that the BIA's 2007 proposed actions would not and could not enroll anyone in the Tribe. Instead, the BIA merely identified those who were *already* recognized as Tribal members based on custom and tradition.

G. While Burley's Appeal Was Pending, Plaintiffs' Actions Eliminated the Need for the BIA to Assist the Tribe

Although Ms. Burley's appeal to the Board forced the BIA to stay its efforts to assist the Tribe in organizing, Plaintiffs moved forward on their own to organize the Tribe in a manner consistent with the judicially approved 2004 and 2005 Decisions. As the AS-IA had encouraged in his 2005 Decision [AR 000610-000611] and as outlined in the 2007 Decision, Plaintiffs set out to "bring together the . . . whole community, the 'putative' group, who would be entitled to participate in the Tribe's efforts to organize a government that will represent the Tribe as a whole" [AR 001498]. Plaintiffs invited all lineal descendants of the Tribe's known historical members—including all those identified in the BIA's 2007 public notice—to participate in organization and the drafting of a Tribal constitution [*see* AR 002259-002261, 002295-002296].

Several hundred people submitted genealogical information to the Tribe and have since participated in regular meetings and Tribal activities, including the drafting of a Tribal constitution that would formally define inclusive citizenship criteria, embracing all members of the Tribe [AR 002297-002313]. When the Plaintiffs filed their First Amended Complaint, the

Tribe's roster contained 242 adult members, along with approximately three hundred children (names of children withheld) [AR 002265-002275]. The Tribe will hold an election to ratify the Constitution and will ask the Secretary to recognize its government when that process is complete [AR 002142].[7] As a result, there is no need for the BIA to convene a meeting or to take any other action. As discussed below, this renders the Burley's appeal moot.

H. The AS-IA's 2011 Decision Makes a 180 Degree Change From Prior Administrative and Judicial Decisions and Approves Burley's Antimajoritarian Gambit

In March 2010, while the AS-IA was considering Ms. Burley's appeal, Ms. Burley's lobbyist, Wilson Pipestem, provided top BIA officials with a letter containing the arguments that formed the basis for the AS-IA's eventual decision [AR 001997[8]]. The Government withheld this letter from Plaintiffs until filing the administrative record on December 1, 2011, in violation of the prohibitions on ex parte contacts for pending appeals.

The AS-IA issued his initial decision in Burley's appeal on December 22, 2010 (the "2010 Decision") [AR 001797-001893]. Plaintiffs challenged the 2010 Decision before this Court, and the AS-IA withdrew the decision on April 1, 2011 [AR 001998-001999]. The AS-IA stated in his April 1 letter that he would issue a new decision after briefing by both parties [AR 001998]. But five days later, before any briefing, Ms. Burley's attorney stated in open court, in a

[7] To date, Plaintiffs' Tribal Council has derived its authority to represent the Tribe from consensus and tradition. The Tribe's members have recognized the Council's authority by their acceptance of its proposals and their participation in Tribal meetings and affairs. But the Tribe's draft constitution and election ordinances call for a general election to be held as soon as possible following the ratification of the constitution, in order to formally establish an elected government of the Tribe.

[8] The letter is an attachment to the email bearing Bates number 001997. The letter itself is not Bates-stamped and can only be accessed by right-clicking the "Attachment" line in the electronic version of the email included in the DVD of the administrative record. Also, Defendants' index to the administrative record incorrectly dates this document as March 25, *2011*, instead of March 25, *2010*, the date the document was delivered.

related California court proceeding, that the Government had informed him it planned to reaffirm the substance of the December 22 Decision [AR 002013]. This additional ex parte communication supports the view that the reconsideration was not conducted in good faith.

After briefing by Ms. Burley and the Plaintiffs, the AS-IA issued the 2011 Decision. The AS-IA reached substantially the same conclusions as he had in his 2010 Decision. He reached far beyond the scope of the issues raised in Ms. Burley's appeal and purported to decide both issues beyond his authority (*i.e.*, Tribal membership) and issues that were already finally resolved by prior DOI decisions and *CVMT I* and *CVMT II* (*i.e.*, whether the Tribe was already organized).

The 2011 Decision finds that the Tribe's membership is limited to the five people whom the AS-IA recognizes as members: the Burley Faction and Yakima Dixie [AR 002049, 002051]. The 2011 Decision incorrectly describes all of the Tribe's other members as "potential citizens" and finds that they have no right to participate in the Tribe's governance [AR 002051].

The 2011 Decision finds that the Tribe is organized under the 1998 Resolution, a document signed by just two people [AR 002050]. In doing so, the 2011 Decision effectively overturns the 2004 and 2005 Decisions that determined the Tribe was not organized.[9] The Decision finds that the "General Council" created by the 1998 Resolution consists solely of the five people whom the AS-IA acknowledges as Tribal members, and that it has the sole right to determine membership criteria for the Tribe and to "conduct the full range of government-to-government relations with the United States" [AR 002050-002051].

[9] The AS-IA states that his ruling "shall apply prospectively" to avoid what he calls the "unintended consequences" of rescinding prior decisions [AR 002054]. This statement cannot be reconciled with his actions, which clearly overturn the Government's prior decisions.

III. APPLICABLE LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *McKinley v. Board of Governors of Fed. Reserve*, 647 F.3d 331 (D.C. Cir. 2011). The movant bears the burden of showing that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 325. But the mere existence of a factual dispute will not bar summary judgment. A factual assertion is *material* if it is capable of affecting the substantive outcome of the litigation, and an issue is *genuine* only if supported by sufficient admissible evidence that a reasonable trier of fact could find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986); *Laningham v. U. S. Navy*, 813 F.2d 1236, 1242-1243 (D.C. Cir. 1987).

B. Judicial Review Under the Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), provides that a court must hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although the court should not substitute its judgment for that of the agency, its review must be "searching and careful." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (citation omitted). "[W]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo

its action." *Ransom v. Babbitt*, 69 F.Supp.2d 141, 149 (D.D.C. 1999) (quoting *Petroleum Communications, Inc., v. F.C.C.*, 22 F.3d 1164, 1172 (D.C. Cir. 1994)).

Whenever an agency changes its course it must "supply a reasoned analysis for the change." *Jicarilla Apache Nation v. DOI*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (citation and internal quotation marks omitted). "Reasoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent, and an agency that neglects to do so acts arbitrarily and capriciously." *Id.* (citations and internal quotation marks omitted). An agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Id*. at 1120 (citations and internal quotation marks omitted); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute").

C. The Indian Reorganization Act

The IRA, 25 U.S.C. § 461 *et seq.*, adopted in 1934, authorizes Indian tribes to "organize for [their] common welfare" by adopting a tribal constitution and bylaws. 25 U.S.C. § 476(a). Majoritarian values lie at the heart of the IRA. Among other things, the IRA provides that a constitution or bylaws adopted pursuant to the IRA must be (1) "ratified by a majority vote of the adult members of the tribe" in a special tribal election called by the Secretary,[10] and (2) approved by the Secretary. *Id. See also* 2 Ops. Sol. Int. 1253, 1255 (Mar. 10, 1944) (tribal members are entitled to vote on membership criteria because, under the IRA, "the right to organize is given to the 'adult members of the tribe'").

