IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CALIFORNIA VALLEY MIWOK TRIBE, et al., Plaintiffs, v. KEN SALAZAR, et al., Defendants.	Civil Action No. 11-160 (RWR)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The motion to dismiss filed by the Intervenors, Silvia Burley, her two daughters and her granddaughter ("the Burley Faction"), should be denied. Plaintiffs are the California Valley Miwok Tribe (the "Tribe"), its Tribal Council, and several individual Tribal members who are lineal descendants of historical Tribal members. Since 2004, successive decisions of the U.S. Department of Interior ("Interior" or "Department") and judicial decisions of this Court and the U.S. Court of Appeals for the D.C. Circuit have properly thwarted the efforts of the Burley Faction – a tiny, rogue faction having no relationship with the Tribe prior to 1998 – to seize control of the Tribe and exclude Plaintiffs. The August 31, 2011 decision (the "2011 Decision") by the Interior Department, which Plaintiffs challenge in this case, improperly reverses or ignores those prior decisions and approves the same "antimajoritarian gambit" by the Burley Faction that the Interior Department and the courts previously condemned.

The Department's decision to establish government-to-government relations with the Burley Faction violates the fundamental requirement of majority rule for federally recognized Indian tribes. California Valley Miwok Tribe v. USA, 515 F.3d 1262, 1263, 1267 (D.C. Cir. 2008) ["Miwok II"]. The Interior Department has a "responsibility to ensure that a tribe's representatives, with whom [the Department] must conduct government-to-government relations, are valid representatives of the tribe *as a whole*." Id. at 1267 (emphasis in original) (citation omitted). Yet that is exactly what the 2011 Decision fails to do.

The 2011 Decision purports to establish government-to-government relations with a "Tribe" consisting of just five people (including the four Burleys), based on a 1998 document that was signed by only two persons (the "1998 Resolution"). The 1998 Resolution was adopted without notice to, or opportunity for participation by, Plaintiffs Velma WhiteBear, Michael

Mendibles, Antonia Lopez, Antone Azevedo and Evelyn Wilson, as well as Melvin Dixie and scores of other Tribal members who were entitled to vote on any Tribal government. By recognizing a Tribal government that does not represent the Tribe as a whole, the 2011 Decision violates the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, and the United States' "unique trust obligation to Indian tribes." Id. (citation omitted).

A. Plaintiffs Have Standing to Challenge the 2011 Decision.

The Burley Faction's assertion that Plaintiffs lack standing to challenge the Decision cannot be accepted. The facts alleged in the First Amended Complaint ("FAC") clearly demonstrate that Plaintiffs have standing to challenge the 2011 Decision, for reasons parallel to those that led the Court to conclude in its March 26, 2012 Order that Intervenors have standing. The Plaintiff Tribe has standing to seek reversal of the 2011 Decision because, unless it is overturned, the Decision will permanently strip the Plaintiff Tribe of its ability to continue to hold itself out as, and to operate as, the Tribe. The Plaintiff Tribal Council has standing because, if the 2011 Decision is affirmed, the Tribal Council will no longer exist. The individual Plaintiffs have standing to challenge the 2011 Decision because the Decision improperly allows the Burley Faction to exclude Plaintiffs – current Tribal members who are lineal descendants of original Tribal members – from the organization of the Tribal government.

These injuries to Plaintiffs are concrete and real. The 2011 Decision not only disenfranchises hundreds of Tribal members, it also prevents 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 federal funds, as well as more than nine million dollars that the State of California holds in trust for the Tribe, is also at

stake. Depending on the outcome of this case, that money will either go to the four members of the Burley family or to the real Tribe, its 242 adult members and their children.

The Burley Faction argues there can be no injury to Plaintiffs because they were never Tribal members but instead are only "potential" members. This argument assumes too much and ignores the allegations of the First Amended Complaint. As set forth in the First Amended Complaint, the individual Plaintiffs are ***not*** merely "potential" members of the Tribe. Rather, each "is a lineal descendant of a historical member or members of the Tribe" and is included on the Tribal roster as an enrolled member. (FAC ¶ 28) The fact that the 2011 Decision states that the individual Plaintiffs other than Mr. Dixie are only "potential" Tribal members is not pertinent to the issue of standing. That finding by Interior is directly at issue in this case. The Burley Faction cannot use the outcome of the administrative decision in dispute (i.e., the 2011 Decision) to support its argument for lack of standing. See Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489, 1499 (D.C. Cir. 1997).

The Burley Faction likewise insists that Plaintiffs lack standing because *it* is the legitimate Tribe and Tribal government, and Plaintiffs are not. The fatal problem with this argument is that it improperly *assumes* the validity of the 2011 Decision which is the focus of this case. In other words, the Burley Faction is only the legitimate Tribe and Tribal government *if* there is no merit to Plaintiffs' challenge to the 2011 Decision. Although the Tribe's "legal status as a tribal political entity is undisputed as a matter of Federal law," its "***polity in fact – who or what individuals collectively constitute, or are entitled to constitute, the 'Tribe' for purposes of participating in organizing a tribal government and establishing membership criteria – is bitterly disputed*** . . . ." California Valley Miwok Tribe v. BIA Pac. Reg. Dir., 51 IBIA 103, 105 (Jan. 28, 2010) (emphasis added).

Thus, the Burley Faction improperly seeks to put the proverbial "cart before the horse." For purposes of the motion to dismiss, the allegations of the First Amended Complaint must be taken as true – including the allegation that Plaintiffs are the Tribe and its legitimate Tribal Council, and that the Burley Faction ***does not constitute the Tribe***.

B. The Court Has Subject Matter Jurisdiction Over Plaintiffs' Challenge to the Unlawful 2011 Decision of the Department.

The Burley Faction seeks to deny this Court subject matter jurisdiction over Plaintiffs' suit by erroneously portraying this case as involving an internal tribal membership dispute. This case is not a tribal membership dispute case. It does not involve a challenge to the criteria or procedures used by a previously organized tribal government for the admission of new members. Rather, it is a challenge to a decision of the Department that recognizes a Tribal government consisting of the Burley Faction, reversing years of prior Departmental and judicial actions that rejected the Burley Faction as the representatives of the Tribe.

The Burley Faction's motion to dismiss is predicated on a fiction; namely, that a victory for Plaintiffs "would completely reverse almost a century of dealings between the Tribe and the United States and would eradicate the Tribe's established governing structure and membership." ("Burley Mem."), at 22. This contention ignores the fact that Ms. Burley – who claims to be leader of the Tribe – had no relationship whatsoever with the Tribe before 1998. Nor is her heretofore unsuccessful attempt to hijack control of the Tribe accurately characterized as an "established governing structure." To the contrary, the Decision reverses years of repeated rulings by the Department that the Burley Faction could not be accepted as a valid Tribal government because it excluded the greater Tribal community—the lineal descendants of known tribal members. (See FAC ¶¶ 53-55) Indeed, the 2011 Decision acknowledges that it makes a

"180 degree change of course from positions defended by [the Interior] Department in administrative and judicial proceedings over the past seven years." (FAC Exhibit A, at 2)

There is also no merit to the Burley Faction's argument that the six-year statute of limitations in 28 U.S.C. 2401 bars a challenge to the 2011 Decision. Plaintiffs challenge determinations that did not become final decisions, ripe for judicial review, until August 31, 2011.

C. The Burley Faction Is Not a Necessary and Indispensable Party.

The Court should reject the Burley Faction's assertion that the case be dismissed pursuant to Rule 19 for failure to join the Burley Faction as a "necessary and indispensable" party. This entire argument is based on the Burley Faction's characterization of itself as "the Tribe." (Burley Mem. at 21-22) In fact, it is only a rogue faction effectively consisting of four members of a single family, who improperly characterize themselves as the Tribe and seek to limit Tribal membership to themselves alone.

