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

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

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

The greater tribal community that Defendants identified in the decisions of the U.S. Department of Interior ("Department") from 2004 to 2007 concerning the California Valley Miwok Tribe ("Tribe") – and that Defendants successfully defended in Federal court against an unlawful attempt to seize control of the Tribe by what the Court of Appeals for the D.C. Circuit described as a rogue faction – has coalesced into an effective functioning Tribal government consisting of more than 240 adults and their children. The Tribal government performs a full range of functions and maintains the cultural heritage of the Tribe—its language, its traditions and home at the Sheep ranch property. The Department seeks to abandon these Tribal members and to turn the Tribe over to the very rogue faction it previously rejected. If allowed to stand, the Department's decision will destroy this Tribal community. As demonstrated below, Defendants' actions are quintessentially arbitrary and unlawful and should be overturned.

1. Defendants' brief in support of their Cross Motion for Summary Judgment and opposition to Plaintiffs' Motion for Summary Judgment, Doc. 56-1 ("Def. Br.") fails to refute the fact that the 2011 Decision of the Assistant Secretary – Indian Affairs ("AS-IA") is arbitrary and capricious because it recognizes a Tribal government that does not represent the members of the Tribe.

In attempting to defend the core finding in the 2011 Decision that only five members of the Tribe were entitled to be involved in the organization of the Tribal government, Defendants assert that "for the past fourteen years, the Assistant Secretary has consistently dealt with the General Council [and] its five members" and "the Department has *never* recognized Plaintiffs' faction nor acknowledged the remaining Plaintiffs as members of the Tribe." Def. Br. at 25. This argument is contrary to undisputed evidence in the agency record that, from at least the March 26, 2004 decision of defendant Bureau of Indian Affairs ("BIA") (AR 000499-000502)

until the AS-IA issued the December 2010 initial decision which was affirmed in the 2011 Decision, the Department consistently acknowledged that the Tribe consists of a much larger Tribal community, estimated to number in the hundreds, who are entitled to participate in Tribal governance. *See, e.g.,* March 26, 2004 Letter, at 2 (AR 000500) ("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") (emphasis added). The Department defended that view in the prior federal litigation involving the governance of the Tribe. *See, e.g.,* "Memorandum in Support of Defendants' Motion to Dismiss," *Miwok I* (Aug. 5, 2005), at 2 (AR 000824) (Burley government was "not supported by a majority of the 'whole tribal community'"). Indeed, the 2011 Decision itself acknowledges that its finding that the Tribe has only five members represents a "180-degree change of course." (AR 002050)

The 2011 Decision's finding that the Tribe is limited to five members also is contrary to the Tribal roster that is in the record (AR 002264-002275), which specifically identifies the 242 individuals whom the Tribe acknowledges as adult members. The Tribal roster is fully consistent with prior estimates by the Department that the Tribe consisted of approximately 250 individuals. These individuals are lineal descendants of known historical Tribal members. The record also *should* contain genealogies submitted to the Department by Tribal members, which constitute information that the AS-IA should have considered in reaching his 2011 Decision, and which Defendants improperly excluded from the administrative record.

2. Defendants argue that the Tribe should be limited to five members because, according to Defendants, that would be the outcome if the Tribe were treated like a tribe whose official tribal status had been officially *terminated* and subsequently restored through litigation. *See* Def. Br. at 21-25. Defendants specifically rely on *Alan-Wilson, Sr. v. Sacramento Area Dir.*,

30 IBIA 241, 255 (1997) ("*Alan-Wilson")* and *Alan-Wilson, Sr. v. Acting Sacramento Area Dir.*, 33 IBIA 55, 56-57 (1998) (*Alan-Wilson II*"), to claim that the Department has a consistent policy of determining the membership, and participation in initial organization efforts, for tribes that were *terminated* and subsequently restored to recognition under the stipulated judgment in *Hardwick v. United States*, Civ. No. C-79-1710, 2006 WL 3533029 (N.D. Cal. Dec. 7, 2006) ("*Hardwick* Settlement"). The Department argues that, under that alleged policy (the "*Hardwick/Alan-Wilson* policy"),[1] participation is "based on the list of distributees and the distributees' lineal descendants." Def. Br. at 23. The claim is without merit.

The *Hardwick* Settlement and *Alan-Wilson* decisions do not apply here because it is undisputed that the Tribe was never terminated; rather, it has maintained its sovereign status continually since 1915. Defendants nevertheless maintain that "the *Alan-Wilson* line of reasoning applies with equal force here, despite the fact that this Tribe never completed the termination process . . . ." Def. Br. at 24. This argument – which is a key component of Defendants' brief – constitutes an impermissible *post hoc* argument of agency counsel. The 2011 Decision contains no discussion or analysis of applying the *Hardwick/Alan-Wilson* policy to non-terminated tribes. In fact, it rejects *Alan-Wilson* as inapplicable to this Tribe because that case involved a terminated tribe. Defendants' argument that the *Hardwick/Alan-Wilson* policy applies equally to non-terminated tribes appears for the first time in their summary judgment brief. It cannot be considered in connection with the summary judgment motions.

Even assuming, *arguendo*, that application of the *Hardwick/Alan-Wilson* policy to determine membership of a non-terminated tribe was not an impermissible *post hoc* argument of counsel (which it clearly is), it would be contrary to prior Department and court decisions that

[1]The term "*Hardwick/Alan-Wilson* policy" is used for convenience. As discussed in the text below, Plaintiffs dispute that the Department could lawfully have such a policy.

recognized the rights of the whole Tribal community to participate in actions to establish a Tribal government. Applying the *Hardwick/Alan-Wilson* policy here would not be a discretionary change in policy, as Defendants claim, but an inexcusable disregard of the Department's obligations to the lineal descendants and of its duty to ensure that a tribal government with which it establishes relations represents the majority of a tribe.

Using the *Hardwick/Alan-Wilson* policy to limit the membership in this Tribe to "distributees and their descendants" would also violate sections 476(f) and (g) of the Indian Reorganization Act ("IRA"), which Congress enacted in 1994 to halt the Department's practice of imposing membership limitations on what it called "created" tribes. Moreover, Defendants' attempted application of *Hardwick/Alan-Wilson* to the Tribe causes the *de facto* termination of this Tribe by administrative fiat. That is plainly unlawful, for only Congress (or the Department acting pursuant to Congressional directive) has the power to terminate a federally recognized Indian tribe.

If upheld, Defendants' attempted application of the *Hardwick/Alan-Wilson* policy to non-terminated tribes would revive the "termination era," a dark period in federal Indian relations that Congress has repudiated. During the termination era, it was the United States' official policy to force assimilation of Indians into mainstream society by abolishing the special status of Indian tribes and allotting tribal reservations to individual Indians. Termination deprived tribes of their autonomy, powers of self-government, and relationship with the United States, and deprived individual Indians of their status as Indians. Tribal cultures were fragmented and dispersed, and many tribal governments became dysfunctional or ceased to exist. *See* Walch, Terminating the Indian Termination Policy, 35 Stan. L. Rev. 1181, 1188-1191 (1982-1983). The 2011 Decision would have the same effect on this Tribe, denying the Plaintiff Tribe autonomy, self-governance,

and any relationship with the United States, and depriving individual Plaintiffs of their status as Tribal members.

This Tribe was not terminated under the California Rancheria Act or any other law. Congress has since repealed the policy of termination and adopted a new policy of tribal self-determination and self-governance. *See* Pub.L. 103-454, 108 Stat. 4791 § 103(5), 25 U.S.C. 479a note ("Congress has expressly repudiated the policy of terminating recognized Indian tribes"); Walch, Terminating the Indian Termination Policy, at 1191 (citing to the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-450n, 455-458e). The Department must not be permitted to disregard the will of Congress by reviving termination through unsanctioned agency action.

3. The Department's 2011 Decision recognizes a Tribal government based on a 1998 Resolution signed by only two people, which purports to establish a General Council of the Tribe. This was arbitrary and capricious because the administrative record demonstrates that, with the exception of Plaintiff Yakima Dixie, none of the other lineal descendants of the Tribe's known historical members was given notice of the establishment of this purported General Council. The lineal descendants were deprived of their right to participate in the establishment of the Tribal government.