[10] The Secretary has also promulgated regulations that govern such elections. 25 C.F.R. Part 81.

A provision of the IRA added in 2004, subsection 476(h), also allows tribes to "adopt governing documents under *procedures* other than those specified in [Section 476]." 25 U.S.C. § 476(h) (emphasis added). But, as this Court has explained, subsection 476(h)'s reference to "governing documents"

> must be understood as references to documents that have been 'ratified by a majority vote of the adult members,' as required by subsection 476(a). Subsection 476(h) did not repeal the provisions of 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."

CVMT I, 424 F.Supp.2d at 202-203. *See also CVMT II*, 515 F.3d at 1267-1268 ("tribal organization under the [IRA] must reflect majoritarian values").

This interpretation of subsection 476(h) is informed by the United States' obligations as a trustee to Indian tribes and the Indian people. *Id.* at 1267. *See also*, *e.g.*, *United States v. Mitchell*, 436 U.S. 206, 225 (1983) ("[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"); *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp.2d 122, 147 (D.D.C. 2002) (DOI's "distinctive obligation of trust" to Indian peoples required it to intervene in tribal elections to protect tribe members excluded from elections) (citation omitted).

IV. ARGUMENT

Plaintiffs are entitled to summary judgment under the APA because the undisputed facts in the administrative record show that the 2011 Decision was arbitrary, capricious and unlawful. The 2011 Decision purports to determine that the "Tribe as a whole" now consists of just five people, four of whom had no contact with the Tribe prior to approximately 1998. That determination is arbitrary and capricious because it ignores uncontroverted evidence proving the existence of a much larger body of Tribal members who are Lineal Descendants. In addition, the 2011 Decision lacks any reasoned explanation of how it reached its conclusions regarding Tribal membership.

Because the Tribe's membership is not limited to the Burley Faction and Yakima Dixie, the Government's recognition of a Tribal government that represents only those five people violates the IRA and the Government's trust responsibility to the Tribe and its members.

In addition to those fatal flaws, the Government's 2011 Decision is estopped by the prior decisions of this Court and the Court of Appeals in *CVMT I* and *II*, and by the Government's own representations before this and other federal courts. The 2011 Decision also violates the DOI's own appeals regulations by engaging in prohibited ex parte contacts, exceeding the proper scope of appeal, and purporting to overturn final decisions that are not subject to further appeal.

A. The 2011 Decision Depends Entirely On A Determination of the Tribe's Membership that Is Arbitrary, Capricious and Unlawful

The overwhelming weight of the evidence in the record shows that the Tribe's membership is not limited to the Burley Faction and Yakima Dixie. The AS-IA chose to ignore this information, making his 2011 Decision arbitrary and capricious. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency"). The 2011 Decision also violates the fundamental tenet that the Tribe, not the Government, is entitled to determine Tribal membership.

1. The 2011 Decision Improperly Disregards Undisputed Evidence In The Record That The Tribe Consists Of More Than Five Members

The BIA has been dealing with this Tribe for nearly 100 years. It has compiled a wealth of information proving that the Tribe's membership is not limited to the Burley Faction and Yakima Dixie. In finding that the Lineal Descendants are only "potential members," the 2011 Decision ignores this information .

a. The 2011 Decision Ignores Testimony of BIA Officials and Legal Pleadings in Prior Cases

Brian Golding of the BIA's Sacramento office testified in 2004 that the BIA's records demonstrated the existence of a larger Tribal community beyond the Burley Faction and Yakima Dixie. Explaining a letter that he had written in 1997 regarding the BIA's lack of a "government to government relationship" with the Tribe, Mr. Golding stated:

> **Based on the records of this office, the Tribe [as of 1997] consisted of a loosely knit community of Indians in Calaveras County**. . . . [N]o one affiliated with the Tribe had requested any services or assistance from this office, apart from a request from one individual for housing assistance. Essentially, at that time, the Tribe kept to itself. **In no way was the [1997] letter intended to suggest that the Tribe had no members or that the Tribe did not exist or** had been terminated or, in any way, **was ineligible for services or recognition from the federal government as a tribe.**

[AR 000507 (emphasis added.]

The statement that the Tribe existed as a "loosely knit community" in 1997 that was eligible for "recognition from the federal government as a tribe" necessarily implies the existence of Tribal members other than Yakima Dixie and the Burley Faction, since the Burleys did not even enter the scene until 1998. The Government's pleadings in recent cases involving this Tribe, in which membership was a key issue, confirm this conclusion.

In 2002, Ms. Burley sued the Government in federal district court for the Eastern District of California, seeking to force the Government to take land into trust for the Tribe so she could build a casino [AR 000299]. Ms. Burley's claims turned on the erroneous assertion that the Tribe had been terminated under the California Rancheria Act and later restored [AR 000300]. To support her claim that the Tribe had been terminated, Ms. Burley argued that there were no tribal members in the 1980s and early 1990s [AR 000509-000510].

The Government denied Ms. Burley's claims regarding Tribal membership, relying on BIA records and the testimony of BIA officials. In a brief filed in 2004, the Government stated:

> [Ms. Burley] argues that there were no tribal members until 1992 or thereabouts. . . . However, the [BIA] consistently has had communications with members of

> this tribe who have continued to live in the area. BIA recognizes this Tribe as a duly constituted, loose-knit Tribe that has not formally organized. **Based on nearly 100 years of interaction with the Tribe, BIA believes that the tribal community constituting this Tribe is substantially larger than is portrayed in the Burley constitution**.

[AR 000510 (emphasis added).] The district court agreed and dismissed Ms. Burley's claims, and the Ninth Circuit affirmed [AR 000555, 000557, 001259].

A year later, in 2005, Ms. Burley filed her claims before this Court in *CVMT I*. In its motion to dismiss, the Government noted that Ms. Burley had admitted in an earlier lawsuit that the Tribe could have a membership of 250 people. The Government then stated, "These 250 people, in our opinion, constitute the "whole" (or at least) "greater" tribal community discussed in the March 26th [2004] letter, which is not reflected in the *present* membership of the Tribe" [AR 000827 (emphasis in original)]. Note that the Government's reference to the "present membership" of the Tribe refers to the five members acknowledged by Ms. Burley in 2005 and is not a determination of the Tribe's *actual* membership [*see*, *e.g.*, AR 000830 (stating that "Ms. Burley had failed to identify the greater tribal membership and obtain its support")].

b. The 2011 Decision Ignores Prior BIA Decisions and Analysis of Members' Genealogies

BIA decisions contained in the record provide additional information about the Tribe's members. The 2004 Decision noted that Ms. Burley's proposed "base roll" for determining Tribal membership "contains only the names of five living members [i.e., the Burley Faction and Yakima Dixie]" and therefore "suggests that this tribe did not exist until the 1990s, with the exception of Yakima Dixie. *However, BIA's records indicate . . . otherwise*" [AR 000500 (emphasis added)]. The BIA identified various individuals and groups that had resided on the Rancheria, lived adjacent to the Rancheria, or otherwise maintained cultural contact with the Tribal community, including Lena Shelton and her descendants, the offspring of Merle Butler,

Tillie Jeff and Lenny Jeff, and the Indians residing at nearby West Point. The BIA explained that northern California Miwok tribes typically defined their membership by reference to a historical census or other official rolls from the early twentieth century [AR 000500].