The Burley Faction is not a necessary party because the Court can provide complete relief to the parties without involving the Burley Faction. The Court is not being asked to decide who is the Tribe, who constitutes the Tribal Council, or who is a member. Rather, the narrow focus of this litigation is whether the Interior Department violated the Administrative Procedure Act and other federal laws and obligations in rendering the 2011 Decision. If the Court grants the requested relief, the Burley Faction would only find itself in the position it was in before the Interior Department made a 180 degree change from its prior positions.

The Burley Faction claims not only that it is a necessary party, but also that it cannot be joined because of its "sovereign immunity" as a Tribal government. Once again this argument assumes too much. The Burley Faction is only entitled to sovereign immunity as the lawfully recognized Tribal government ***if*** the 2011 Decision is affirmed through a final judicial decision

(including any appeals). The Interior Department decision that is at issue in this litigation cannot supply the basis for the sovereign immunity claim. Otherwise, Interior decisions recognizing a Tribal government ***would always be unreviewable on sovereign immunity grounds***, which is contrary to the presumption in favor of judicial review of agency action. See infra, Section IV(B).

Even if it could not be joined, the Burley Faction is not an indispensable party. The Burley Faction asserts that it would be prejudiced by a judgment in its absence because vacating the 2011 Decision "would reverse decades of history between the Tribe and the United States", [and] "undermine the Tribe's sovereign authority to make independent membership determinations without federal interference." (Burley Mem. at 24) This is specious. This is a challenge to a federal action claiming to establish government-to-government relation with the Burley Faction. Plaintiffs do not seek a decision from this Court regarding Tribal membership. On the contrary, they seek relief from a federal agency action that unlawfully seeks to interfere in Tribal affairs by limiting the Tribe's membership to five people.

We also note that the Burley Faction does not have "decades of history" with the Tribe. The Burleys had no relationship with the Tribe until 1998, when Ms. Burley repaid the charity and generosity of Yakima Dixie by attempting to steal the Tribe for the sole financial benefit of the Burley family. The perpetration of such a scheme hardly qualifies the Burleys as an "indispensable party." In any event, in cases where plaintiffs have challenged the propriety of decision making by federal administrative agencies, courts frequently have concluded that states and municipalities affected by that decision making are not indispensable parties. See infra, Section IV(B). Thus, even if the Burley Faction did represent the Tribe, it would not be an indispensable party here.

The Burley Faction also should not be considered indispensable if that would lead to the dismissal of this case for non-joinder because if that happens Plaintiffs will have no remedy available to challenge the 2011 Decision.

D. Plaintiffs Have Stated A Claim Upon Which Relief Can Be Granted.

Finally, the Plaintiffs have clearly stated a claim against the Interior Department defendants in connection with their arbitrary and capricious, and otherwise unlawful, 2011 Decision to recognize the Burley Faction as the lawful Tribal government.

II. STATEMENT OF FACTS

A. The Plaintiffs.

Plaintiffs are the California Valley Miwok Tribe (the "Tribe"); its Tribal Council – which is "the legitimate governing body of the Tribe as recognized by a majority of Tribal members" and several individual members of the Tribe and Tribal Council. (FAC ¶¶ 25-28) The individual Plaintiffs are ***not*** merely "potential" members of the Tribe. Rather, each is a "member[] of the Tribe and . . . a lineal descendant of a historical member or members of the Tribe." (Id. ¶ 28)

B. The Tribe.

The Tribe was first recognized around 1916, when the United States established the Sheep Ranch Rancheria for the benefit of a small band of Me-Wuk Indians living in present-day Calaveras County, California. (Id. ¶ 25) Today, the Tribe consists of 242 adult Indian members and approximately 350 children who are lineal descendants of those original 1916 members or of other historical members known from census documents, election rolls, or other official records. (Id. ¶ 1)

In 1935, the Tribe voted to accept the Indian Reorganization Act of 1934 (the "IRA"). (FAC ¶ 37) The IRA allows Indian tribes to "organize," or form a tribal government, by

adopting a written constitution or other governing documents. For tribes that have accepted it, the IRA establishes procedural and substantive requirements for organization. These requirements include notice, a defined process, and minimum levels of participation by a tribe's members. (FAC ¶ 39)

Despite having accepted the IRA, the Tribe did not at that time take action to "organize" under the Act. Instead, the Tribe continued to exist as a loose-knit community of families living on or near the Rancheria in Calaveras County, with no formal governing documents.

In 1965, the Bureau of Indian Affairs ("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. 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. 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.

The distribution plan for the Rancheria's assets named Mabel Hodge Dixie (Yakima Dixie's mother) as the sole distributee. Because the BIA never completed the steps necessary for termination under the Rancheria Act, all parties agree that the Tribe was never terminated. At all times, the government has continued to recognize the Tribe, and there is no law or regulation which allows the Department to treat this Tribe in a manner different from other federally recognized Tribes.

The Tribe existed as an Indian community with no formal governing documents when the Burleys entered the scene in 1998, after having no prior connection to the Tribe. As discussed more fully below, the Burleys attempted to seize control of the Tribe and install themselves as

the Tribal government, without so much as consulting its members. (FAC ¶ 47-50) The Tribe had at least 83 members who were alive and over the age of 18 in 1998, and were entitled to participate in any Tribal actions, but no member except for Yakima Dixie received any notice or opportunity to participate in either the decision to accept the Burleys as members of the Tribe or to vote on a resolution drafted by the BIA that purported to establish a "General Council" of the Tribe or any subsequent actions of the Burleys' purported government. (FAC ¶ 1, 6)

After the Tribe's members learned of the Burleys' claims to represent the Tribe, they began working to organize a legitimate Tribal government with the participation of the entire Tribal community. They convened a group of Tribal elders and community leaders in 2003 to create a formal Tribal Council. (FAC ¶ 65) The Council met with the Department in September 2003 and requested that the Department call an election pursuant to the IRA so that the Tribe's members could adopt a Tribal constitution and establish government-to-government relations with the United States. The Department did not act on the Council's request but continued to meet regularly with the Council to discuss efforts to organize the Tribe. (Id. ¶ 66).

With the support and participation of the Tribe's members, the Tribal Council has met approximately every other month since its formation to discuss Tribal policy, enact resolutions, and conduct other Tribal business. Under the Council's leadership, the Tribe and its members have engaged in a variety of cultural, religious, economic and social activities that benefit the full Tribal membership, strengthen the Tribal community and restore historic ties with the larger Indian community. (FAC ¶ 67)

In 2006, the Tribal Council adopted a Tribal constitution, which established that the Tribe's first priority was to identify and enroll all Tribal members—i.e., those who are lineal descendants of one or more historical members of the Tribe, as documented by personal

genealogies, birth records and other documents. Under the Council's leadership, the Tribe has continued to identify its members and established a tribal roster. Those who are on the roster are eligible to participate in Tribal activities. The Tribe has provided the Burleys with notice and an opportunity to participate, but they refused to do so. (FAC ¶ 69)

On July 26, 2011, the Tribe adopted Resolution 2011-07-16(b), establishing an Election Committee and providing for voter registration in order to facilitate a Tribal election to adopt and ratify a revised constitution. The Tribe provided the Department with notice of Resolution 2011-07-16(b) and of its intent to hold an election. The only action that remains to complete the Tribal organization process under the IRA is final ratification and adoption of the constitution by the entire Tribal membership. The Tribe plans on holding an election for that purpose, consistent with the IRA. (FAC ¶ 70)