Defendants also ignore the undisputed fact that the 1998 Resolution was not signed by even a majority of the members whom the Department claims were eligible to participate in 1998. This failure makes the 1998 resolution void *ab initio*. Nor has the Department addressed the AS-IA's reliance on illegal *ex parte* communications in deciding Ms. Burley's appeal, or Plaintiffs' argument that the appeal was rendered moot by the Tribe's own organization efforts. The Department has therefore waived any arguments it might have on those issues.

4. Defendants erroneously assert that "[t]he narrow issue before this Court is whether the Assistant Secretary reasonably halted any further governmental efforts to compel a Tribe to organize, where the evidence in the record demonstrated that the United States has consistently recognized this Tribe's membership as comprised of only five members." Def. Br. at 1. In fact, Plaintiffs do not seek to have the AS-IA compel any action by the Tribe. Plaintiffs made that abundantly clear in response to the AS-IA's request for briefing on remand from the initial December 2010 decision. Plaintiffs stated that there was no need for the Department to "assist" the Tribe in organizing, because the Tribe was forming a representative government on its own and would soon hold an election, open to all 242 adult Tribal members, to ratify a Tribal constitution. Once the election is held, the Tribe will seek the Department's recognition of the resulting Tribal government.

Thus, the issue of whether the AS-IA may or must compel the Tribe to organize is simply not before the Court. Moreover, since the BIA action appealed by the Burley Faction involved the BIA facilitating a meeting of the Tribe's members, Plaintiffs unequivocally asked the AS-IA to dismiss the appeal as moot. The AS-IA did not address Plaintiffs' mootness argument in his decision, and Defendants did not address it in their Motion for Summary Judgment.

Instead of the narrow issue erroneously framed by Defendants, the genuine issue before the Court is whether the Department's decision, regarding whom the United States will recognize for purposes of a government-to-government relationship with the Tribe, is arbitrary, capricious and unlawful. From Plaintiffs' perspective, the outcome should be the same as in the prior litigation involving this Tribe, in this Court and the D.C. Circuit Court of Appeals: the Department may not recognize a Tribal government that does not actually represent the Tribe's members and that was formed without the involvement of the Tribal community. *California*

Valley Miwok Tribe v. United States, 424 F.Supp.2d 197, 202 (D.D.C. 2006) ("*Miwok I*"), *affirmed*, 515 F.3d 1262 (D.D.C. 2008) ("*Miwok II*"). That duty trumps any obligation the Department may have to recognize some Tribal government "if possible." This means that the Burley Faction, whether acting under the 1998 Resolution or some other governing document, cannot be recognized as the government of this Tribe. Moreover, to the extent it chooses to recognize any Tribal government at this time, the Department's decision not to recognize Plaintiff's broadly representative and inclusive government is arbitrary and capricious.

Defendants properly acknowledge that it is the sole responsibility of a tribe to define the contours of membership. (AR 002054) It is not the domain of the courts, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), nor the federal government, *see Williams v. Gover*, 490 F.3d 785, 791 (9th Cir. 2007) (observing that a restored Rancheria had the power to define its own membership requirements and that "BIA could not have defined the membership of Mooretown Rancheria, even if had [sic] tried." Despite its invocation of this valid principle, the Department is seeking, as a matter of policy, to create a rule that limits the membership of this Tribe to the distributees named under the 1967 Sheep Ranch Distribution Plan and their lineal descendants. The Department has no such authority.

Defendants claim that the 2011 Decision is within the "expansive authority" that Congress has given the AS-IA to manage federal Indian relations. But Congress's delegation of authority to the AS-IA does not include the power to convert a federally recognized tribe into a terminated tribe or to make any kind of "policy determination" about the membership of federally recognized Indian tribes under the guise of "promoting tribal sovereignty." Nor does it place the 2011 Decision outside the requirements of the Administrative Procedure Act, which requires that the 2011 Decision "articulate a satisfactory explanation for its action including a

'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

5. Defendants' suggestion that Plaintiffs' claims are untimely, because the 2011 Decision "merely reaffirms the state of affairs that has existed since 1998," Def. Br. at 21, is also meritless. As set forth above, although Defendants claim that the Department consistently recognized the Tribe as consisting of five members and governed by a general council of those members under the 1998 Resolution, the record shows otherwise. The undisputed facts show that the Department has consistently acknowledged the existence of a "larger Tribal community" estimated at several hundred members, even if the Department did not know the exact number or identities of those members. As for the "general council" supposedly recognized since 1998, the Department's 2005 Decision stated that the Department did not recognize any government of the Tribe, and both this Court and the D.C. Circuit upheld that decision. The Department reiterated that same position in other letters to Ms. Burley.

6. Defendants fail to explain why they are not bound by the preclusive effects of *Miwok I* and *II*, and of their own representations before this and other courts. Those cases finally decided that the Burleys had not established a valid Tribal government under any governing documents then in existence, just as the Department had argued. Holding the Department to those decisions regarding this specific Tribe does not implicate any of the policy concerns that would prevent application of preclusion or estoppel against the government.

7. The 2011 Decision rests on the assumption that the enrollment of the Burleys, without Tribal authorization, was valid. There is no support in the record for that assumption.

8. Finally, Defendants fail to explain why the AS-IA should not be bound by the Department's own regulations for administrative appeals. The Department's authority to change

its legal interpretations and adopt new policies for prospective application does not authorize the AS-IA to reconsider long-settled, final Department adjudications of previous appeals, or to ignore the scope of the issues presented by an administrative appeal.

ARGUMENT

I. THE 2011 DECISION IS ARBITRARY AND CAPRICIOUS.

A. The Interior Department's Conclusion That The Tribe Consists Of Only Five Members Is Contrary To Undisputed Evidence In The Record.

In the 2011 Decision, the AS-IA determined that there are only five members of the Tribe who are entitled to be involved in the organization of the Tribal government. (AR 002055) In seeking to defend that fundamental underpinning of the 2011 Decision, Defendants suggest that the Interior Department has consistently, "for the past fourteen years," acted as if there were only five Tribal members entitled to participate in the organization of the Tribe. *See* Def. Br. at 25. This characterization is directly contrary to the actual evidence in the record, which demonstrates that the Department, commencing in March 2004, fully acknowledged the existence of a much greater "tribal community" who must be allowed to participate in the organization of the Tribe. The Department's "head-in-the-sand" approach of simply pretending that such inconvenient facts never existed (and are not part of the record) cannot be accepted.

The finding of the 2011 Decision that the Tribe consists of only five members entitled to participate in its organization is directly contradicted by the March 26, 2004 decision of defendant BIA, which *rejected* the claim by Ms. Burley that the Tribe had been properly organized by only three members (*i.e.*, the adult Burleys). BIA stated:

> ***Where a tribe that has not previously organized seeks to do so, BIA . . . 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. We are unaware of any efforts to involve Yakima Dixie or Mr. Dixie's brother Melvin Dixie or any offspring of Merle Butler, Tillie Jeff or Lenny Jeff, all persons who are known to have resided at Sheep Ranch Rancheria at various times in the past 75 years and persons who inherited an interest in the Rancheria***.
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> * * *
>
> ***It is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified. The participation of the greater tribal community is essential to this effort***. . . .

March 26, 2004 Letter, at 1-2 (AR 000499-000500) (emphasis added). Subsequently, the Department pointed to this BIA finding in claiming that the Burley Faction was improperly seeking "to have this Court settle an internal tribal dispute by declaring that Plaintiff's constitution, leader and tribal forum are legitimate, even though they are not supported by the will of the tribal membership – that is not supported by a majority of the 'whole tribal community.'" "Memorandum in Support of Defendants' Motion to Dismiss," *Miwok I* (Aug. 5, 2005), at 2(AR 000824).

The 2011 Decision does not refute the prior BIA decision that there is a "greater tribal community" that was entitled to participate in the organization of the Tribe. Nor does it reverse the prior finding that the BIA was "unaware" of any efforts to involve Yakima Dixie, Melvin Dixie, or offspring of Merle Butler, Tillie Jeff, Lenny Jeff, or other members of the Tribal community. (AR 000500 (2004 BIA Decision)) With such clear and undisputed evidence in the record of a greater "tribal community" much larger than five persons, it was arbitrary and capricious for the Interior Department to conclude that the Tribe consists solely of five members. The Department's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of 5 U.S.C. § 706. *Butte Cnty. v. Hogan*, 613 F.3d 190, 194

(D.C. Cir. 2010); *State Farm*, 463 U.S. at 43. "[A]n agency cannot ignore evidence contradicting its position." *Butte Cnty.*, 613 F.3d at 194. It was equally improper for the Department to ignore the Tribal roster, genealogies and other evidence of Tribal membership submitted to the Department.