Subsequently, the BIA issued a public notice in April 2007, identifying the Tribe's known historical members and inviting descendants of those members to submit documentation to the BIA [AR 001501]. In response, the BIA received genealogies from more than five hundred individuals [AR 002139-002140]. The BIA analyzed those genealogies to confirm which of the individuals were lineal descendants of the historical members [AR 002105-002106]. Although the Government has not released those findings, has ignored the genealogies in reaching the 2011 Decision, and refuses to acknowledge that the genealogies are part of the record for this case, it cannot deny the existence of the information [AR 002139-002140].

c. The 2011 Decision Ignores Plaintiffs' Tribal Roster

Plaintiffs submitted uncontroverted evidence showing that the Tribe's current membership consists of the Lineal Descendants—242 adult members and their children [AR 002264-002275]. This evidence, which included a complete roster of the Tribe's adult members, was provided at the request of the AS-IA [AR 002004]. If the AS-IA did not believe that the individuals included on Plaintiffs' roster were Tribal members, he was required to explain why. He had all the evidence he needed to do so, because most or all of Plaintiffs' 242 adult members also submitted genealogies to the BIA in response to the 2007 public notice [AR 002139-002140]. But the AS-IA simply ignored the information.

"[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of [APA] § 706." *Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (citing *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43). *See also Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Management*, 455 F. Supp. 2d 1207, 1223-

1224 (D. Nev. 2006) (arbitrary and capricious for Bureau of Land Management to ignore scientific evidence in the agency record that ancient human remains were affiliated with modern-day Native American tribe).

Remarkably, the 2011 Decision makes no effort to address any of the evidence contradicting its conclusions—neither the genealogies received by the BIA, nor the Plaintiffs' roster, nor the BIA's repeated statements that its records revealed the existence of a larger Tribe. As a result, the 2011 Decision is a quintessential example of arbitrary and capricious agency action.

2. The Government Offers No Reasoned Explanation for Its Determination of Tribal Membership

Not only does the 2011 Decision neglect to address evidence that contradicts its conclusions; it also fails to offer any reasoned explanation *supporting* its determination of the Tribe's membership. The APA requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43. If the agency itself does not supply a reasoned basis for its decision, the court cannot make up for that deficiency. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Here, the 2011 Decision simply *assumes* that the Tribe is limited to five members and dismisses all others as merely "potential members" [AR 002051], without offering any clue as to how it reached that result. It defends this conclusion by arguing that "the General Council of the Tribe [*i.e.*, the five members recognized by the 2011 Decision] has the exclusive authority to determine the citizenship criteria for the Tribe" [AR 002051]. But this simply begs the question of how the AS-IA determined that the 1998 Resolution, which allegedly established the "General Council," was a valid Tribal action. The AS-IA's circular argument "provides no basis upon

which [the Court] could conclude that it was the product of reasoned decisionmaking" and therefore violates the APA. *Butte County*, 613 F.3d at 195 (Secretary of Interior violated APA §§ 555(e) and 706 by failing to offer any valid explanation for rejecting interested party's arguments in an informal adjudication concerning tribal trust lands).

The AS-IA's lack of explanation is glaring in light of the acknowledged "180 degree change of course" that the 2011 Decision represents and its failure to "come to grips" with the Government's prior decisions. *Jicarilla Apache Nation, supra*, 613 F.3d at 1120; *Greater Boston, supra,* 444 F.2d at 852. The D.C. Circuit has repeatedly explained that an "agency's unexplained 180 degree turn away from precedent [or] an agency's decision to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *Brady Campaign to Prevent Gun Violence*, *supra*, 612 F.Supp.2d 1, 18 (D.D.C. 2009) (citing *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 184 F.3d 892, 897 (D.C. Cir. 1999)) (quotation marks omitted). *See also F.C.C. v. Fox Television Stations*, 129 S.Ct. 1800 (2009) (a heightened need for explanation exists "when, for example, [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account"). In addition, an agency's reversal of position must be viewed in light of its statutory duties. *See Fund for Animals v. Norton*, 294 F.Supp.2d 92, 105 (D.D.C. 2003) *appeal dismissed*, 2005 WL 375622 (D.C. Cir. Feb. 16, 2005). Here, in light of the Government's prior decisions and its trust obligation to the Tribe, the 2011 Decision's unexplained membership determination is clearly arbitrary and capricious.

3. The 2011 Decision Is Unlawful because the Tribe, and Not the Government , Decides Who Is a Tribal Member

"A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). As the Government stated before the Ninth Circuit in 2005, in another case involving this Tribe, "[U]nless limited by treaty or statute, a Tribe has the power to determine tribal membership" [AR 000649 (*quoting Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978)].

The Government does not suggest that this Tribe's inherent powers of self-government have been limited by any treaty. Nor has Congress acted to define or limit the Tribe's membership, as it has with certain other tribes where it defined a tribal membership roll or authorized the Secretary to do so. *See*, *e.g.*, *Groundhog v. Keeler*, 442 F.2d 674, 679 (10th Cir. 1971) (discussing enrollment criteria imposed by Congress on the Five Civilized Tribes); 25 C.F.R. § 61.2 (explaining that rules prescribed in 25 C.F.R. Part 61 are to "govern the compilation of rolls of Indians by the Secretary of the Interior pursuant to statutory authority"); 25 C.F.R. § 61.4 (defining criteria for inclusion on tribal rolls prepared by Secretary for the purpose of distributing judgment funds to specific tribes).

Because Congress has not given the Secretary or his delegates the authority to determine the Tribe's membership, that power belongs to the Tribe alone. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490 (D.C. Cir. 2010) ("a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so") (Brown, Circuit Judge, concurring) (citation omitted). Thus, the AS-IA's attempt to determine the Tribe's membership is *ultra vires* and violates the APA. 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action "in excess of statutory jurisdiction, authority, or limitations"); *Emily's List v. Fed. Election. Com'n*, 581 F.3d 1, 21 (D.C. Cir. 2009) (FEC regulations exceeded agency's statutory and violated the APA).

a. The Tribe Acknowledges Members Based on Hereditary Descent and Participation in the Tribal Community

Generally speaking, "[i]n the absence of Congressional legislation, tribal membership is usually acquired by birth into, affiliation with, and recognition by the tribe." 2 Ops. Sol. Int. 1253, 1254 (Mar. 10, 1944). As explained in the foremost treatise on Indian law:

> [T]ribal 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.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03(2) (2005 ed.) (emphasis added). Tribes may impose additional requirements, such as residence, but are not required to do so.