C. The Burley Faction.

Prior to 1998, the Burleys had no connection to the Tribe. In 1998, at the BIA's urging, Ms. Burley approached Yakima Dixie, whom the BIA had designated as a Tribal spokesperson for purposes of maintaining contact with the Tribe. (AR 000235, 001083) Ms. Burley asked to be "adopted" into the Tribe along with her two daughters and her granddaughter. The Department erroneously told Mr. Dixie that he had the authority to accept the Burleys into the Tribe, and he agreed to do so. The Department thereafter treated the Burleys as Tribal members, although their enrollment was invalid without Tribal consent. (FAC ¶ 4)

D. The 1998 Resolution.

Around September 1998, Mr. Dixie and Ms. Burley began discussions with the BIA about organizing the Tribe. The BIA erroneously told Mr. Dixie that the people entitled to participate in the initial organization of the Tribe were determined by the distribution plan that had been prepared in 1966 as part of the unsuccessful attempt to terminate the Tribe under the

California Rancheria Act. The BIA concluded that these people included Mr. Dixie and his brother Melvin Dixie (the living heirs to the sole distributee, Mabel Hodge Dixie), and the Burleys (by virtue of their purported adoption), and that those individuals were entitled to decide who else might participate in Tribal organization. This conclusion was and is incorrect. (FAC ¶ 4)

The BIA suggested to Mr. Dixie that the Tribe form a general council as an interim step in order to manage itself until it had adopted a constitution and completed the organization process as defined in the IRA. A general council is a form of government consisting of all of a tribe's members. The BIA supplied a resolution purporting to create such a general council, and Mr. Dixie and Ms. Burley signed the resolution on November 5, 1998 (the "1998 Resolution"). (FAC ¶ 7)

The 1998 Resolution recites that it was signed by a majority of the Tribe's adult members. That is incorrect. A "majority" means more than one-half. There were at least 83 adult members of the Tribe still alive today who in 1998 who were entitled to vote on the formation of any government. Moreover, even under the government's erroneous theory of tribal organization, at least four people were entitled to participate: Yakima Dixie and Melvin Dixie, and Silvia Burley and Rashel Reznor (the two adult Burleys). (FAC ¶ 43) Yet only two persons signed the 1998 Resolution. Two is not a majority of four, or of at least 83. Both the Burley adoption and the 1998 Resolution were invalid and of no force and effect because each was adopted without notice to, participation by, or consent of a majority of the Tribe's adult members. (FAC ¶ 47).

In light of these facts, the Department's current claim that the 1998 Resolution established a legitimate government now consisting of five people, to which the United States must defer, is absurd.

E. The Successive Rejections of the Burley Faction's Attempts to Seize Control of the Tribe.

The purpose of the 1998 Resolution, which was drafted by the Department, was to allow the BIA to provide funding and technical assistance to facilitate the Tribal organization process. (AR 000145, 173-175) The BIA expected that funding to be used to identify the Tribe's members and involve them in the creation of a legitimate, representative government. But after the 1998 Resolution was adopted, the Burley Faction did not take any actions to identify the other Tribal members. Instead, the Burley Faction attempted to seize control of the Tribe, over the objection of Mr. Dixie and other Tribal members, and to exclude the other members from the Tribe.

Ms. Burley submitted tribal constitutions to the Department in 1999, 2000, 2001 and 2004, which would have limited Tribal membership to the Burleys and Mr. Dixie. (FAC ¶ 9) The Department rejected each of those constitutions. Correcting the erroneous advice it provided to Mr. Dixie in 1999, the Department informed Ms. Burley that a valid Tribal government must involve the entire Tribal community, and it identified a number of other people who must be allowed to participate, including the lineal descendants of historical Tribe members. (Id.) In a March 26, 2004 letter to Burley, the Department stated:

> Where a tribe that has not previously organized seeks to do so, [the Department's Bureau of Indian Affairs ("BIA")] also has a responsibility to determine that ***the organizational efforts reflect the involvement of the whole tribal community***. We have not seen evidence that such general involvement was attempted or has occurred with the purported organization of your tribe. . . . To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts, were you and your two daughters . . . . ***It is only after the greater tribal community is***

initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified. (Id.) (emphasis added)

The letter identified several segments of the tribal community who should be involved in the initial organization efforts. (Id.). The Department's actions were a necessary and proper step in carrying out its duty to ensure that any tribal government it dealt with actually represented the members of the Tribe. The Department did not seek to determine who were members. It left that determination to the Tribe.

In a letter dated February 11, 2005, the Acting Assistant Secretary for Indian Affairs confirmed as final for the Department the 2004 decision that the BIA did not consider the Tribe to be organized and did not recognize any tribal government. California Valley Miwok Tribe, supra, 51 IBIA at 105.

F. The District Court and D.C. Circuit Decisions.

In April 2005, Ms. Burley filed suit in this Court. (FAC ¶¶ 58-59) Her suit challenged the Department'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, despite Burley's failure to involve the full Tribal community. This Court dismissed Ms. Burley's claims, upholding the Department's refusal to recognize the Tribe as organized under the Burley government. California Valley Miwok Tribe, supra, 51 IBIA at 105. The Court 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." California Valley Miwok Tribe v. United States, 424 F.Supp.2d 197, 201 (D.D.C. Mar. 31, 2006) ("Miwok I"), aff'd, California Valley Miwok Tribe v. USA, 515 F.3d 1262, 1263, 1267 (D.C. Cir. 2008) ("Miwok II"). The Court held that the Department'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." Miwok I, at 202.

The Court noted that the Burleys' constitution "conferred tribal membership upon only 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 the Burleys' motivation for restricting membership was self-evident. Id. (FAC ¶ 59)

The D.C. Circuit affirmed, stating that the Department's 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." Miwok II, at 1267. (FAC ¶ 11) 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.

In its brief to the D.C. Circuit, the Department stated, *inter alia*, that "the Burley Government [cannot] speak[] for the Tribe in the exercise of [the Tribe's] sovereign power . . . 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." (FAC ¶ 64). That reasoning applies equally well to the 1998 Resolution; in fact, the government's brief before this Court in Miwok I stated that the

Department's "refusal to recognize the [Burleys Faction's] tribal constitution implicitly encompasses any and all tribal governing documents." (AR 000826).

G. The BIA Seeks to Assist the Tribe.

On November 6, 2006, after the district court had dismissed Burley's claims, the BIA informed Ms. Burley and Mr. Dixie that it would assist the Tribe in organizing according to majoritarian principles, consistent with the decisions upheld by the court. (FAC ¶ 71) Ms. Burley appealed the Superintendent's November 6, 2006 decision to the BIA's Pacific Regional Director, who affirmed. (FAC ¶ 72) The Regional Director wrote:

> We believe the main purpose [of the November 6, 2006 decision] was to assist the Tribe in identifying the whole community, the "putative" group, who would be entitled to participate in the Tribe's efforts to organize a government that will represent the Tribe as a whole. . . . It is our belief that until the Tribe has identified the "putative" group, the Tribe will not have a solid foundation upon which to build a stable government. (Id.)

On April 10 and April 17, 2007, the BIA published a public notice requesting that putative members[1] of the Tribe submit documentation of their membership to the BIA (e.g., personal genealogies showing their lineal descent from historical Tribe members). The public notice defined the putative members as lineal descendants of: (1) individuals listed on the 1915 Indian Census of Sheep-Ranch Indians; (2) individuals listed as eligible voters on the federal government's 1935 IRA voting list for the Rancheria; and (3) individuals listed on the plan for distribution of the assets of Sheep Ranch Rancheria (which included only Mabel Hodge Dixie).

[1]The Burley Faction and, subsequently the Interior Department, 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 2011 (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.