B. The *Post Hoc* Argument Of Defendants' Counsel – That The Tribe Is Limited To "Distributees" As If The Tribe Had Been "Terminated" – Cannot Justify The 2011 Decision.

Defendants' brief argues, for the first time, that membership in non-terminated tribes should be determined the same way as membership in tribes that were terminated and later restored to recognition pursuant to the *Hardwick* Settlement – *i.e.*, it should be limited to distributees and their lineal descendants. Def. Br. at 21-25. Defendants offer this argument to explain the Department's finding, in the 2011 Decision, that Tribal membership is limited to Yakima Dixie and the Burleys.

This argument is nowhere in the 2011 Decision, which does not even suggest that a *Hardwick/Alan-Wilson* policy is the basis for its conclusion that Tribal membership is limited to five people. Nor did the AS-IA request that the interested parties address this issue in the briefs submitted to the Department before the 2011 Decision was issued. (*See* AR 002004-002005)

The 2011 Decision states, "At the present date, the citizenship of the CVMT consists solely of Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace," and "the CVMT today operates under a General Council form of government, pursuant to Resolution #[GC]-98-01, which the CVMT passed in 1998, facilitated by representatives of the Bureau of Indian Affairs." (AR 002049-002050) The 2011 Decision recites conclusory statements such as, "the factual record is clear: there are only five citizens of CVMT," but it provides not even a hint that its determination of Tribal membership rests on the application of a *Hardwick/Alan-Wilson* policy to this Tribe. Nor does the 2011 Decision even suggest that this

Tribe should be treated as a terminated tribe. On the contrary, the 2011 Decision states that "the CVMT has been continuously recognized, and its political relationship with the Federal government *has not been terminated*." (AR 002055 (emphasis added)) The 2011 Decision specifically *distinguishes* the *Alan-Wilson* decision because, "[u]nlike CVMT, the Cloverdale Rancheria [involved in *Alan-Wilson*] was . . . terminated under the California Rancheria Act [and] later restored pursuant to the *Tillie Hardwick* litigation and settlement." (AR 002055)

1. The 2011 Decision Cannot Be Sustained Based On *Post Hoc* Arguments Of Agency Counsel.

In considering the lawfulness of the 2011 Decision, the "reviewing court must judge the propriety of [agency] action solely by the grounds invoked by the agency, and may not consider counsel's post hoc explanations." *John L. Doyne Hosp. v. Johnson*, 603 F. Supp. 2d 172, 182 (D.D.C. 2009) (citing *Clark Cnty., Nev. v. FAA*, 522 F.3d 437 (D.C. Cir. 2008) (internal quotation marks omitted). "[C]ounsel's *'post hoc* rationalizations' cannot substitute for an agency's failure to articulate a valid rationale in the first instance." *Taylor Energy Co. LLC v. U.S. Dep't of the Interior*, 734 F. Supp. 2d 112, 119 (D.D.C. 2010). "Such agency litigating positions are not entitled to deference because they do not necessarily reflect the views of the agency, but rather may have been developed hastily, without adequate consideration of opposing positions pursuant to the agency's normal deliberative process." *Id.* (citation and internal quotation marks omitted); *see also State Farm., supra,* 463 U.S. at 50 ("the courts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *Manin v. NTSB,* 627 F.3d 1239, 1243 (D.C. Cir. 2011) ("the law does not allow us to affirm an agency decision on a ground other than that relied upon by the agency"); *Republic Airline Inc. v. DOT*, 669 F.3d 296, 312 (D.C. Cir. 2012) (DOT could not justify decision based on new reason proffered for first time by agency counsel).

In *Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984), the court held that the Interstate Commerce Commission ("ICC"), in exempting railroad boxcar traffic from regulation of certain freight rates, failed to adequately explain its assertion that large long-haul carriers would not close off efficient routes of small short-haul carriers. *Id.* at 1047. In its brief to the court, the ICC sought to explain that "in such a monopolization situation where 'a carrier seeks to foreclose a smaller carrier from markets it [the small carrier] could serve as part of an efficient route, antitrust remedies are available.'" *Id*. (citation omitted). In rejecting this argument, the court stated:

> While the ICC itself mentioned antitrust laws as a possible remedy for predatory pricing by large railroads against small railroads generally, . . . it never mentioned antitrust remedies either as a deterrent to potential monopolizing stemming from the relationship created by co-participation in joint rates or through routes or as an after-the-fact remedy that would correct such abuses by large carriers . . . ***We therefore must reject the argument in the government's brief as a post hoc rationalization of counsel and not the Commission's reason***.

Id. (emphasis added). Similar to *Brae Corp.*, Defendants are improperly trying to defend the 2011 Decision based on a rationale not present in the Decision. *See also W. Res., Inc. v. FERC*, 9 F.3d 1568, 1575 (D.C. Cir. 1993) ("Obviously, a new gambit undertaken by the Commission in its brief at this stage cannot be used to rationalize the Commission's action below").

2. There Is No Merit To Defendants' Attempt To Apply A Policy For Determining Membership Of Terminated Tribes To A Tribe That Was Never Terminated.

Even if the Court were to consider the *post hoc* argument of agency counsel that the *Hardwick/Alan-Wilson* policy for terminated tribes applies to non-terminated tribes, it should not accept the argument. Regardless of whether the Department actually has, or could lawfully have, such a policy,[2] it would not apply to this Tribe. First, the 2011 Decision explicitly recognizes

[2]*See Williams v. Gover*, 490 F.3d 785, 790 (9th Cir. 2007). In *Williams*, the Ninth Circuit rejected the plaintiffs' argument that the BIA had "a policy amounting to a 'rule' that tribal

that this Tribe was never terminated: "[T]he CVMT has been continuously recognized, and its political relationship with the Federal government has not been terminated." (AR 002055) Thus, any policy dealing with terminated tribes would, by its own terms, have no relevance here.

Second, the *Alan-Wilson* appeal, and the alleged Department policy referenced in that decision, dealt *only* with tribes that were parties to the *Hardwick* Settlement. The BIA Area Director's decision under appeal in that case stated:

> "**We *base our determination on the order issued in [Hardwick].*** The court case restored the Cloverdale Rancheria to Federal status and stipulated that only distributees, dependent members, and their descendants would have the right to organize. In order to determine those persons, the original distribution list for termination is relied upon." 30 IBIA at 249-250 (emphasis added; brackets in original). The Board's analysis in *Alan-Wilson* focused exclusively on whether the Department had correctly and consistently "interpreted [the *Hardwick*] judgment as limiting the right to reorganize the tribal government of a rancheria ***restored under Hardwick*** to that rancheria's distributees."

30 IBIA at 254 (emphasis added).

Because the parties to *Alan-Wilson* had presented no evidence whether the Department had a consistent practice regarding the membership and organization of the *Hardwick* rancherias, the Interior Board of Indian Appeals ("Board") directed the Department, on remand, to research whether the Department had a consistent practice "concerning the reorganization of other *Hardwick* Rancherias . . . ." *Alan-Wilson*, 30 IBIA at 262. The resulting "Zunie Report," which the Department references in its brief (Def. Br. at 24), dealt *only* with the Department's practice regarding the reorganization of the 17 rancherias that were parties to the *Hardwick* Settlement. *See Alan-Wilson II.*, 33 IBIA at 55 (quoting Area Director's brief on remand, which reported the results of an "investigation to determine whether the Bureau had been consistent in its

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membership in restored rancherias ought to consist of the original distributees and their lineal descendants." The court explained that, "given a tribe's sovereign authority to define its own membership, it is unclear how the BIA *could* have any such policy."

interpretation of *Hardwick* ***when organizing the seventeen Tribes subject to that decision***") (emphasis added).