For example, a California Court of Appeal explained the traditional membership practices of the Pomo Indian Tribe of Northern California prior to organization: "Before the adoption of the articles of association in 1973, the Tribe was governed solely by custom and tradition, under which any lineal descendant of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth." *In RE Bridget R.*, 41 Cal.App.4th 1483, 1493 (1996) (superseded by statute on other grounds). The court noted that the Pomo tribe had 225 members, of whom only 25 lived on the reservation. *Id.* at 1492.

A Senate Report prepared for the California Rancheria Act in 1958 shows that, in other California rancheria tribes, it was common for members to have only informal assignments of rancheria land and to come and go as residents of the rancheria properties, just as with this Tribe. Sen. Report 1874, pp. 13-50 (July 22, 1958). This arrangement did not prevent non-residents from being considered members. *Id.* at 39 (discussing Redwood Rancheria). Most of the 41

rancherias identified in the Rancheria Act[11] did not have approved membership rolls. *See id.* at 13-50.

Federal regulations and BIA guidance recognize that traditional tribal ways of defining membership are valid, and that formal enrollment is not required. The BIA's guidelines for implementing the Indian Child Welfare Act state, "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls." 44 Fed. Reg. 67584, 67586 (Nov. 26, 1979). The BIA's regulations for implementing the IRA define a "member" as: "any Indian who is duly enrolled in a tribe who meets a tribe's written criteria for membership *or who is recognized as belonging to a tribe by the local Indians comprising the tribe.*" 25 C.F.R. 81.1(k) (emphasis added). *See also In RE Bridget R.*, 41 Cal.App.4th at 1493 ("although his name is not on the [BIA's] enrollment list for the Tribe, Richard, who was born in 1972, is recognized as a tribal member according to pre-1973 customs").

This Tribe's membership practices are consistent with those described above and are typical for unorganized tribes: Membership in the Tribe is determined by hereditary descent and acknowledgment by the Tribal community, in accordance with Miwok traditions. Residence on the Rancheria is not a condition of membership. Because of the small size of the Tribe's Rancheria property (0.92 acre), it has never been feasible for all of the Tribe's members to live there at any given time. The BIA has never maintained an "approved membership roll" for the Tribe [*see* AR 000649]. The 2011 Decision fails to address these traditional practices or to explain why they would be superseded now.

[11] This Tribe was not one of the 41 tribes that the Rancheria Act specifically singled out for termination.

b. The Tribe's Current Membership Can Be Determined From Historical Records

Because membership is derived from hereditary descent, the Tribe's current membership—and participation in any organization efforts—can best be determined by reference to historical lists of Tribal members. As the Board explained in a case involving the Cloverdale Rancheria in Northern California: "Unorganized Federally recognized tribes would look to historical records and rolls to determine recognized membership for organizational purposes." *Alan-Wilson, Sr., v. Sacramento Area Director*, 30 IBIA 241, 249-250 (1997).[12] *See also*, *e.g.*, *Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996) (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).

The record shows that the Tribe existed prior to 1915, when a BIA official identified a band of 12 Miwok Indians living at Sheepranch (the 1915 Members) who were the remnants of "once quite a large band" [AR 000003]. The Rancheria was "purchased for these Indians" [AR 000004], and the Tribe was federally recognized from that time forward [AR 000006, 000009, 000063-000065]. The United States recognized the 1915 Members as members; otherwise the Tribe would have had no members and would not have existed.

[12] In the case of the Cloverdale Rancheria, the Board explained that, although historical records were available, they did not determine membership because the Cloverdale Rancheria was a party to *Hardwick v. United States,* Civil No. C-79-1710 SW (N.D. Calif. Dec. 22, 1983). The stipulated judgment in that litigation restored to federal recognition 17 terminated California rancherias and specified who would be eligible to participate in subsequent organization efforts. *See*, *e.g.*, *Jeffrey Alan-Wilson Sr. v. Sacramento Area Director*, 30 IBIA 241, 245-246 (1997) (explaining the application of the stipulated judgment to the Cloverdale Rancheria). Thus, for the Cloverdale Rancheria, "the [*Hardwick*] case govern[ed] the initial establishment of a tribal government." 30 IBIA at 250. But this Tribe was never terminated and was not a party to *Hardwick*, so historical rolls govern. For more discussion of *Hardwick*, see subsection (c), *infra*.

The 1915 census document thus forms the first known record of historical membership, from which the Lineal Descendants can be identified [*see* AR 000005]. Other available records that identify historical members of the Tribe include the 1935 IRA voter list for the Tribe [AR 000016] and the 1966 distribution plan [AR 001501].

The BIA recognized this in its 2004 Decision, which identified Indian census documents from 1915 and 1916, and IRA voter lists, as documents that Miwok tribes commonly use to begin constructing a membership roll [AR 000500]. The BIA's 2007 public notice was based on the same historical documents: the census of 1915 members, the 1935 IRA voter list, and the 1966 distribution plan [AR 001501]. The 2011 Decision offers no evidence or explanation for rejecting these normal sources of membership information and intruding into this Tribe's sovereignty by relegating the Lineal Descendants to "potential member" status.

When Plaintiffs set out to organize the Tribe, they invited all lineal descendants of historical Tribe members to participate. Subsequently, the Tribe prepared written rolls of all those who elected to participate. Every person on the Tribe's current roster is a lineal descendant of a known historical member [AR 002139-002140, 002253-002254]. The Tribe has drafted written criteria that formalize the membership traditions described above and that include all the people identified in the BIA's 2007 public notice and 2004 Decision[13] [*see* AR 002253-002254].

c. The 1966 Distribution Plan Did Not Redefine the Tribe's Membership

The 2011 Decision provides no explanation or rationale in support of its conclusion that the membership of the Tribe is limited to five people. However, the Decision's focus on "distributees and their descendants" suggests that the Government is implicitly relying on the

[13] These criteria do not exclude the Burley Faction from being members if they show that they are, in fact, lineal descendants, and desire to participate in the Tribal community. So far they have rejected all involvement with the Tribal community in favor of maintaining their own private "tribe" of four people.

theory that the Sheep Ranch distribution plan prepared in 1966 established the membership of the Tribe and determined who would be entitled to participate in any subsequent Tribal reorganization [AR 000048-000051]. If so, the Government's reliance is misplaced, because the distribution plan did not determine the membership of the Tribe.

The federal regulations in effect in 1966 explicitly provided that distribution plans for unorganized tribes were not based on tribal membership. Distribution plans reflected tribal membership rolls only for those tribes that were already organized and thus had written membership criteria and rolls. For unorganized tribes, such as this Tribe, distribution plans were required to include only those persons who were using Rancheria lands through formal or informal allotments. *Compare* 25 C.F.R. §§ 242.3(a) (1965) (organized tribes), 242.3(b) (1965) (unorganized tribes) [AR 000035]. Thus, the 1966 distribution plan does not define this Tribe's membership. At most, the plan identifies Tribal members who happened to live on the 0.92-acre Rancheria in 1966.