(FAC ¶ 73) According to the BIA, approximately 503 persons submitted personal genealogies to the BIA in response to the April 2007 public notices, including Plaintiffs WhiteBear, Lopez, Mendibles, Wilson and Azevedo. (FAC ¶ 74; AR 002105)

H. The Department's 2011 Decision.

Once the putative members were identified, the BIA planned to facilitate a meeting so the members could proceed with Tribal organization if they wished to do so. But Ms. Burley filed administrative appeals, essentially attempting to re-litigate her previous position that the Tribe was already organized under her leadership. When Ms. Burley's appeal reached the IBIA, the IBIA found that all but one of her claims had already been decided by the previous Department decisions confirmed in Miwok I and II, and dismissed those claims. It found that the only new issue properly raised by the Burley appeal concerned the steps that the BIA would take to implement those prior decisions, and it referred that issue to the AS-IA for resolution. CVMT, 51 IBIA at 121. The AS-IA eventually issued the 2011 Decision, which purported to decide Ms. Burley's appeal. (FAC ¶ 12)

In the 2011 Decision, the Interior Department grossly exceeded its authority and concluded, without any explanation or support, that the membership of the Tribe is limited to five people. (FAC ¶ 13, 81) In doing so, the Interior ignored the overwhelming evidence before it that the Tribe's membership currently includes 242 adult members and their children, who are lineal descendants of historical Tribe members. (Id.) Although it had received genealogies documenting the membership of several hundred Tribal members, the Department consciously chose to ignore this critically relevant information in making its decision.

In the 2011 Decision, Interior found that the Tribe had established a valid Tribal government under the 1998 Resolution, which was signed by only two people, and that the federal government must carry on government-to-government relations with that government. It

ignored the fact that the 1998 resolution was void *ab initio* as a Tribal action because it was adopted without notice to, or consent of, the vast majority of the Tribe and did not comply with the substantive requirements of the IRA. (FAC ¶ 14)

The 2011 Decision also explicitly repudiated and failed to carry out the Department's duty to ensure that any Tribal government it recognizes represents the interests of all Tribal members and that the governing documents for the Tribe reflect the will of a majority of the members, as required by the IRA and binding decisional law of this Circuit. (FAC ¶ 15)

III. LEGAL STANDARD

"On review of a 12(b)(6) motion a court must treat the complaint's factual allegations as true," and "must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003) (citation and internal quotation marks omitted). The same standard applies where the defendant alleges that the complaint should be dismissed on the ground of sovereign immunity. See Peterson v. Royal Kingdom of Saudi Arabia, 332 F. Supp. 2d 189, 195-96 (D.D.C. 2004); see also Samuels v. Bureau of Prisons, 498 F. Supp. 2d 415, 417-18 (D. Mass. 2007) ("On both a 12(b)(1) motion to dismiss founded on considerations of sovereign immunity and a 12(b)(6) motion to dismiss for failure to state a claim, the court must accept as true all well pleaded allegations in the complaint and draw all reasonable inferences in favor of the plaintiff"). "In considering a motion to dismiss for lack of subject-matter jurisdiction, the court should accept as true all of the factual allegations contained in the complaint." Freeman v. Fallin, 254 F. Supp. 2d 52, 55 (D.D.C. 2003). "While the district court may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction, the court must still accept all of the factual allegations in [the] complaint as true." Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005) (citation and internal quotation marks omitted).

IV. ARGUMENT

A. Plaintiffs Have Standing to Challenge The Interior Department's 2011 Decision.

The Burley Faction's argument that Plaintiffs lack standing to challenge the 2011 Decision of the Interior Department is meritless.

1. The Requirements For Standing.

The test for standing to challenge agency action contains two prongs: (1) "constitutional" or "Article III" standing, which enforces the Constitution's case-or-controversy requirement, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-62 (1992); and (2) prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction, see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). "For plaintiffs to establish Article III standing, at least one [plaintiff] must demonstrate that it has suffered an injury that is 'concrete and particularized' as well as 'actual or imminent.'" City of Jersey City v. Consol. Rail Corp., 668 F.3d 741, 744 (D.C. Cir. 2012) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)); see also Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (if "standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.") The "injury must be fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision." Consol. Rail, supra, 668 F.3d at 744 (citation and internal quotation marks omitted).

"[P]rudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Elk Grove, supra, 542 U.S. at 12 (citation and internal quotation marks omitted). The "zone-of-interests test is not especially

demanding." Amador Cnty. v. Salazar, 640 F.3d 373, 379 (D.C. Cir. 2011) (citation and internal quotation marks omitted); Patchak v. Salazar, 632 F.3d 702, 705-06 (D.C. Cir. 2011).

In addressing the issue of standing in response to a motion to dismiss the complaint, the Court "must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." LaRoque v. Holder, 650 F.3d 777, 785 (D.C. Cir. 2011) (internal quotation marks omitted). "And critical to the issue" of standing, the Court "must assume that plaintiffs will prevail on the merits of their claims" i.e., their challenge to the 2011 Decision. See Consol. Rail, supra, 668 F.3d at 744; Muir v. Navy Fed. Credit Union, 529 F.3d 1100, 1105 (D.C. Cir. 2008); Amador Cnty., supra, 640 F.3d at 378 ("for the purposes of standing, 'we assume the merits' in favor of the plaintiff"); Parker v. Dist. of Columbia, 478 F.3d 370, 377-78 (D.C. Cir. 2007) (holding that whether the plaintiff actually had a Second Amendment right to bear arms was irrelevant to whether he had standing to challenge a law impeding that right).

2. Plaintiffs Have Constitutional Standing To Challenge The 2011 Decision.

Plaintiffs have standing to pursue their challenge to the 2011 Decision because, accepting as true the allegations of the First Amended Complaint, it is clear that Plaintiffs have suffered an injury in fact that is concrete and particularized as well as actual or imminent and directly caused by the decision under appeal. Plaintiffs claim to be the California Valley Miwok Tribe (the "Tribe"); its Tribal Council – which is "the legitimate governing body of the Tribe as recognized by a majority of Tribal members" – and several individual members of the Tribe and Tribal Council. (FAC ¶¶ 25-28) It is undisputed that, if the 2011 Decision stands, Plaintiffs will be stripped of their right to be considered as the legitimate Tribe, its Tribal Council or (except for

Yakima Dixie), members of the Tribe. This is concrete injury caused directly by the arbitrary and capricious 2011 Decision.

Plaintiffs will also be injured since the 2011 Decision will allow Burley to divert funds held in trust for the Tribe by the State of California. (Id. ¶ 88) Similarly, Plaintiffs will be injured since the Decision will allow Burley to divert federal funds intended for the Tribe under PL 638. If the Decision is allowed to stand, the Tribe will be denied its rightful use of the PL 638 funds, because those funds will be paid to Burley and her illegitimate government instead. (Id. ¶ 89)

Because the Decision disavows any requirement that the Tribe form a government representative of its entire membership, Plaintiffs and the Tribe's other members will be injured by the loss of the opportunity to participate in the organization or operation of the Tribal government. Plaintiffs are injured since the 2011 Decision explicitly denies individual Plaintiffs' (except Mr. Dixie) membership in the Tribe. (FAC ¶¶ 82-86) By denying Plaintiffs' membership in the Tribe and recognizing the Burley government under the 1998 Resolution, the 2011 Decision strips the Tribal Council of legitimacy and interferes with the vital programs that the Council has established to benefit the Tribe and its members, to strengthen Tribal culture and traditions, and to restore Tribal ties with the larger Native American community. (Id. ¶ 87)

In Feezor v. Babbitt, 953 F. Supp. 1 (D.D.C. 1996), the court held that individual members of a Sioux Indian tribe had standing to challenge the Interior Department's approval of a tribal ordinance that resulted in the tribe adopting additional members and thereby diluting the plaintiffs' interests in casino gambling proceeds. Plaintiffs met the "injury in fact requirement" by alleging "that they were subjected to an unfair and arbitrary [Interior Department] appeal process and that their voting rights and per capita shares have been diluted by the result of that

process." Id. at 4. The court stated that "[t]raceability is satisfied by the allegations that it was [Interior's] decision to approve the adoption ordinance which led to the injury in fact. And redressability is shown by [Interior's] power to disapprove the ordinance." Id.