Unlike the Cloverdale Rancheria that was involved in the *Alan-Wilson* decisions, this Tribe was never terminated and was never a party to *Hardwick*. Defendants' interpretation of the *Hardwick* Settlement, and its practices concerning terminated tribes that were parties to that Settlement, have no relevance here.

Defendants argue that membership in this Tribe can nonetheless be defined by the Sheep Ranch distribution plan because "distribution plans prepared for Rancherias to be terminated . . . reflected actual membership in unorganized tribes, *i.e.*, the Indians residing on a reservation." Def. Br. at 24 (citing 25 U.S.C. § 479). This claim is simply wrong. Under the regulations in effect when the Sheep Ranch distribution plan was prepared, distribution plans for *organized* tribes were based on tribal membership criteria set forth in the tribe's organic documents. 25 C.F.R. § 242.3(b) (1965) (AR 000035). But distribution plans for *unorganized* tribes (which had no organic documents defining membership criteria, *see* 25 C.F.R. § 242.2(i),(j) (1965)) were based on those individuals who held formal or informal allotments or assignments to use the rancheria property, *not* on the membership of the tribe. 25 C.F.R. § 242.3(a) (1965) (AR 000035). Thus, distribution plans could not define membership for unorganized tribes such as this one.

Moreover, Congress did not demonstrate any intent for distribution plans to define the membership of unorganized tribes or to limit membership to current residents on the rancheria property. On the contrary, the legislative history shows that Congress disclaimed any intent to define the membership of rancherias. A 1958 Senate Report discussing the California Rancheria Act states, "Attention is directed to the fact that no provision is made for preparing a membership

roll for each rancheria or reservation. The preparation of such rolls would be impracticable because the groups are not well defined." Sen. Report 1874, p. 3 (July 22, 1958). *See also* House Report 1129 (Aug. 13, 1957) (same). The Senate Report also shows that it was common for members of California rancherias to come and go as residents of the rancheria properties, Sen. Report 1874, pp. 13-50, and this did not prevent non-residents from being considered members of those tribes, *id.* at 39.

Case law, Solicitor's Opinions, and even the Department's own regulations show that membership in rancheria tribes has never been limited to residents on the rancheria property unless a tribe chose to impose that limit. "In 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). The Dry Creek Rancheria of Pomo Indians of Northern California, for example, had approximately 225 members in 1996, of whom only 25 lived on the reservation. *In Re Bridget R.*, 41 Cal.App.4th 1483, 1492 (1996) (superseded by statute on other grounds). 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). They make no mention of residence. The Department's attempt to establish a new policy for the membership of rancheria tribes, articulated for the first time in a litigation brief, is unsupported by any authority. Not only that, it is clearly prohibited by Congress's enactment of IRA subsections 476(f) and (g), as discussed in the text below.[3]

[3] Even if Defendants' theory of rancheria membership were accurate, it would prove too much. None of the Burleys has ever resided on the Sheep Ranch Rancheria (*see* AR 000304-000370 (Burley deposition discussing her places of residence)), yet the 2011 Decision finds that these four individuals are the only members of the Tribe aside from Yakima Dixie (who does live on the Rancheria).

Given that this Tribe was never terminated, it enjoys the same rights and sovereign powers as every other federally recognized Tribe, including the fundamental right to define its own membership. *E.g.*, *Montana v. U.S.*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership") (citing *U.S. v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978)); *Santa Clara Pueblo*, *supra*, 436 U.S. at 72 n. 32 (*citing Roff v. Burney*, 168 U.S. 218 (1897), *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)); *Williams v. Gover*, *supra*, 490 F.3d at 790; *Adams v. Morton*, 581 F.2d 1314, 1320 (9th Cir. 1978) ("unless limited by treaty or statute, a Tribe has the power to determine tribal membership") (citations omitted). Although Defendant's brief acknowledges that a Tribe has the "sole responsibility" to "define the contours" of membership, Def. Br. at 27, their actions deprive the Tribe of that right, based on the assertion that it is a "very small, uniquely situated tribe." (AR 002053) In fact, the Tribe is not small, since it has more than 240 adult members, and it is not uniquely situated. It is no different from any other Tribe that, at all times since its initial federal recognition, has maintained its sovereign status.

Application of the *Hardwick/Alan-Wilson* policy to this Tribe is the equivalent of allowing the Department to terminate the Tribe by administrative action, because it would impose membership limitations that apply only to terminated tribes and would deny the Tribe's sovereignty. The Department has no such power, and its actions violate multiple laws enacted by Congress to govern the Department's interactions with Tribal governments. As the Supreme Court has stated, "Present federal policy appears to be returning to a focus upon strengthening tribal self-government, and . . . courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship'."

Bryan v. Itasca Cnty., 426 U.S. 373, 389 n. 14 (1976) (holding that a federal law, granting state courts civil jurisdiction over criminal acts committed on reservations, did not confer power to undermine tribal governments by taxing reservation Indians) (brackets in original) (quoting *Santa Rosa Band of Indians v. Kings Cnty.,* 532 F.2d 655, 663 (9th Cir. 1975)).

3. The Department's Attempt to Limit This Tribe's Membership Violates IRA § 476(f) and (g).

The disparate treatment of the Tribe based on contrived assertions of size and uniqueness, or its status as a rancheria tribe, violates subsections 476(f) and (g) of the IRA, which Congress added through the Technical Corrections Act of 1994, Pub. L. No. 103-263, 108 Stat. 709. Those statutory provisions explicitly prohibit the Department from treating this Tribe differently from any other federally recognized tribe.

Subsection 476(f) provides:

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. 476(f). Subsection 476(g) states:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on the date of enactment of this Act [enacted May 31, 1994] and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. 476(g).

The addition of 476(f) and (g) was intended to end the Department's practice of distinguishing between what it called "historic" tribes and "created" tribes. The term "created" tribes referred to tribes for which reservations had been established in locations other than their

traditional lands. *See* 140 Cong. Rec. S6417, p. 7 (May 19, 1994) (colloquy between Sen. McCain and Sen. Inouye, co-sponsors of S.1654, enacted as Pub.L. 103-263). It would include rancherias such as this Tribe. (AR 000022 (1939 Solicitor's Opinion finding that California rancherias are "small reservations"))

The Department had a self-professed "policy" of imposing membership limitations on "created" tribes, and it threatened tribes that challenged that policy with loss of federal recognition and services. *See Rosales v. Sacramento Area Dir., Bureau of Indian Affairs, supra*, 32 IBIA 158, 164-165 (1998).[4] Congressman Richardson, the sponsor of a House bill similar to the version that became Public Law 103-263, strongly criticized the Department's policy:

> [T]here is great danger in a policy that recognizes the authority of the Department of the Interior and the Bureau of Indian Affairs to limit the inherent sovereign authority of Indian tribes by the Solicitor's pen. If carried to an extreme, the Solicitor could by fiat significantly erode tribal sovereignty through a series of opinions and carry out his or her own termination policy. . . . ***We must not revisit the darkest period of Federal Indian policy by allowing the termination of tribal sovereign authority through the implementation of the Bureau of Indian Affairs policy distinction between historic and created Indian tribes*.**

140 Cong. Rec. E663 (Apr. 14, 1994) (emphasis added).

Congress therefore enacted IRA 476(f) and (g) to end the Department's distinction between historic and created tribes and put all federally recognized tribes on an "equal footing." *Rosales*, *supra*, 32 IBIA at 165. *See also* 140 Cong. Rec. S6417, p. 8 (Sen. Inouye and Sen. McCain, stating that Act was intended to prohibit all such distinctions between tribes, regardless of the basis). According to a memorandum that the AS-IA wrote to BIA officials in 1994, the legislation established that tribes "all have the same sovereignty and political relationship with

[4]In *Rosales*, the Department sought to impose minimum blood quantum requirements for membership in the Jamul Indian Village. The Board, relying on IRA 476(f), held that the Department's efforts to limit the tribe's membership were unlawful. 32 IBIA 158, 164-165. The application of the *Hardwick/Alan-Wilson* criteria to this Tribe is equally unlawful.

the United States regardless of the means by which they were recognized or the method of their governmental organization." *Rosales*, 32 IBIA at 165.