In certain cases, the BIA *has* made a practice of limiting tribal organization to people named on a rancheria distribution plan, and their descendants. *But that practice has no application here.* The practice is limited to the 17 terminated California rancherias that were restored to federal recognition under the stipulated judgment in *Hardwick v. United States,* Civil No. C-79-1710 SW (N.D. Calif. Dec. 22, 1983). This Tribe was never terminated and did not participate in the *Hardwick* litigation. As a result, the stipulated judgment in *Hardwick* does not apply and does not provide a basis for the 2011 Decision to limit this Tribe's membership.

For all the reasons set forth in this section IV.A, the AS-IA's determination of the Tribe's membership is arbitrary, capricious and unlawful.

B. The 2011 Decision Violates the APA, and the Government's Trust Obligations to the Tribe, By Allowing Burley's 'Antimajoritarian Gambit' to Succeed

As the official charged with overseeing the United States' government-to-government relationship with Indian tribes, the Secretary is both authorized and obligated to ensure that he deals only with tribal governments that actually represent the members of their tribes. The 2011 Decision violates the IRA and abdicates the Secretary's obligation to this Tribe by recognizing a Tribal government that does not represent the Tribe's members, based on a process from which all but one of the Lineal Descendants were excluded. As a result, the 2011 Decision is unlawful, and the APA requires this Court to set it aside. *See* 5 U.S.C. § 706(2)(A).

1. The Secretary Must Ensure that a Tribe's Representatives With Whom He Deals Are Valid Representatives of the Tribe as a Whole, Even Under IRA § 476(h)

IRA section 476(a), enacted in 1934, permits Indian tribes to organize by adopting a "constitution and bylaws," which must be ratified by a majority of a tribe's adult members at a special election called by the Secretary. 25 U.S.C. § 476(a); *see also id.* § 476(c) (prescribing election procedures). Subsection 476(h), added in 2004, clarifies that tribes also may adopt constitutions or other governing documents "under *procedures* other than those specified in [section 476]." 25 U.S.C. § 476(h) (emphasis added).

In *CVMT I* and *II*, the Government took the position that IRA 476(h)'s reference to documents adopted outside of the IRA's *procedures* did not repeal the IRA's *substantive* requirement that tribal governing documents must reflect the will of a majority of the tribe's adult members [AR 000846, 000848, 000851; *see also* 002090-002096.]. Thus, "[g]overning documents, whether adopted under Section 476(a) or recognized under 476(h), must, therefore, be adopted by a majority of the tribal members" [AR 000851]. This holds true whether the document in question is a constitution or a tribal resolution [AR 000846, 000848].

Importantly, the Government also acknowledged that the Secretary has the obligation—independent of the IRA—to "determine that he or she is dealing with a government that is

representative of the tribe as a whole" [AR 000849 (citing *Seminole Nation v. United States*, 316 U.S. 286, 295-296 (1942)]. This duty arises from the United States' trust relationship with Indian tribes, which the Secretary is bound to honor in exercising his broad authority over federal Indian relations [AR 000849 (citing 43 U.S.C. § 1457 and *Seminole Nation*, 316 U.S. at 295-296)]. *See also* 25 U.S.C. §§ 2, 9, 13 (granting Secretary power over various aspects of Indian affairs). "This duty to deal only with representative governments has made the majority the yardstick against which legitimacy of tribal governments are measured" [AR 000849]. As the Government argued, nothing in IRA § 476(h) suggests that Congress intended to modify this background principle of Indian law, which is "fundamental to the relationship between the federal government and a tribe" [AR 000849-000851, 002095].

The Government's interpretation of IRA § 476(h) was supported by the rules of statutory construction and by ample statutory authority[14] [AR 000846-000851]. *See*, *e.g.*, *Seminole Nation v. Norton*, 223 F.Supp.2d 122, 138-140 (D.D.C. 2002) (DOI upheld its trust obligation by refusing to recognize tribal elections from which members were excluded); *Ransom v. Babbitt*, 69 F.Supp.2d 141, 151 (D.D.C. 1999) (BIA acted arbitrarily and capriciously by recognizing a tribal government based on a constitution it should have realized was not validly adopted); *Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 552 (10th Cir. 1987) ("since the Department is sometimes required to interact with tribal governments, it may need to determine which tribal government to recognize"); *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107

[14] The Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1301 *et seq*, reinforces the Government's duty to uphold majoritarian principles. The Board has repeatedly held that, "in maintaining the government-to-government relationship with Indian Tribes, BIA has the authority and the responsibility to decline to recognize a tribal action where it finds that the action is tainted by a violation of the [ICRA]." *Jeffrey Alan-Wilson, Sr.*, 30 IBIA 241, 260 (1997) [AR 000107] (citations omitted). Recognition of a Tribal government that excludes a majority of a Tribe's members from citizenship, voting or other fundamental rights would deny those members equal protection, a constitutional right guaranteed to Indian citizens by Congress. 25 U.S.C. § 1302(8).

F.3d 667, 669-670 (8th Cir. 1997) (Secretary has authority to disapprove constitutional amendments based on doubts about the "fundamental integrity and fairness" of tribal elections conducted under IRA § 476(a)); *Morris v. Watt*, 640 F.2d 404, 414-416 (D.C. Cir. 1981) (referenda on tribal constitution were invalid due to lack of meaningful opportunity for members to decide fundamental questions of tribal governance).

This Court agreed with the Government in *CVMT I*, finding that IRA§ 476(h) did not repeal the substantive protections afforded by the IRA, and that its reference to "governing document[s] adopted by a tribe" must be understood as references to documents that have been "ratified by a majority vote of the adult members." *CVMT I*, 424 F.Supp.2d at 202-203. The Court of Appeals held that, "[a]s Congress has made clear, tribal organization under the [IRA] must reflect majoritarian values." *CVMT II*, 515 F.3d at 1267-1268; *accord*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04(3)(b) n. 398 (2005 ed.) [2009 supplement] (citing to *CVMT II*). The Court of Appeals' holding is now the law of this Circuit.

2. The Government Does Not Deny Its Duty to Uphold Majoritarian Values

The 2011 Decision states that the Tribe has "chosen to avail itself of the provisions in [IRA] § 476(h) . . . which recognizes the inherent sovereign powers of tribes 'to adopt governing documents under procedures other than those specified [in the IRA].'" [AR 002053.] It goes on to state that previous DOI officials misinterpreted both 476(h) and the nature of the Government's general trust obligations to the Tribe [AR 002054]. According to the 2011 Decision, neither 476(h) nor any other law authorizes the Government to intrude into the Tribe's internal affairs by "attempting to force the Tribe to expand its citizenship" [AR 002054].