Similarly here, Plaintiffs meet the injury in fact requirement because they are harmed by their exclusion from the Tribal government organizational process. Traceability is satisfied by Plaintiffs' allegations that it was Interior's 2011 Decision which led to the injury in fact, and redressability is shown by Interior's power to rescind its Decision and return to its earlier position which requires the Tribe to involve all of its members in the process for organizing the Tribal government.

In Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997), the court held that a Cherokee tribe had constitutional standing to challenge the Interior Department's decision to recognize a Delaware tribe residing within the territory of the Cherokee tribe because the Interior decision negatively impacted the Cherokee tribe's eligibility for certain federal funds. Similarly here, the 2011 Decision will preclude the Plaintiff Tribe from receiving federal and state funds to which it is entitled.

In denying that Plaintiffs have standing, the Burley Faction insists that the Tribe already has "in place an existing governing body and Tribal membership . . . ." (Burley Mem. at 6) This argument improperly assumes that Plaintiffs' claims are baseless. The Burley Faction also asserts that Plaintiffs lack standing because the "Non-Member Plaintiffs have never once been recognized as members of the Tribe, nor have they otherwise been recognized as having any rights to or interests in the Tribe." (Id. at 7) This ignores the abundant evidence cited in the First Amended Complaint that Plaintiffs are in fact members of the Tribe, and that the Interior

Department and even the Burley Faction have acknowledged in the past the existence of a Tribal community of approximately 250 members.

While the Department does not currently recognize Plaintiffs as the Tribe's government, that does not deny Plaintiffs standing. Federal courts have routinely heard claims filed in the name of a federally recognized tribe, by an entity that the BIA did not recognize at the time as the "official" government of the tribe. See, e.g., Seminole Nation of Oklahoma v. Norton, 223 F.Supp.2d 122, 125, 137-140, 145-146 (D.D.C. 2002); Sac & Fox Tribe of the Mississippi in Iowa v. United States, 264 F.Supp.2d 830, 833-835 (N.D. Iowa 2003), affirmed in part, reversed in part on other grounds by 340 F.3d 749 (8th Cir. 2003). In fact, Ms. Burley herself has filed a number of cases in federal court, in the name of this Tribe, during the past seven years while she was not recognized as the "federally recognized authority" for the Tribe. See Miwok I, 424 F.Supp.2d at 200; Miwok II, 515 F.3d at 1263, 1263 n. 1; California Valley Miwok Tribe v. Kempthorne, No. S-08-3164 (E.D. Cal. Feb. 23, 2009) (Memorandum and Order).

None of the "standing" cases relied on by the Burley Faction is applicable here. In Displaced Elem Lineage Emancipated Members Alliance v. Sacramento Area Director, BIA, 34 IBIA 74, 77 (1999), Indians lacked standing to challenge a tribal election because they had "given up their membership" in the tribe, or, alternatively, the government's decision had nothing to do with the organization of the tribe. In Bingham v. Massachusetts, 2009 WL 1259963 (D. Mass. 2009), the court ruled that the plaintiffs lacked standing to assert that township incorporation of lands was an unconstitutional "taking" of Indian lands because plaintiffs were not the tribe whose rights were allegedly violated, and could not prove they were related to the original tribal members. In Chris C. White v. Acting Muskogee Area Dir., BIA, 29

IBIA 39, 41 (1996), the claimant did not even purport to be a member of the tribe at issue in the case.

There also is no merit to Burley's contention that Yakima Dixie is not injured by the 2011 Decision. (Burley Mem. at 9-10) If the 2011 Decision is upheld, his position on the Tribal Council will be lost and his ability to participate in Tribal governance and the benefits of membership will be terminated. The Burley Faction has consistently sought to deny Mr. Dixie any involvement in their purported Tribal government and has frozen him out of any financial benefits from his membership in the Tribe. They purported to "disenroll" him from the Tribe in 2005, only to "re-enroll" him in 2009 in an attempt to deny him standing in related litigation in the California state courts. (FAC ¶ 83) The 2011 Decision will further embolden the Burley Faction to complete their freezing Mr. Dixie out of the Tribe.

Several of the cases cited by the Burley Faction are entirely inapplicable as they involved the long-simmering dispute between the Navajo and Hopi Tribes, with the courts ruling that individual members of these established Tribes lacked standing to pursue Tribal rights. See, e.g., Attaki v. United States, 746 F. Supp. 1395, 1400 (D. Ariz. 1990) (individual Navajo Tribe members lacked standing to challenge construction of fences and livestock watering facilities on tribal land because "Congress intended to foreclose participation by individuals in the inter-tribal land dispute in order to prevent duplicative and protracted litigation…"); Benally v. Hodel, 940 F.2d 1194 (9th Cir. 1990) (individual members of Navajo Tribe lacked standing to challenge Interior Department's alleged failure to comply with the Navajo and Hopi Indian Settlement Act and Uniform Relocation Assistance and Real Property Acquisition Act).

The Burley Faction claims that Smith v. Babbitt, 100 F.3d 556 (8th Cir. 1996), supports finding that Mr. Dixie lacks standing. (Burley Mem. at 17) This is not true. In Smith, members

and non-members of a Sioux tribe alleged that allocation of gaming proceeds violated federal laws and the tribal constitution. The court held that the claim solely concerned internal tribal membership determinations over which the court lacked jurisdiction. Id. at 559. Once again, the Burleys have resorted to completely irrelevant case law. As stated above, this case is not a tribal membership case. Rather, it focuses on whether the Interior Department lawfully recognized a Tribal government that does not represent or involve the vast majority of the Tribal members.

3. Plaintiffs Have Prudential Standing To Challenge The 2011 Decision.

Prudential standing exists here because Plaintiffs are clearly within the zone of interests of the APA and the IRA. Their interests in being allowed to participate in the organization of their Tribe's government coincide and are consistent with the interests that the IRA was designed to protect.

The purpose of the IRA was to encourage Indians to revitalize their self-government, rehabilitate their economic life, and reverse government policy which had destroyed Indian social and political institutions. Feezor v. Babbit, supra, 953 F. Supp. at 4-5 (prudential standing existed for Tribal members to challenge Interior Department approval of tribal ordinance which would enlarge tribal membership); see also Cherokee Nation of Oklahoma v. Babbitt, supra, 117 F.3d 1489 (tribe had prudential standing to challenge recognition of competing tribe).

The Burley Faction's reliance on Canadian St. Regis Band of Mohawk Indians v. New York State, 573 F. Supp. 1530 (N.D.N.Y. 1983), is unavailing. There, the court held that Indians who alleged membership in certain tribes lacked prudential standing to assert claims on behalf of their tribes based on the Nonintercourse Act "because the Nonintercourse Act protects only tribal

land rights, and not individual Indian land rights . . . ." Id. at 1535.[2] By contrast, Plaintiffs clearly fall within the "zone of interests" of the laws that preclude the Interior Department from acting arbitrarily and capriciously in granting formal recognition to a Tribal government.

B. The Court Has Jurisdiction to Determine Whether the Interior Department Violated the Administrative Procedure Act and the Plaintiffs' Rights by Reversing Its Position and Allowing the Burleys to Seize Control of the Tribe.