The membership limitations that the Department seeks to impose on this Tribe represent exactly the type of arbitrary discrimination by an overreaching Department that Congress intended to end by enacting subsections 476(f) and (g). Congress has made clear that the Department may not terminate Tribal sovereignty by imposing membership restrictions that erode the Tribe's inherent powers. As the Board explained in *Rosales*:

> [U]nless at some time Congress acts to 'derecognize' the [Tribe], the [Tribe] is a Federally recognized Indian tribe which, under new subsections (f) and (g) of 25 U.S.C. § 476, has all of the same rights and authorities as every other recognized Indian tribe, including the right to define its own membership. With the [Tribe's] status thus clarified, its members may have an opportunity which has not previously existed to develop membership criteria tailored to their particular situation.

Id. at 166.

Because Defendants' attempt to limit this Tribe's membership amounts to administrative termination of the Tribe's sovereignty, it also violates the Federally Recognized Indian Tribe List Act of 1994. That Act states unequivocally, "a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress." Pub.L. No. 103-454, § 103, 25 U.S.C. § 479a note. In enacting the Tribe List Act, "Congress made it emphatically clear that the Department lacks authority to withdraw recognition of an Indian tribe, and that only Congress has such authority." *Rosales*, 32 IBIA at 166 (citing H.R. Rep. No. 781, 103rd Cong., 2nd Sess. 2-4, reprinted in 1994 U.S.C.C.A.N. 3768-3770). *See also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[8][a] (2005 ed.) (citing to 25 U.S.C. §§ 479a, 479a-1).

Despite these clear statutory limits, Defendants argue that it lies within the AS-IA's "expansive authority" over Indian affairs to limit Tribal membership to distributees and their descendants based on the *Hardwick/Alan-Wilson* policy. But whatever the scope of the AS-IA's

authority, it clearly does not include the power to define a Tribe's membership, absent some specific Congressional authorization that is absent here. *U.S. v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978) ("unless limited by treaty or statute, a tribe has the power to determine tribal membership"). *C.f. Groundhog v. Keeler*, 442 F.2d 674, 679 (10th Cir. 1971) (discussing enrollment criteria imposed by Congress on the Five Civilized Tribes). *See also Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 497 (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, C.J., concurring) (citation omitted). Therefore, the determination that the Tribe's membership is limited to five people is arbitrary, capricious and unlawful, 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 Comm'n*, 581 F.3d 1, 21 (D.C. Cir. 2009) (FEC regulations exceeded agency's statutory authority and thus violated the APA).

C. The Department's Recognition Of The Burley Government, Based On The 1998 Resolution, Was Unlawful.

1. The IRA's Requirement Of Majoritarian Rule Applies To The 1998 Resolution.

The Department's recognition of a government based on the 1998 Resolution violates the IRA, which applies to any type of Tribal organization, whether it involves the adoption of a constitution under the election procedures in IRA § 476(a), or the adoption of other governing documents under different procedures, as allowed by IRA § 476(h). The Department has a duty to determine for itself whether a purported tribal government is valid, and it may not willfully ignore the Burleys' exclusion of the larger Tribal community in the guise of respecting tribal sovereignty. The 2011 Decision also violates the Department's duty not to recognize a tribal action tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* ("ICRA").

In an effort to cloak the 2011 Decision in *Chevron* deference, the Department attempts to recast the issue in this case as whether the IRA obligates the Department to "compel organization in the absence of Tribal consent." Def. Br. at 18. But the Department's 2006 and 2007 decisions challenged in the Burleys' appeal did not seek to "compel organization." They merely proposed to facilitate a meeting of the Tribe's members, at which the Tribe itself could choose whether and how to organize itself. (AR 001260-001262 (2006 Decision), AR 001494-001498 (2007 Decision)) Nor have Plaintiffs asked the Department to compel any action by the Tribe. In fact, Plaintiffs argued in their briefing to the AS-IA that there was no need for the Department to continue its efforts to assist the Tribe with organization, because the Tribe itself has acted to identify its members and is working to establish a formal government through a process of its own choosing. (AR 002138)

Thus, the issue is not whether the IRA allows, or requires, the Department to "compel" Tribal organization. The issue is whether the Department acted arbitrarily, capriciously and unlawfully by deciding to recognize a Tribal government based on the 1998 Resolution. *Chevron* deference does not apply to that decision. *Chevron* applies only "[w]hen a court reviews an agency's *construction of the statute* which it administers." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). The recognition of the Burley government does not depend on any statutory interpretation offered in the 2011 Decision. It depends entirely on the Department's unlawful determination that the Tribe's membership is limited to five people—or, as the 2011 Decision puts it, on 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))

The Department's membership determination, in turn, is completely unsupported. The 2011 Decision offers no interpretation of *any* authority, let alone any statute, to support its conclusion that the Tribe is limited to five members. Even Defendants' *post hoc* rationalization, offered for the first time in their brief, does not rely on statutory interpretation. Def. Br. at 21-25. It relies on *Hardwick* and the *Alan-Wilson* cases to justify limiting Tribal membership to distributees and their descendants.

Because the Department has not even offered an interpretation of a federal statute for this Court to review, the *Chevron* doctrine does not apply here. The Court should not grant deference to the 2011 Decision based on the Department's mischaracterization of the issues. Nor does the Department's mere invocation of the term *"Chevron"* shield the 2011 Decision from judicial scrutiny.

For tribes that have accepted it, "the IRA require[s] that tribal actions reflect the will of a majority of the tribal community—whether or not they choose to organize under the IRA procedures." *Miwok I*, 424 F. Supp. 2d at 202. This is true whether a tribe adopts a constitution under the Secretarial election procedures in IRA § 476(a), or adopts other governing documents under different procedures, as permitted by § 476(h). *Id.* In the latter case, "subsection 476(h)'s reference to documents adopted by a tribe must be understood as references to documents that have been 'ratified by a majority vote of the adult members,' as required by subsection 476(a)." *Id.*

Defendants do not dispute this construction of the IRA which the Department offered, and the courts accepted, in *Miwok I* and *II*. Nor does the Department dispute that this Tribe accepted the IRA in 1935. (AR 000021) But the Department attempts to avoid the application of the IRA by drawing a distinction between "organization" under IRA § 476(a) or (h), and the

formation of a government under the 1998 Resolution. No such distinction exists. The 1998 Resolution plainly falls within the catch-all category of other "governing documents" covered by § 476(h). *See* 25 U.S.C. § 476(h). Therefore, the fundamental requirements of majoritarian rule, including "notice, a defined process, and minimum levels of participation," apply to the 1998 Resolution. *Miwok I*, 424 F.Supp.2d at 203. The Department cannot downgrade the minimum requirements for a Tribal government worthy of federal recognition merely by characterizing the 1998 Resolution as something other than "organization."

Even assuming, for the sake of argument, that the IRA did not apply to the 1998 Resolution, the Department would still have "the authority and responsibility to ensure that the [Tribe's] representatives, with whom it must conduct government-to-government relations, are the valid representatives of the [Tribe] as a whole." *Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d 122, 140 (D.D.C. 2002). In *Seminole Nation*, the court upheld the Department's refusal to recognize a Tribal government based on elections from which certain groups of members had been excluded. The Nation was organized pursuant to its "inherent sovereignty" rather than under the IRA[5] or the Oklahoma Welfare Act. *Id.* at 125 n. 1. The court still held that the Department's "duty to protect [not only] the rights of the tribe, but also the rights of individual members," required it to reject the tribal election results. *Id.* at 146-147. So too, the Department has a duty to the members of this Tribe to reject any Tribal government based on a process from which members were excluded. *Miwok II*, 515 F.3d at 1267-1268.

2. The 1998 Resolution Was Adopted Without The Participation Or Consent Of A Majority Of The Tribe's Members.

[5] The Seminole Nation, like certain other tribes, was excluded by Congress from the coverage of the IRA. *See* 25 U.S.C. 473.

Recognition of a Tribal government based on the 1998 Resolution is unlawful because only two people participated in the adoption of the Resolution. This falls far short of a majority of the Tribe's members, as required by the IRA. *See Miwok I*, 424 F.Supp.2d at 202. Each of the 242 adult lineal descendants listed on the Tribe's current roster (AR 002265-002275) is a member of the Tribe, not a "potential member" as the 2011 Decision claims. Based on the Tribal roster in the record, at least 83 of the current members were over the age of 18 in 1998, when the 1998 Resolution was purportedly adopted, but none of them other than Yakima Dixie had an opportunity to participate. Affidavit of Plaintiff Velma WhiteBear, Exhibit 2 to Plaintiffs' Motion to Supplement the Administrative Record (Doc. # 51). As a result, the 1998 Resolution fails to meet the requirements of 476(h), including notice, a defined process, and minimum levels of participation. *Miwok I*, 424 F.Supp.2d at 203.