The 2011 Decision thus attempts to present the issue in this case as one of statutory interpretation, no doubt seeking deference from this Court. *See*, *e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (applying *Chevron* deference to

agency's change in statutory interpretation). But the 2011 Decision does not dispute the Government's legal duty, even under 476(h), to deal only with tribal governments that actually represent their tribes' members.[15] Instead, the Decision rests on a new finding that the Tribe's membership is limited to five people. For example, the Decision states, "this change [of course] is driven by a *straightforward correction in the Department's understanding of the [Tribe's] citizenship* and a different policy perspective on the Department's legal obligations in light of those facts" [AR 002050 (emphasis added)]. "In my view, prior [DOI] officials misapprehended their responsibility when they: (1) took their focus off the fact that the [Tribe] was comprised [of] five individuals, and (2) mistakenly viewed the Federal government as having particular duties relating to individuals who were not citizens of the tribe" [AR 002053].

This new membership determination, and not a change in statutory interpretation, distinguishes the 2011 Decision from the Government's position in *CVMT I* and *II*. In those prior cases, the Government recognized that the Tribe had a membership of approximately 250 people that had not yet been precisely determined, and that only after those members were specifically identified could the Secretary know whether a governing document enjoyed majority support [AR 000848]. Now, the Government argues that the Tribe's membership is limited to five people and that, *as a result*, the five-person "General Council" has the authority to govern the Tribe and cannot be "forced to expand its membership" [AR 002051, 002055].

3. The Undisputed Evidence Shows that the 1998 Resolution Was Not Adopted by a Majority of this Tribe's Members

As explained in Section IV.A of this brief, the Government's attempt to limit the Tribe to five members is arbitrary, capricious and unlawful. The Tribe is not a terminated tribe, and

[15] If the Government does intend to argue that it can ignore the will of a tribe's members and recognize a tribal government that consists of an unrepresentative faction, Plaintiffs welcome the Government's clarification.

whatever membership standards may apply to terminated rancheria tribes do not apply here. Plaintiffs submitted undisputed evidence that the membership of the Tribe consists of 242 Lineal Descendants and their children. That evidence is corroborated by the BIA's own records, sworn testimony and legal filings that are part of the administrative record. The Government has offered no explanation for excluding the Lineal Descendants from this Tribe, and no theory under which it would have the authority to do so.

Because the 2011 Decision depends entirely on the Government's erroneous membership determination, the rest of the Decision must fall as well, including the recognition of a "General Council" based on the 1998 Resolution that was adopted by two people. Plaintiffs' current Tribal roster includes at least 83 members, including each of the individual Plaintiffs, who were 18 years old in 1998 and were entitled to vote on any governing document adopted then (other members then living have since died) [*see* AR 002268-002275; Affidavit of Velma Whitebear, attached as Exhibit "2" to Plaintiffs' Motion to Supplement the Administrative Record]. Two is not a majority of 83.

Even under the Government's view of membership, there were a minimum of four adult members in 1998: Yakima and Melvin Dixie (the two remaining heirs of Mabel Hodge Dixie) and Sylvia Burley and Rashel Reznor [AR 000172-000173, 000111-000114]. Only two persons signed: Yakima Dixie and Silvia Burley [AR 000179]. As the Government admits in its answer, two is not a majority of four. As a result, the 1998 Resolution is invalid on its face.[16]

Plaintiffs specifically challenged the validity of the 1998 Resolution in their briefing to the AS-IA [AR 002147-002149]. But the AS-IA chose to ignore the issue entirely, again making

[16] Further, given the fact that Mr. Dixie was not the sole member of the Tribe in 1998, the Government cannot assume the validity of Ms. Burley's enrollment into the Tribe. It has made no explanation to support that enrollment. In our view, Ms. Burley was not properly admitted to the Tribe in 1998 and was not entitled to a vote on the 1998 Resolution.

his 2011 Decision arbitrary and capricious. *Butte County, Cal.*, *supra,* 613 F.3d at 194; *Fallon Paiute-Shoshone Tribe*, *supra*, 455 F. Supp. 2d at 1223-24.

Because the recognition of Burley's five-person "General Council" under the 1998 Resolution violates the IRA, the ICRA and the United States' trust duties to the Tribe, and is unsupported by the record, the 2011 Decision is arbitrary, capricious and unlawful.

C. The Government Is Estopped from Recognizing Burley's 'Unrepresentative Faction'

In addition to violating the APA, the 2011 Decision is precluded by the final decisions of this Court and the Court of Appeals in *CVMT I* and *CVMT II*. Those cases determined that the Tribe was not properly organized under Ms. Burley's antimajoritarian government and that organization must involve the entire Tribal community.

1. *CVMT I and II* Necessarily and Finally Decided that the Tribe Was Not Organized Under Burley's Antimajoritarian Government

Once a court has decided an issue of law or fact necessary to its judgment, the doctrine of issue preclusion prevents the relitigation of that issue in a subsequent proceeding involving a party to the first case.[17] *Allen v. McCurry*, 449 U.S. 90, 94 (1980). A prior proceeding has preclusive effect when (1) the same issue was contested and submitted for judicial determination in a prior case, (2) the issue was actually and necessarily decided in that case, and (3) preclusion would not work a "basic unfairness" to the party bound by the prior judgment. *Yamaha Corp. of*

[17] The Government was a party to *CVMT I and II*. Plaintiffs were not parties to those cases, but Yakima Dixie participated as a proposed intervenor in the *CVMT I* proceedings and as amicus curiae in *CVMT II*. *CVMT I*, 424 F.Supp.2d at 198 n. 2 (stating that Chief Dixie's motion to intervene was mooted by the court's decision dismissing Burley's claims); *CVMT II*, 515 F.3d at 1263. A party who would be precluded from relitigating an issue with the opposing party in the first action is also precluded from relitigating that issue with another person, unless some special circumstances make issue preclusion inappropriate. *Yamaha*, *infra*, 961 F.2d at 254 n.11 (citing Restatement (Second) of Judgments § 29 (1982)). Here, both the Government and Burley had a full and fair opportunity to litigate the issues related to Tribal organization in *CVMT I* and *II*. *E.g.*, *CVMT I*, 424 F.Supp.2d at 201. Thus, the fact that Plaintiffs were not parties in *CVMT I* and *II* does not prevent the Court from giving preclusive effect to that judgment here.

America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992). Issue preclusion applies to both judicial actions and administrative decisions. *Deerfield v. F.C.C.*, 992 F.2d 420, 424-428 (2d Cir. 1993); *Spawr Optical Research, Inc. v. Baldrige*, 649 F. Supp. 1366, 1369 (D.D.C. 1986).

a. The 2011 Decision Addresses the Same Issue Previously Raised Before This Court

The 2011 Decision revisits a key issue that is identical to an issue already decided by this Court. In *CVMT I*, the Burley Faction argued that they must be recognized as the Tribe's government because they had adopted valid governing documents under IRA § 476(h) and the Tribe's "inherent sovereign authority" [AR 000710 (Burley complaint)]. The Court rejected the Burleys' claims to authority, because their documents were adopted without involving the Tribal community. *CVMT I,* 424 F.Supp.2d at 201, 203 n. 7; *see also CVMT II*, 515 F.3d 1267-1268.