The Burley Faction contends that this Court lacks jurisdiction because this case is nothing more than an "intra-tribal dispute" over whether the Tribe should permit Plaintiffs to become members. (Burley Mem. at 15) This is wrong. This case does not present an internal dispute over Tribal membership. It is not a situation in which a tribe with a previously established and recognized government uses duly promulgated membership criteria to prevent a non-member from becoming a member. Rather, it is a case where the Department is recognizing a government controlled by the Burley Faction – which had no relationship to the Tribe prior to 1998 (AR 001573 (Associate Solicitor's letter summarizing Tribal history); AR 000110 (1998 document purporting to accept Burleys into Tribe)) – has improperly tried to seize control of the Tribe and seeks to unlawfully prevent the greater Tribal community – including Plaintiffs – from participating in the organization of the Tribal government (AR 000500 (2004 Decision stating Burleys failed to include Tribal community in organization)), *Miwok II*, 515 F.3d at 1263 (Department properly rejected a constitution that Burleys adopted "to govern the tribe without so much as consulting its membership") .

[2] Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979), also involved a claim by an individual Indian under the Nonintercourse Act, which has no relevance here); James v. Watt, 716 F.2d 71, 72 (1st Cir. 1983) (same).

This case is about the Department's unlawful decision to legitimize a rogue tribal faction that claims to have acquired control of the Tribal government by excluding the vast majority of the Tribe's members, including Plaintiffs. (*See* AR 002195-002243 (affidavits establishing Plaintiffs' Tribal membership and positions on Tribal Council); AR 002265-002275 (Tribal roster)) In dealing with Indian tribes and their members, the Interior Department bears "obligations of the highest responsibility and trust." Seminole Nation v. United States, 316 U.S. 286, 297 (1942). The government's conduct is "judged by the most exacting fiduciary standards." Id. The Supreme Court has recognized that it "would be a clear breach of the Government's fiduciary obligation" to a tribe and its members to remit funds to a tribal council which, the government knew, "was composed of representatives faithless to their own people and without integrity." Id. Similarly here, the Interior Department has breached its obligation to Plaintiffs by knowingly permitting the Burley Faction to seize control of the Tribe through its antimajoritarian gambit.

In Feezor, supra, 953 F. Supp. 1, the court rejected an argument similar to the one the Burley Faction makes here, stating:

> It is true, as defendants argue, that federal courts have been reluctant to assume jurisdiction over claims involving intra-tribal membership disputes or questions of tribal constitutions. . . . In [Goodface v. Grassrope, 708 F.2d 335, 339 (8th Cir. 1983)], however, the district court's error was not in reviewing BIA's actions under APA standards, but in going beyond judicial review to reach the merits of the tribal election dispute. This Court is mindful of the difference.

Id. at 4. Here too, the Court has jurisdiction to review the Department's 2011 Decision under APA standards. It is not being asked to go beyond judicial review and reach the merits of an election dispute.

In Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), the Court held that it had subject matter jurisdiction to consider the challenge by members of the Creek Nation tribe to the Interior

Department decision to deal solely with the tribal chief to the exclusion of the tribal council. The primary issue was whether the Department acted lawfully in granting the chief full authority "to disburse tribal funds and enter into contracts on behalf of the Creek Nation without the approval of the Creek National Council." Id. at 1115. The Department contended that the Court lacked jurisdiction over the subject matter of the action because the issue involved an intra-tribal dispute not traditionally within the jurisdiction of the federal courts. In rejecting this argument, the Court stated:

> While factional rivalries do appear to have played a significant part in motivating plaintiffs to file the suit, the only relevant question for the Court, as indeed the above cases recognize, is whether the issues raised by plaintiffs are internal tribal issues or whether they arise under the constitution [or] laws of the United States. . . . [T]his case questions not the propriety of tribal actions, but the legality of actions of federal officials pursuant to federal statutes. ***The issue is not who is entitled to membership in the tribe or to vote in tribal elections, but whether the Secretary has acted lawfully in refusing to permit the Creek National Council to participate in the determination of the uses to which tribal funds will be put and other tribal matters.*** In sum, the Court perceives no relevance of the "intra-tribal dispute" doctrine to the circumstances of this case, nor any other reason why this controversy is inappropriate for resolution by federal judicial power.

Id. at 1117 (emphasis added). The same is true here. The issue is not who is entitled to membership in the Tribe or to vote in Tribal elections, but whether the Department has acted lawfully in allowing the Burleys to seize control of the Tribe and granting recognition to them even though the 1998 resolution was not approved by a majority of the Tribe (AR 000179 (1998 Resolution bearing only two signatures)), and even though the Tribe's members were precluded from participating by the Department's wrongful application of criteria that apply only to terminated tribes.

In Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999), the court held that the Interior Department acted arbitrarily and capriciously "in refusing to review . . . the intensely disputed

tribal procedures surrounding the adoption of a tribal constitution, in crediting unreasonable decisions of a seemingly invalid tribal court, and in refusing to grant official recognition to the clear will of the Tribe's people with regard to their government." Id. at 143. The court stated that both the record before the Interior Board of Indian Appeals and its legal obligation to respect tribal sovereignty and self-determination should have led it to reject the BIA's determination that the tribal constitution was valid. Id. at 152. The court added that the Board failed to fulfill its "responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out their duty to recognize a tribal government." Id. at 153. The court stated:

> [The Board] merely repeated the rhetoric of tribal exhaustion and federal non-interference with tribal affairs. By not determining for themselves whether or not the Constitution was valid, Defendants were derelict in their responsibility to ensure that the Tribe make its own determination about its government consistent with the will of the Tribe and the principles of tribal sovereignty. Id.
>
> * * *
>
> The essence of tribal self-determination is the Tribe's ability to choose for itself how its government will operate. For Defendants to refuse to acknowledge that choice because they disagree with it, or to actively seek to institute the form of government that they prefer, turns that notion on its head. Defendants' repeated refusal to recognize the Tribe's earnest efforts to undo its contentious certification of the Constitution, couched in the language of respect for tribal sovereignty, is disingenuous at best. Upon review, Defendants' actions reveal themselves to be arbitrary, capricious, and contrary to law. Id. at 155

The same is true here. The Department acted arbitrarily and capriciously in permitting the Burley Faction to seize control of the Tribal government without seeking to involve the participation of the other Tribal members. (AR 002051 (2011 Decision) Its current deference to the Burleys' purported government, "couched in the language of respect for tribal sovereignty, is disingenuous at best." Ransom, 69 F.Supp.2d at 155.

The Burley Faction's reliance on Lincoln v. Saginaw Chippewa Indian Tribe of Mich., 967 F. Supp. 966 (E.D. Mich. 1997), is unavailing. That was a classic membership dispute case,

where the plaintiffs complained of being improperly denied membership in a tribe with an established, organized government, and where the Interior Department had previously approved the tribe's gaming proceeds allocation plan which excluded the plaintiffs. Id. at 967. The same is true for Montgomery v. Flandreau Santee Sioux Tribe, 905 F. Supp. 740, 746 (D. S. D. 1995) ("Giving deference to the Tribe's right as a sovereign to determine its own membership, the Court holds that it lacks subject matter jurisdiction to determine whether any plaintiffs" – who alleged favoritism in disbursement of casino profits to tribal members – "were wrongfully denied enrollment in the tribe"); and R.H. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989) (sovereign immunity barred claims by descendants of former slaves of the Cherokee Indian Nation who were denied the right to vote in tribal elections and to participate in federal Indian benefits programs because it was an intra-tribal dispute).