Plaintiffs' brief to the AS-IA noted that hundreds of Tribal members were excluded from the process of adopting the 1998 Resolution. (AR 002148-002149) This is a point the AS-IA could easily have validated by consulting records in the Department's possession, including the genealogies and other material submitted to the Department by the Tribe's lineal descendants in response to the BIA's 2007 Public Notice, which were noted in Plaintiffs' pre-Decision briefing. (AR 002140) Indeed, Defendants' brief admits that the BIA has reviewed the genealogies and identified who it believes are the lineal descendants. (Def. Br. at 27) But the Department states that the AS-IA chose to ignore this highly relevant information in making his 2011 Decision. His refusal to consider relevant information violated the APA. *Butte Cnty., supra*, 613 F.3d at 194; *see also Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 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).

Even under the Department's theory of Tribal membership, which would limit participation to distributees and their descendants (plus the Burleys), the 1998 Resolution was not a valid governing document. It was signed by only two people (AR 000000179), which is not a majority even of the four people whom the Department would have recognized as eligible to participate. Those four people included Yakima Dixie, Melvin Dixie (an heir to Mabel Hodge Dixie) and Silvia Burley and Rashel Reznor (whom the Department claims were "enrolled" by Yakima Dixie, acting alone).[6] Two is not a majority of four. *See* Webster's Third New International Dictionary (1981) (defining "majority" as "a number *greater than half* of a total") (emphasis added). The Department's brief does not even attempt to explain how two people, who do not constitute a majority of the Tribe even by the Department's own reasoning, could establish a valid Tribal government.[7]

Defendants also argue that Yakima Dixie took actions that indicated his acceptance of the 1998 Resolution and that those actions somehow excuse the invalidity of the document. We disagree. The 1998 Resolution was void *ab initio*. *See Ransom v. Babbitt*, 69 F.Supp.2d 141, 151-152 (D.D.C. 1999) (tribal constitution, though recognized by the Department, never established a valid tribal government because it was not ratified by a majority of the tribe's members). No actions by Mr. Dixie could validate it.

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[6] Ms. Burley's other daughter, Anjelica Paulk, and her granddaughter, Tristian Wallace, were not 18 years old in 1998. (AR 000112, 000114)

[7] The 2011 Decision accepting the 1998 Resolution is a new decision that must have a valid basis. The 2011 Decision does not address numerous issues Plaintiffs raised, including Melvin Dixie's lack of participation, Any BIA statement that Melvin Dixie could be ignored as a member because his whereabouts were unknown was clearly an arbitrary agency action. The 2011 Decision similarly treats Melvin Dixie as if he did not exist, and its failure to consider his right to participate violates the APA.

3. Deference to Burley's General Council Is Not Appropriate When The Department Is Making the Initial Decision To Recognize A Tribal Government.

The Department claims that it has an obligation to recognize a Tribal government "if possible," Def. Br. at 27, and that it must defer to decisions of the Tribe's governing body regarding the Tribe's membership and form of government. (AR 002051) But this is not a dispute over tribal governance or membership within an already organized tribe that has an established governing body. Prior to the 2011 Decision, the Department did not recognize any Tribal government. As the Board held in the *Alan-Wilson* case, "This is not an ordinary tribal government dispute, arising from an internal dispute in an already existing tribal entity. In such cases, [the Department] must exercise caution to avoid infringing upon tribal sovereignty. [citation omitted] Rather, this case concerns, in essence, the creation of a tribal entity from a previously unorganized group. ***In such a case, [the Department has] a responsibility to ensure that the initial tribal government is organized by individuals who properly have a right to do so***." *Alan-Wilson*, *supra,* 30 IBIA at 252 (emphasis added).

In this situation, the Department cannot willfully ignore the fact that a tribal government lacks the support of its members, in order to install a government that the Department prefers, on the pretext of respecting tribal sovereignty. *Ransom v. Babbitt*, 69 F.Supp.2d 141 (D.D.C. 1999). *Ransom* involved the Department's refusal to recognize the elected leaders of the Saint Regis Tribe. *Id.* at 144. The BIA instead recognized a tribal government based on a tribal constitution that was not approved by the tribe's members, relying in part on two erroneous decisions by an illegitimate tribal forum. *Id.* at 143, 145. The Board upheld the Department's decision against an appeal, but this Court disagreed. The Court held that the Board acted arbitrarily and capriciously by "refusing to review for themselves 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, in reviewing the BIA's actions:

> [The Board] merely repeated the rhetoric of tribal exhaustion and federal noninterference 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.* at 153
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> 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 "deferring" to a government based on the 1998 Resolution, when the overwhelming evidence in the record shows that a majority of the Tribe's members clearly did not approve that document. *See also Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d at 138-140 (D.D.C. 2002) (Department upheld its trust obligation by refusing to recognize tribal elections from which members were excluded); *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) Cmty. v. Babbitt*, 107 F.3d 667, 669-670 (8th Cir. 1997) (Secretary had authority to disapprove constitutional amendments based on doubts about the "fundamental integrity and fairness" of tribal elections conducted under IRA § 476(a)).

The Department's obligation *not* to defer to illegitimate Tribal actions is reinforced by the ICRA. "The Board has 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 Indian Civil Rights Act." *Alan-Wilson*, *supra*, 30 IBIA at 260 (citing *Wadena v. Acting Minneapolis Area Dir.*, *Bureau of Indian Affairs*, 30 IBIA 130, 148 (1996); *John v. Acting Eastern Area Dir.*, *Bureau of Indian Affairs*, 29 IBIA 275 (1996); *Naylor v. Sacramento Area Director*, 23 IBIA 76 (1992); *Greendeer v. Minneapolis Area Dir.*, *Bureau of Indian Affairs*, 22 IBIA 91 (1992)) (emphasis added). The exclusion of the Tribe's members from citizenship, voting and other rights of membership is a clear violation of constitutional rights guaranteed by Congress under the ICRA. *See* 25 U.S.C. § 1302(8) (no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law").

D. Plaintiffs Have Timely Challenged A Final Agency Action That Was Issued On August 31, 2011.

Plaintiffs' First Amended Complaint challenges an agency decision issued on August 31, 2011. The First Amended Complaint was filed within two months of that decision. (Doc. 32) The Department nonetheless suggests that Plaintiffs' claims are not timely because the 2011 Decision merely reaffirms prior Department decisions recognizing the General Council under the 1998 Resolution and limiting the Tribe's membership to five people. This claim is specious.

Prior to the 2011 Decision, the Department has never purported to limit this Tribe's membership to five people. The *Burleys* consistently tried to limit the Tribe's membership to themselves and their future descendants (and sometimes Yakima Dixie), and the Department consistently *rejected* those attempts. *See Miwok I*, 424 F. Supp. 2d at 203 n. 7 (Burleys were "seeking approval of a tribal constitution that conferred tribal membership only upon them and

their descendants"); 2004 Decision (AR 000499-000500 (rejecting tribal constitution and stating that "[w]e have not seen evidence that such general involvement [of the whole tribal community] was attempted or has occurred with the purported organization of your tribe").