The 2011 Decision now states that the Burley Faction established a valid government by "avail[ing] itself of the provisions in [IRA] § 476(h)" and adopting the 1998 Resolution pursuant to its inherent authority [AR 002053]. Although the Burleys claimed in *CVMT I* that they had "organized" the Tribe, and the 2011 Decision strains to avoid using that word, the issue is the same. The Government's "switch in the verbal formula" cannot escape the binding effect of this Court's prior decision. *Starker v. United States*, 602 F.2d 1341, 1345 (9th Cir. 1979).

b. This Court Actually and Necessarily Determined the Issues Addressed In the 2011 Decision

The preclusive effect of a judgment extends to all issues "actually and necessarily determined" in the prior litigation, including both matters explicitly addressed by the prior court and matters that the court "must necessarily, albeit implicitly," have decided in order to reach its judgment. *Yamaha*, 961 F.2d at 254, 256. Furthermore, "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." *Id*. at 254 (internal quotations and citations omitted) (emphasis in original).

In *CVMT I*, the Burley Faction claimed that it had established a legitimate Tribal government based on "valid, governing documents" adopted by the Tribe. *CVMT I*, 424 F.Supp.2d at 201. The Burley Faction relied on documents including the 1998 Resolution and subsequent resolutions and constitutions [AR 000713-000718]. In dismissing Burley's complaint, the Court necessarily determined that the Burley Faction had not established a legitimate Tribal government under *any* set of "valid governing documents" then in existence. *See id.* at 203. Although the Court focused on Ms. Burley's constitutions rather than on the 1998 Resolution, the Government itself stated that its "refusal to recognize the [Burleys Faction's] tribal constitution implicitly encompasses any and all tribal governing documents" [AR 000826].

The Court's prior determinations preclude *any* attempt to relitigate the validity of the Burley Faction's government, including both the particular arguments emphasized in *CVMT I*, and arguments based on the 1998 Resolution. *Yamaha*, 961 F.2d at 254; *Seminole Nation, supra*, 223 F.Supp.2d at 134, 133 n.14 (judicial finding that racial discrimination invalidated a tribal election applied equally to a later election not addressed in the first decision).

c. Giving Preclusive Effect to This Court's Decision Would Not Work A 'Basic Unfairness'

Issue preclusion applies unless giving preclusive effect to a prior judgment would work "a basic unfairness" on the party to be precluded. *Yamaha*, 961 F.2d at 254. Here, applying issue preclusion would not violate any overriding public policy or cause manifest injustice. In 2009, the Government argued that another federal court *should* give preclusive effect to *CVMT I* and *II*. In a lawsuit that Ms. Burley filed in the Eastern District of California, the Government urged that Ms. Burley was estopped from relitigating this Court's determinations of her claims to Tribal leadership [AR 001583-1584]. The court agreed, relying on *CVMT I* to establish that the Tribe did not have a recognized government. *California Valley Miwok Tribe v. Kempthorne*, No.

S-08-3164, *3-6 (E.D. Cal. 2009) [AR 001599]. The Government cannot have it both ways. Having relied on *CVMT I* in the previous litigation, it cannot claim unfairness if it is bound by *CVMT I* in this case. Moreover, applying issue preclusion would prevent manifest injustice to Plaintiffs and uphold the overriding public policy in favor of majoritarian rule. *CVMT I*, 424 F.Supp.2d at 202; *CVMT II*, 515 F.3d at 1267-1268.

D. Judicial Estoppel Bars the Government From Denying the Rights of the Tribal Community

Judicial estoppel is a separate equitable doctrine that prevents a party from adopting one argument to prevail in one phase of a case, and then adopting a contrary position to prevail in another phase of that case or in another proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001) (citations omitted). The doctrine avoids inconsistent court determinations. *Id.* at 750-751. Judicial estoppel applies to the government as well as to private parties. *See, e.g.*, *Valentine-Johnson v. Roche*, 386 F.3d 800, 810-812 (6th Cir. 2004).

In briefs submitted to this Court and the Court of Appeals, the Government argued that it could not recognize the Burleys' tribal government 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" [AR 002097]. Three people did not represent a majority of the Tribe, because "the BIA ha[d] records relating to a number of other Indian families who lived or are living in Calaveras County and who are believed to be part of the Indian community of Sheep Ranch, California" [AR 000775]. Yet the 2011 Decision takes the position that those other members have no right to a voice in Tribal governance, and that the Burley government is valid [AR 002051].

The Government's new position is not only inconsistent with its prior position before this Court; it is completely opposite. *New Hampshire*, 532 U.S. at 745-747, 752 (New Hampshire's

position that the "Middle of the [Piscataqua] River" meant the low water mark on the Maine shore was estopped by its previous litigation position that the phrase meant the middle of the River channel). Moreover, this Court and the Court of Appeals wholeheartedly accepted the Secretary's prior position. *CVMT II*, 515 F.3d at 1267-1268. If this Court were to let the Government reverse that position now and disenfranchise the Lineal Descendants, "the risk of inconsistent court determinations would become a reality." *New Hampshire*, 532 U.S. at 755.

Moreover, Plaintiffs would suffer an unfair detriment if the Government were not estopped from reversing its position. Plaintiffs have relied on the Government's prior position by making good faith efforts to organize the entire Tribal community, cooperating with the BIA and submitting genealogies to document their membership, all while Burley filed a series of lawsuits and administrative appeals [AR 002138-002142]. *C.f. Valentine-Johnson*, 386 F.3d at 810-811.

Finally, the Government has pointed to no change in the facts or law upon which *CVMT I* and *II* were decided, or any "broad interest of public policy," to justify its change in position. *See New Hampshire*, 532 U.S. at 755-756. The Government claims that its change of course is "driven by a straightforward correction in the DOI's *understanding* of the [Tribe's] citizenship" [AR 002050 (emphasis added)]. To paraphrase the Supreme Court in *New Hampshire*, "What has changed between [2005] and today is [the Government's] interpretation of the historical evidence." *Id.* at 756. Therefore, the Government is judicially estopped from reversing itself.

E. The 2011 Decision Is Procedurally Invalid Because It Violates the DOI's Own Regulations

An agency action that does not comply with the agency's own rules and procedures violates the APA. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 713 (8th Cir. 1979). Here, the AS-IA violated multiple DOI regulations by reopening issues not subject to appeal and by

relying on ex parte communications, without giving interested parties notice or an opportunity to comment on that information.

1. The AS-IA Violated DOI Regulations By Deciding Burley's Appeal Based on Information Not Disclosed to Interested Parties

In an administrative appeal of a BIA action, if the deciding official intends to consider information not contained in the record on appeal, *see* 25 C.F.R. § 2.21(a), the deciding official must "notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided." 25 C.F.R. § 2.21(b). *See also* 43 C.F.R. § 4.24 (prohibiting any decision based on material not open to inspection by all parties to an appeal).[18] The AS-IA is a "deciding official" within the meaning of the regulations when he hears an appeal on referral from the Board. 25 C.F.R. §§ 2.4(c), 2.20(f). Plaintiff Yakima Dixie was an interested party to Ms. Burley's appeal [AR 001514, 001516, 001685].