C. Plaintiffs' Challenge to the 2011 Decision Is Not Barred by the Six-Year Statute Of Limitations.

The First Amended Complaint challenges an agency decision issued on August 31, 2011. The First Amended Complaint was filed within two months of that decision. It is therefore highly specious for the Burley Faction to assert that Plaintiffs' claims are barred by the six-year statute of limitations in 28 U.S.C. 2401(a). (See Burley Mem. at 4-5)

The Burley Faction tries to overcome this fundamental problem with its statute-of-limitations argument by contending that the 2011 Decision merely reaffirmed prior Interior Department rulings more than six years old. (See Burley Mem. at 19) This too is highly specious. As the Interior Department itself recognized in its 2011 Decision, the Decision "mark[s] a 180-degree change of course from positions defended by this Department in administrative and judicial proceedings over the past seven years." (AR 002050) Notably,

neither the Department's answer nor its motion for summary judgment raised a statute of limitations claim.

The Burley Faction raises a straw man argument when it points to Interior Department actions relating to the Tribe which purportedly occurred during the period 1934 through 1993. (Burley Mem. at 19) Plaintiffs are not challenging any of those alleged actions in this case.

The Burley Faction also asserts that Plaintiffs are challenging "the September 24, 1998 BIA final agency action which first recognized the Tribe's five member citizenship and their authority to establish a Tribal government . . . ." (Burley Mem. at 19) This argument improperly asserts that the Interior Department in 1998 issued a final decision that there were only five members of the Tribe. In fact, the Interior Department did not issue any such decision until the 2011 Decision. (AR 002049) Therefore, the filing of this lawsuit was timely.

D. The Burley Faction Is Not A Necessary and Indispensable Party Whose Joinder Would Violate Sovereign Immunity.

Seeking to preclude any judicial challenge into the 2011 Decision, the Burley Faction erroneously contends that the case must be dismissed because the Burley Faction is a necessary and indispensable party which refuses to participate in the merits of this case.

Rule 19(a)(1) of the Federal Rules of Civil Procedure states:

> **(1)** ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> **(A)** in that person's absence, the court cannot afford complete relief among existing parties; or
>
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> **(i)** as a practical matter impair or impede the person's ability to protect the interest; or

> **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19(b) provides that "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." The factors for the court to consider include:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

Id.

"Rule 19 of the Federal Rules of Civil Procedure establishes a two-step procedure for determining whether an action must be dismissed because of the absence of a party needed for a just adjudication." Cherokee Nation, 117 F.3d at 1495-96. "First, the court must determine whether the absent party is 'necessary' to the litigation according to factors enumerated in Rule 19(a); if so, the court must order that the absent party be joined. If a necessary party cannot be joined, the court must turn to the second step, examining the factors in Rule 19(b) to 'determine whether in equity and good conscience, the action should proceed among the parties before it, or

should be dismissed, the absent person being regarded as indispensable.'" Id. at 1496. Rule 19(b).

"In all events it is clear that multiple factors must bear on the decision whether to proceed without a required person. The decision 'must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." Republic of the Phil. v. Pimentel, 553 U.S. 851, 863 (2008). "Dismissal . . . is not the preferred outcome under the Rules." Askew v. Sheriff of Cook Cnty., Ill., 568 F.3d 632, 634 (7th Cir. 2009).

1. The Burley Faction Is Not A 'Necessary' Party Under Rule 19(a)(1).

The Burley Faction is not a necessary party because the Court can provide complete relief to the parties without involving the Burley Faction in this case. Any interest that the Burley Faction has in continuing its scheme to unlawfully wrest control of the Tribe is insufficient to qualify it as a necessary party because the result of a reversal of the 2011 Decision would be that the parties return to the status quo. Plaintiffs are not seeking an affirmative ruling from the Court regarding the governance or membership of the Tribe. In no manner would the Burley Faction be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

In claiming that it is a "necessary party" to this case, the Burley Faction characterizes itself as "the Tribe." (Burley Mem. at 21-22) In fact, it is only a rogue faction which improperly alleges that it is the Tribe. Even assuming, arguendo, that the Burley Faction is the same as the Tribe (and it clearly is not), it is still not a necessary party. In holding that a rival tribal government was not an indispensable party, the court in Ransom v. Babbitt, supra, 69 F. Supp. 2d at 148, emphasized that in "cases where plaintiffs have challenged the propriety of

decisionmaking by federal administrative agencies, courts frequently have concluded that states and municipalities affected by that decisionmaking are not indispensable parties.'" (citing Coal. on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1387 (D.D.C. 1986)). The same principle applies here to the Intervenors.

2. The Burley Faction Can Be Joined If Necessary.

Even if it were a necessary party (which it is not), the Burley Faction could not rely on its purported "sovereign immunity" to resist being joined in this case. Prior to the 2011 Decision, the Department explicitly refused to recognize the Burley Faction as the government of the Tribe. (*E.g.*, AR 000611 (2005 Decision stating that the Department "does not recognize any Tribal government"); AR 000961 (Oct. 26, 2005 letter from Department to Burley, stating it does not have a government-to-government relationship with the Tribe)) Accord, *Miwok I*, 424 F.Supp.2d at 201. The Burley Faction now claims it has sovereign immunity by reason of the 2011 Decision. But the Interior Department decision that is at issue in this litigation cannot supply the basis for the sovereign immunity claim. Otherwise, Interior recognition decisions would always be unreviewable on sovereign immunity grounds, which is contrary to the presumption in favor of judicial review of agency action.

In Cherokee Nation, supra, 117 F.3d 1489, the district court granted a motion to dismiss a challenge to an Interior Department decision based on the court's ruling that an Indian tribe – the Delaware Tribe – was a necessary and indispensable party. In reversing, the D.C. Circuit stated:

> [T]he Final Decision on which the recent listing of the Delawares is based cannot itself be used to block review. The Cherokee Nation's complaint alleges that recognition of the Delawares is contrary to federal law . . . . If the Department acted contrary to law, the Final Decision would be owed no deference. Finally, were the court to decline to review the district court's sovereign immunity ruling, then the Department's recognition decisions would be unreviewable, contrary to the presumption in favor of judicial review. . . . [Tribal sovereign immunity] is thus inappropriately invoked when tribal sovereignty is the ultimate issue.

Id. at 1499. Here, the ultimate issue is whether the Burley Faction constitutes the legitimate governing body of the Tribe. Only if that issue is decided in the Burleys' favor would they be arguably entitled to claim sovereign immunity on behalf of the Tribe. The Burley Faction cannot prevent that determination being made with an argument that already assumes the outcome of the issue under review. See Shenandoah v. U.S. Dep't of the Interior, 159 F.3d 708, 715 (2d Cir. 1998) ("Even had the [Interior] Department determined that [one tribal member] represented the [tribal] Nation notwithstanding his second purported removal, we are not certain that dismissing plaintiffs' complaint on Rule 19 grounds would be consistent with our duty to review such agency determinations"). Consequently, Intervenors can be joined in the litigation, if necessary.

3. The Burley Faction Is Not An Indispensable Party Under Rule 19(b).

Only if the Court determines that the Burley Faction meets the criteria of Rule 19(a)(1)(A) and (B), but the party cannot be joined, must the Court turn to Rule 19(b) and decide what to do about the situation. Askew, supra, 568 F.3d at 635. "Even then, dismissal is not automatic. Instead, the court must 'determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.'" Id.

The Burley Faction is not an indispensable party because: (1) a judgment invalidating the 2011 Decision would not prejudice the Burley Faction. Such a judgment would not recognize any Tribal government, and the Burleys could presumably challenge any subsequent decision by the Department recognizing a Tribal government; (2) the narrow scope of this administrative litigation limits prejudice; (3) a judgment rendered in the Burley Faction's absence would be adequate to determine the lawfulness of the 2011 Decision since this is a challenge to a federal agency action; and (4) if this action is dismissed for non-joinder, Plaintiffs will have no remedy available to challenge an arbitrary, capricious and otherwise unlawful Interior Department decision.