Nor has the Department consistently recognized the General Council under the 1998 Resolution as a valid governing body. The Department briefly dealt with a General Council, and then later a "Tribal Council"[8] consisting of Ms. Burley and her daughters (and excluding Mr. Dixie). Most of the documents that the Department cites as evidence of General Council recognition, *see* Def. Br. at 28-28, actually refer to the Burleys' Tribal Council, not the General Council. (AR 000208-000209 (Dec. 22, 1999); AR 000261 (Oct. 31, 2001); AR 000356 (Nov. 24, 2003))

In addition, none of the "recognition" documents that the Department relies upon even purports to be a "final agency action," and none contains the notice of appeal procedures that the Department's regulations require in order to trigger the running of an appeal period. 25 C.F.R. § 2.7(c). None of those documents provided notice to any member of the Tribe other than Yakima Dixie, including individual Plaintiffs, which is also required to trigger the appeal period. 25 C.F.R. § 2.7(a)-(b). As a result, the time for appeal of those agency "actions"[9] has never run, and they are not final for the Department. 25 C.F.R. § 2.6(a) (no decision still subject to appeal is "final" for the Department); *Charlotte J. Begaye v. Navajo Reg'l Dir., Bureau of Indian*

[8] The 1998 Resolution defines the "General Council" as a governing body consisting of all adult members of the Tribe (AR 000178). In September 1999, Ms. Burley and her daughter Rashel Reznor signed a resolution purporting to replace the General Council with a "Tribal Council" as the governing body of the Tribe. (AR 000199-000200, 000202) Mr. Dixie was initially named as a member of this "Tribal Council" but was soon removed. (AR 000248 (Tribal Council Resolution March 6, 2000, showing only Silvia Burley and Rashel Reznor as Council members))

[9] Plaintiffs do not believe that any of the documents the Department cites were intended as an official action "recognizing" any governing body of the Tribe, and the absence of appeals language supports this conclusion.

Affairs, 41 IBIA 109, 110 (2005) ("If a [BIA] decision does not comply with subsection 2.7(c), the time period for filing an appeal is tolled"); *see also Alonzo S. Gallegos et al. v. Southwest Reg'l Dir., Bureau of Indian Affairs*, 41 IBIA 286, 290 (2005).

In any case, the Department withdrew any recognition of the General Council (or the Burleys' Tribal Council) it had previously granted when it became clear that the Burleys were not acting with the knowledge, participation or consent of the Tribe's members. (AR 000499-000501 (2004 Decision rejecting Burley constitution and stating that the Tribe could not be considered organized until it involved all members in the organization process); AR 000611 (2005 Decision stating that the Department did not recognize any Tribal government)) Later documents referring to a "general council" simply refer to the Department's proposal to convene a meeting of all the Tribe's adult members; they do not purport to recognize a specific governing body established under the 1998 Resolution. (AR 001260-001262 (Nov. 11, 2006); AR 001455 (Feb. 23, 2007))

In short, the Department can point to no prior agency action that makes the determinations found in the 2011 Decision. That is not surprising, because the 2011 Decision itself states that 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) But even if the Department had recognized the General Council with its limited membership prior to 2004, that recognition would have been withdrawn by the Department's 2004 and 2005 Decisions. Indeed, the 2005 Decision stated that Mr. Dixie's challenge to Ms. Burley's recognition as Tribal "Chairman" had been rendered moot by the 2004 Decision, which "made clear that the Federal government did not recognize Ms. Burley as the Tribal Chairman." (AR 000610) The 2005 Decision went on to say that, in light of the 2004 Decision, the

Department "does not recognize any Tribal government" and that "the first step in organizing the Tribe is in identifying putative tribal members." (AR 000610-000611)

Finally, Defendants' claim that "the membership of this small tribe was also confirmed in 1994 by Mr. Dixie himself when he wrote the BIA, requesting assistance with home repairs [and] describ[ing] himself as the 'only tribal member of Sheep Ranch Rancheria," (Def. Br. at 22 n. 13), is entirely specious. The 1994 letter to which Defendants refer ***was written by the BIA*** (AR 001222-001223) (Declaration of BIA Tribal Operations Officer Raymond Fry given in *Miwok I*)), not by Mr. Dixie, it fails to acknowledge that Mr. Dixie had two living brothers, and it provides no basis upon which to justify the BIA's attempt to limit this Tribe's membership.

E. The 2011 Decision Is Precluded By *Miwok I* and *II* And The Department's Prior Representations Before This Court And Other Courts.

The Department should be bound by this Court's decision in *Miwok I* that the Burleys had not established a valid Tribal government under governing documents then existing. It also is bound by its prior representations that the Burley government was not valid because it was established "without the participation of the vast majority of the potential members of the Tribe." (AR 002097 (Department brief in *Miwok II*))

1. Issue Preclusion Is Appropriate Because the Tribe Was A Named Party In *Miwok I* And *II* And The Issues Presented Here Are Identical.

The Department argues that issue preclusion cannot apply in this case because Plaintiffs were not parties to *Miwok I* and *II*, and nonmutual offensive collateral estoppel does not apply against the United States. The Department overlooks the fact that the Tribe was named as a party in *Miwok I* and *II*, and is a named Plaintiff here.[10] Plaintiffs do not believe that Ms. Burley

[10] Ms. Burley filed *Miwok I* in the name of the Tribe. *Miwok II*, 515 F.3d at 1263. Yakima Dixie participated as a proposed intervenor in the *Miwok I* proceedings. *Miwok I*, 424 F.Supp.2d at 198 n. 2 (stating that Mr. Dixie's motion to intervene was mooted by the court's decision dismissing

had the authority to bring suit in the Tribe's name in *Miwok I* and *II*, and the Burleys contend that Plaintiffs lack authority to represent the Tribe in this litigation. But the fact remains that both the *Miwok* litigation and this case were attempts to assert the Tribe's rights, and both involve the same narrow, fact-bound issue: whether the Burleys established a valid Tribal government under documents adopted prior to 2004, despite the failure to involve the whole Tribal community. *See Miwok I*, 424 F. Supp. 2d at 202; *Miwok II*, 515 F.3d at 1267. As a result, this case does not implicate the same concerns that led the Supreme Court to deny the application of nonmutual collateral estoppel in *United States v. Mendoza*, 464 U.S. 154 (1984), upon which the Department relies.

Mendoza held that "the Court of Appeals was wrong in applying nonmutual collateral estoppel against the government *in this case*," and that nonmutual offensive collateral estoppel "does not apply against the government in such a way as to preclude relitigation of issues *such as those involved in this case.*" *Id.* at 164, 162 (emphasis added). Thus, *Mendoza* necessarily left open the possibility that nonmutual collateral estoppel could apply against the government in a different case involving a different set of issues. Indeed, at least once court since *Mendoza* has applied nonmutual offensive collateral estoppel against the United States. *See Disimone v. Browner*, 121 F.3d 1262 (1997).

Issue preclusion is appropriate in this case because it does not present issues "such as those involved in [*Mendoza*]" and it does not implicate any of the policy concerns that were central to the holding in *Mendoza*. In *Mendoza*, a Filipino national brought a constitutional challenge to certain U.S. naturalization procedures, alleging that they violated due process. He asserted issue preclusion based on an earlier case deciding the same constitutional issue. The

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Burley's claims). He participated in *Miwok II* as *amicus curiae*, 515 F.3d at 1263. Plaintiffs have filed this suit in the name of the Tribe. (FAC, Doc. #32)

Supreme Court denied issue preclusion for three main reasons: (1) government litigation often involves "legal questions of substantial public importance," and allowing preclusion against the government "would substantially thwart the development of *important questions of law* by freezing the first final decision rendered on a particular legal issue;" (2) allowing preclusion would prevent the government from making policy changes on *important legal issues*; and (3) allowing preclusion would force the government "to appeal every adverse decision in order to avoid foreclosing further review." *Mendoza*, 464 U.S. at 160, 161 (emphasis added).

None of the concerns raised in *Mendoza* is present here. *Mendoza* involved a constitutional question that potentially affected many individuals seeking naturalization and was of substantial public importance. In contrast to *Mendoza*, this case involves the narrow, fact-specific question of whether the Burleys established a valid Tribal government under the 1998 Resolution despite failing to involve the Tribe's members. This is simply not a legal question of substantial public importance, like the one addressed in *Mendoza*, because it will not have broad applicability to other parties outside the Tribe. The only broad principle of law with general applicability that is implicated by this case is that the IRA requires a tribal government to actually represent the will of a majority of its members. *See Miwok I*, 424 F.Supp.2d at 202. However, the Department does not question that interpretation of the IRA in this litigation; instead, it relies on a bogus reclassification of the Tribe's members as "potential members" with no rights. Therefore, applying preclusion will not freeze in place the Court's prior interpretation of the IRA.