On March 25, 2010, BIA Director Jerry Gidner and top officials in the AS-IA's office received a letter from Ms. Burley's lobbyist, Wilson Pipestem, that outlined Ms. Burley's latest theory of Tribal organization [AR 001997]. Even a cursory review of this letter reveals that it formed the template for the AS-IA's decision on Ms. Burley's appeal. The letter argues that (1) the Burley Faction and Yakima Dixie are the only members of the Tribe; (2) the Tribe is organized under the 1998 Resolution with a "General Council" consisting of those five members, and is not required to comply with the IRA; and (3) the five-person "General Council" is entitled to make all decisions regarding Tribal membership criteria and government [AR 001997].

[18] The DOI's general procedures for administrative appeals, found in 43 C.F.R. Part 4, apply to all appeals within the DOI, including actions of the Board or the AS-IA, except where they conflict with the special rules for BIA appeals found in 25 C.F.R. Part 2. 43 C.F.R. § 4.1(b). Here, neither set of regulations would allow the AS-IA to consider information provided by a party to the appeal in secret and without notice to other interested parties.

The AS-IA withheld this document from the other interested parties to Ms. Burley's appeal, in violation of 25 C.F.R. § 2.21(b). As a result, the interested parties were denied the opportunity to "comment on the information before the appeal [wa]s decided," as the regulations require. 25 C.F.R. § 2.21(b). Since the AS-IA substantially adopted the letter's arguments, the violation of the regulations is not harmless and requires the reversal of the 2011 Decision.

2. The 2011 Decision Unlawfully Addressed Issues Not Within the Jurisdiction of the Appeal Referred by the Board

Ms. Burley's appeal to the Board, from which the 2011 Decision arose, challenged the BIA Regional Director's 2007 Decision. The 2007 Decision did not make any determinations about the organizational status of the Tribe, the recognition of any Tribal government, or the need to involve the entire Tribal community in the organization process. The *2004* Decision, which Ms. Burley never appealed, had already finally determined those issues [AR 000499-000501]. The 2005 Decision confirmed those determinations [AR 000611], and both this Court and the Court of Appeals upheld them. The Board therefore *dismissed* Ms. Burley's claims to the extent they attempted to relitigate those issues. *CVMT III*, 51 IBIA at 105, 120.

As the Board recognized, the 2007 Decision only raised new issues to the extent it went beyond what was determined by the 2004 and 2005 Decisions and determined "more specifically what BIA would do to *implement* those [2004 and 2005] determinations." *CVMT III*, 51 IBIA at 121 (emphasis added). Thus, the only issue properly raised by Ms. Burley's appeal was the BIA's authority to "determin[e] who would constitute the 'greater tribal community,' or class of 'putative members,'" and to call a "general council" meeting of those members for organizational purposes. *Id.* That is the issue that the Board referred to the AS-IA.

The 2011 Decision, however, reaches far beyond the scope of the issue referred by the Board and addresses issues that the Board properly dismissed: the organizational status of the

Tribe, the recognition of the Burley government, and the participation of the entire Tribal community in the organization process [AR 002050]. The 2011 Decision also claims to define the membership of the Tribe, an issue not even raised by Burley's appeal [AR 002049]. Because the 2007 Decision did not raise those issues, the AS-IA lacked jurisdiction to decide the issues in resolving Ms. Burley's challenge to the 2007 Decision. *See* 25 C.F.R. § 2.2 (defining "appeal" as a "written request for review of an action or the inaction of an official of the [BIA]").[19]

3. The 2011 Decision Overturns Final DOI Decisions That Are Not Subject to Appeal or Reconsideration

The AS-IA's 2011 Decision not only overturns the 2007 Decision, it effectively reverses the 2004 and 2005 Decisions as well. The 2011 Decision overturns each of the fundamental tenets of the 2004 and 2005 Decisions, which this Court upheld in *CVMT I*: that the Tribe is not organized, that the DOI does not recognize Ms. Burley's Tribal government, and that the entire Tribal community must participate in any Tribal organization [AR 000609-000611].

Reversal of the 2004 and 2005 Decisions was unlawful. The 2004 and 2005 Decisions were final for the DOI and not subject to further appeal within the DOI. The 2004 Decision became final when the time for appeal expired without the filing of a notice of appeal (30 days after receipt of notice of the administrative action). 25 C.F.R. § 2.6(b); 25 C.F.R. § 2.9(a). The 2005 Decision, as a decision of the Acting AS-IA, was final agency action upon its issuance. 25 C.F.R. § 2.6(c). The current AS-IA is bound by these duly adopted regulations and therefore did not have the authority to revisit the 2004 and 2005 Decisions in the context of Burley's appeal. *See Oglala Sioux Tribe*, 603 F.2d at 713 (an agency must comply with its own regulations).

[19] 43 C.F.R. 4.318 also limits the scope of review to those issues before the reviewing official. While 43 C.F.R. 4.318 recognizes the Secretary's inherent authority to "correct a manifest injustice or error," this does not allow the Secretary to reopen final agency actions that have already been subject to appeal and judicial review, nor has the Government suggested that the 2004 and 2005 Decisions involved manifest injustice or error.

4. The AS-IA Should Have Dismissed Burley's Appeal As Moot

If the AS-IA had limited his review to the issues actually presented by Ms. Burley's appeal, it would have been proper to dismiss the appeal as moot. The 2007 Decision stated the BIA's intention to help the Tribe identify the members of the Tribal community and bring them together for purposes of organization [AR 001498]. Since 2007, the Tribe has identified all members of the Tribal community, involved them in an inclusive organization process, and drafted a Tribal constitution that establishes membership criteria [AR 002138-002142, 002265-002275, 002297-002313]. As a result, the assistance contemplated by the 2007 Decision is no longer needed, and Ms. Burley's challenge to that Decision is moot.

V. CONCLUSION

The AS-IA's decision works a serious injustice by attempting to turn this Tribe over to a rogue faction that seeks enrichment for itself at the expense of the Tribe's true membership, including Plaintiffs and the other Lineal Descendants. Plaintiffs have worked for many years to establish a Tribal government worthy of recognition by the United States. The AS-IA should not be allowed to cast aside those efforts, along with the reasoned determinations of his predecessors and the Courts, on spurious grounds. For the reasons set forth above and in Plaintiffs' Complaint, the Court should grant Plaintiffs' motion for summary judgment, declare the 2011 Decision invalid, and order the Government to recognize only a Tribal government that actually represents the 242 adult members of this Tribe, including each of the individual Plaintiffs. A proposed Order is attached.

Respectfully submitted,

___/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I caused the forgoing Memorandum of Points and Authorities in Support of Motion for Summary Judgment which was filed through the ECF system, to be sent electronically to all registered participants. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/ Roy Goldberg
Roy Goldberg