The Burley Faction also contends that it is an indispensable party because a finding that the 2011 Decision is unlawful "would reverse decades of history between the Tribe and the United States, [and] undermine the Tribe's sovereign authority to make independent membership determinations without federal interference." (Burley Mem. at 24) However, this argument ignores the facts – namely that the Burley Faction had no relationship with the Tribe until 1998 (AR 000110). It seeks to seize control of the Tribal government through an antimajoritarian gambit which the Department previously blocked, see Miwok I, 424 F.Supp.2d 197, *Miwok II*, 515 F.3d 1262, and has now illegitimately allowed to proceed. Even the Department admits that the 2011 Decision is only made possible by a "180 degree change of course." (AR 002050)

The cases relied on by the Burley Faction are all inapposite. In Smith v. Babbitt, 875 F. Supp. 1353, 1357 (D. Minn. 1995), the issue was whether BIA improperly allowed non-tribal members of an established tribe to receive a portion of tribal gaming funds. Id. at 1357 and 1368. St. Pierre v. Norton, 498 F. Supp. 2d 214 (D.C. Cir. 2007), involved an attempt by two individual tribal members to change the method used by a long-established tribal government – approved by the tribe's own judicial system – for adopting new tribal members, and involved issues "already litigated" by them in the established "tribal court." Id. at 221. It was understandable that the tribe was a necessary party in that case. Id. at 221. It did not involve a situation where a tiny, rogue faction seized control of the tribe *before* it was organized, and excluded the vast majority of tribal members from the tribal government organization process.

Also inapposite is Manybeads v. United States, 209 F.3d 1164 (9th Cir. 2000). This was another Navajo-Hopi case where the court held that the Hopi Tribe was a necessary party in an action by the members of the Navajo Nation alleging that the Navajo and Hopi Indian Land Settlement Agreement of 1974 violated their First Amendment right to freely exercise their

religion. The court reasoned that a judgment for plaintiffs would "upset two [settlement] agreements, long and carefully worked out, by which a balance was struck between the interests of the Navajo Nation and the Hopi Tribe . . . ." Id. at 1166.

Equally inapplicable is Davis v. United States, 343 F.3d 1282 (10th Cir. 2003). There, the court held that an Indian tribe was an indispensable party in an action filed by two bands of Seminole Nation Indians, challenging their exclusion from benefits and programs established with funds obtained from a land claims judgment. Unlike the present case, the plaintiffs in Davis made no claim that the entity asserting sovereign immunity was in fact not entitled to represent the tribe.

Am. Greyhound Racing, Inc. v. Dull, 305 F.3d 1015 (9th Cir. 2002), is also distinguishable. There, Indian tribes with gambling compacts with the State of Arizona were necessary and indispensable parties in an action filed by racetrack owners and operators seeking to, in effect, shut down the tribal casinos. It was undisputed that the negative impacts on the tribes in having their casinos closed would be "enormous." Id. at 1025. There is no similar fact pattern here.[3]

E. The First Amended Complaint States Viable Claims For Relief.

The Burley Faction's argument that the First Amended Complaint fails to state a claim for relief is predicated on an erroneous characterization of Plaintiffs' claims. Plaintiffs are not – as the Burley Faction contends – "explicitly requesting that this Court enroll individuals that have never in the Tribe's history been recognized as Tribal members into a federally-recognized Tribe

[3]The Burley Faction fares no better with Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995), and Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49 (D.D.C. 1999), where it was determined that state governments were indispensable parties in cases involving state-tribe compacts relating to Indian tribe gaming. The interest of a state in regulating gambling within its borders has no relevance here.

. . . ." (Burley Mem. at 27) Rather, Plaintiffs – a federally-recognized but un-organized Indian tribe, its tribal council, and its individual tribal members who are lineal descendants of the original and historical members – challenge an Interior Department decision which – contrary to prior Department decisions and previous court rulings – recognizes a tiny, rogue faction of purported members as a tribal government..

In turning its back on Plaintiffs, the Interior Department has failed to comply with its "obligations of the highest responsibility and trust" to the Tribe and its members. Seminole Nation v. United States, 316 U.S. 286, 297 (1942). In Seminole the Court recognized that it "would be a clear breach of the Government's fiduciary obligation" to a tribe and its members to remit funds to a tribal council which, the government knew, "was composed of representatives faithless to their own people and without integrity." Id.. Similarly here, the Interior Department has breached its obligation to Plaintiffs by knowingly permitting the Burley Faction to seize control of the Tribe.

In Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999), the court held that the Interior Department acted arbitrarily and capriciously "in refusing to review . . . the intensely disputed tribal procedures surrounding the adoption of a tribal constitution, in crediting unreasonable decisions of a seemingly invalid tribal court, and in refusing to grant official recognition to the clear will of the Tribe's people with regard to their government." Id. at 143. The court stated that both the record before the Interior Board of Indian Appeals and its legal obligation to respect tribal sovereignty and self-determination should have led it to reject the BIA's determination that the tribal constitution was valid. Id. at 152. The court added that the Board failed to fulfill its "responsibility to interpret tribal laws and procedures in a reasonable manner in order to carry out their duty to recognize a tribal government." Id. at 153. The same is true here. The

defendants acted arbitrarily and capriciously in recognizing the Burley Faction as the Tribal government without the participation or consent of the other Tribal members.

The 2011 Decision also is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law for the reasons set forth in Plaintiffs' Motion for Summary Judgment and Supporting Memorandum of Points and Authorities (Doc. 49), filed March 3, 2012 and currently pending before this Court. As set forth therein:

1. The 2011 Decision depends entirely on a determination of the Tribe's membership that is arbitrary, capricious and unlawful. The 2011 Decision improperly disregards undisputed evidence that the Tribe consists of more than five members, including testimony of BIA officials, prior BIA decisions and analysis of tribal member genealogies, and the Plaintiffs' Tribal roster. Interior also offered no reasoned explanation for its determination of Tribal membership.

2. The Department also ignored the fact that it is the Tribe, not the government, which decides who is a Tribal member. The government's argument – stated for the first time in its Cross Motion for Summary Judgment – that the 1966 distribution plan redefined the Tribe's membership is not only unreasonable but also an impermissible post hoc argument of agency counsel.

3. Interior violated the Administrative Procedure Act and its trust obligations to the Tribe by allowing Burley's "antimajoritarian gambit" to succeed. Interior must ensure that a Tribe's representatives with whom the Department deals are valid representatives of the Tribe as a whole, even under IRA § 476(h), and the government does not deny its duty to uphold majoritarian values. Moreover, the undisputed evidence demonstrates that the 1998 Resolution was not adopted by a majority of the Tribe's members.

4. Interior is estopped from recognizing Burley's unrepresentative governmental faction because Miwok I and Miwok II finally and conclusively decided that the Tribe was not organized under Burley's antimajoritarian government. In addition, given the Department's arguments in briefs to this Court and the D.C. Circuit in Miwok I and Miwok II, judicial estoppel bars the government from denying the rights of the Tribal community.

5. The 2011 Decision is procedurally invalid because it violates Interior's own regulations by: (a) deciding Burley's appeal based on information not disclosed to interested parties; (b) unlawfully addressing issues not within the jurisdiction of the appeal referenced by the Interior Board of Indian Appeals; (c) overturning final Interior decisions not subject to appeal or reconsideration; and (d) failing to dismiss Burley's administrative appeal as moot. (See Pl. Mem. (Doc. 49), at 41-44)

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny the motion to dismiss filed by the Burley intervenors.

/s/_____
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Dated: April 20, 2012

REQUEST FOR HEARING

Plaintiffs respectfully request a hearing on the Motion to Dismiss.

CERTIFICATE OF SERVICE

I certify that on April 20, 2012, I caused the foregoing PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS to be filed with the Court pursuant to the electronic filing rules. All participants are registered CM/ECF users, and will be served by the CM/ECF system.

/s/
Roy Goldberg