In addition, because *Mendoza* implicated constitutional issues with broad application, the government had a strong interest in maintaining its flexibility to reinterpret the applicable legal principles based on changes in public policy. Here, Plaintiffs seek preclusion of a narrow issue

that is closely tied to the particular facts and parties involved, and allowing preclusion will not threaten the government's interest in maintaining a flexible interpretation of the law that can adapt to changes in public policy. Moreover, the 2011 Decision claims that it reflects a "different policy direction" (AR 002050) from previous Department decisions regarding this Tribe, but neither limiting the membership of the Tribe nor denying its members an opportunity to participate in Tribal governance is a "policy" that the Department is authorized to adopt without Congressional action.

Nor will applying preclusion on this fact-specific issue force the government to appeal every decision in order to foreclose further review of principles that might apply to other litigants. Plaintiffs only seek to hold the Department to this Court's prior determination of issues pertaining to *this Tribe*; they do not seek to take advantage of a ruling involving another tribe. Moreover, further review of this issue did occur, when the D.C. Circuit considered *Miwok II*. For all these reasons, *Mendoza* should not allow the Department to relitigate the narrow issue of whether the Burleys established a valid Tribal government under documents adopted prior to 2004 by only a tiny faction of the Tribe's membership.

The fact that the United States litigated this position and *prevailed* in *Miwok I* and *II* also does not mean that issue preclusion cannot apply. The cases that the Department cites for that principle merely recite one formulation of the issue preclusion rule that applies in certain circumstances. *See Milton S. Kronheim & Co., Inc. v. Dist. of Columbia*, 91 F.3d 193, 197 (D.C. Cir. 1996) (nonmutual offensive collateral estoppel bars defendants "from relitigating identical issues that the defendants litigated and lost against another plaintiff") (citation omitted). But the actual requirements for issue preclusion do not depend on whether a party won or lost in the previous litigation; all that is required is that (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 America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992); *see also Jack Faucett Assocs., Inc. v. AT&T Co.,* 744 F.2d 118, 124 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1196 (1985) (citation omitted).

Furthermore, issue preclusion *does* apply to agency adjudication of issues previously decided by a federal court, despite the Department's protests. *See*, *e.g.*, *Town of Deerfield, NY v. F.C.C.*, 992 F.2d 420, 424-428 (2d Cir. 1993) (holding that a federal court decision precluded the FCC's administrative finding that an FCC regulation preempted local law); *Puerto Rico Maritime Shipping Auth. v. Fed. Maritime Comm'n*, 75 F.3d 63, 64-66 (1st Cir. 1996) (Federal Marine Commission could not reverse determination made by federal court); *Spawr Optical Research, Inc. v. Baldrige*, 649 F. Supp. 1366, 1369 (D.D.C. 1986) (Issue determined in judicial proceeding "accorded preclusive effect at a later administrative proceeding").

Nat'l Cable & Telecomms. Assn. v. FCC, which the Department cites for the proposition that it is free to "revisit prior determinations" (Def. Br. at 33), does not address issue preclusion at all. 567 F.3d 659, 668 (D.C. Cir. 2009). That case involved, among other claims, an APA challenge to a Federal Communication Commission order that prohibited cable companies from enforcing or executing exclusivity clauses in certain contracts, after a previous FCC order had found no basis to ban such clauses. *Id.* at 662. The court found that the FCC had articulated a reasonable basis for the change, which was sufficient under the APA. *Id.* at 669. The Department's reliance on *National Cable* reveals that it has confused the question whether an agency may adopt new policies that revise its own prior positions, with the question whether an agency can be precluded from relitigating a *specific issue* with respect to a *specific party* that a

court of competent jurisdiction has decided in an earlier case. Only the second question is relevant to the subject of issue preclusion.

2. Judicial Estoppel Applies Because The 2011 Decision Is Clearly Inconsistent With The Department's Prior Position And Is Not Based On A Change in Public Policy.

Defendants claim that recognition of the Burley government under the 1998 Resolution is not inconsistent with the Department's prior arguments in *Miwok I* and *II*, where it argued that "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) According to Defendants, the Department's current position "does not deviate from those prior arguments" because the tribal community is now limited to five individuals, Def. Br. Brief at 32, as opposed to the 250 people whom the Department estimated in 2004, *Miwok I*, 424 F.Supp.2d at 203 n. 7.

This is not the kind of "change in facts essential to the prior judgment" that the Supreme Court recognized as a bar to judicial estoppel in *New Hampshire v. Maine*, 532 U.S. 742, 755-756 (2001). *See* Def. Br. Brief at 31. The Tribe's membership has not shrunk from 250 to five since this Court decided *Miwok I*. Rather, "What has changed between [2005] and today is [the Department's] interpretation of the historical evidence…" *New Hampshire*, 532 U.S. at 756 (holding that the "Middle of the Piscataqua River" had not changed from the middle of the river channel to the low water mark on the Maine shore; only New Hampshire's litigation position had changed). Nor has the Department identified any "change in public policy" that would justify the Department's change in position, other than the alleged "policy" regarding membership of *this Tribe* that appeared for the first time in the Department's brief. Therefore, judicial estoppel bars the Department from reversing its position and recognizing the Burleys' unrepresentative government.

F. The 2011 Decision Rests on the Invalid 1998 "Adoption" Of The Burleys Into The Tribe.

The AS-IA's membership determination and recognition of the Burley government depends entirely on his conclusion that Yakima Dixie validly "adopted" the Burleys into the Tribe in 1998. Def. Br. at 22 ("Mr. Dixie had unconditionally adopted Ms. Burley, her two daughters, and her granddaughter"); AR 002051 (2011 Decision stating that "Mr. Dixie 'signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolling Burley's two daughters and her granddaughter'"). The administrative record contains no support for this conclusion. The Department itself has recognized that the documents "did not provide the criteria [Mr. Dixie] used to determine [the Burleys'] eligibility to be enrolled into the Tribe; what documentation that [the Burleys] provided to substantiate [their] eligibility to be enrolled and [Mr. Dixie's] authority to initiate this enrollment action." (AR 001496 (April 2, 2007 Decision of BIA Regional Director rejecting Ms. Burley's administrative appeal of the BIA's proposal to convene a meeting of the Tribe's members); AR 000110-000114 (Burley enrollment documents))

As Plaintiffs pointed out in their Motion for Summary Judgment, Mr. Dixie lacked the authority to admit the Burleys into the Tribe without the consent of the Tribe's other members, including Melvin Dixie. (Doc. # 49, p. 6) Moreover, the purported enrollment occurred during a difficult period in Mr. Dixie's life when he was frequently incarcerated (AR 000461-000463 (Burley deposition discussing her initial contacts with Mr. Dixie)), and Ms. Burley has admitted that she wrote the enrollment documents (AR 000463-000464 (Burley deposition)), strengthening the inference that she took advantage of Mr. Dixie's situation to gain control of the Tribe. *See also* AR 000110-000114 (enrollment documents). In light of these circumstances, the Department's current claim that the 1998 enrollment document allows the Burleys to become

members of the Tribe, and to exclude the Tribe's rightful members, is arbitrary and unsupported by any factual basis in the record. It simply highlights the Department's abdication of its trust responsibilities to this Tribe and its members.

II. THE 2011 DECISION IS INVALID BECAUSE IT VIOLATES THE DEPARTMENT'S OWN REGULATIONS.

In response to Plaintiffs' claims that the 2011 Decision unlawfully violates Department regulations, the Defendants contend that the AS-IA has "expansive authority" over Indian affairs. That may be true, but it does not allow the AS-IA to ignore the Department's own regulations. An agency action that does not comply with the agency's own rules and procedures is unlawful and violates the APA. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 713 (8th Cir. 1979).

A. The 2011 Decision Unlawfully Overturned Prior Adjudications That Are Final for The Department.

The 2011 Decision effectively overturned the Department's 2004 and 2005 Decisions, which found that the Department did not recognize any government for the Tribe, and could not do so until the full Tribal community was involved in the creation of a representative government. (AR 000499-501 (2004 Decision), AR 000611 (2005 Decision)) Reversal of the 2004 and 2005 Decisions was unlawful because the 2004 and 2005 Decisions were final for the Department and not subject to further appeal within the Department. 25 C.F.R. §§ 2.6(b), 2.9(a) (2004 Decision final 30 days after receipt of notice); 25 C.F.R. § 2.6(c) (2005 Decision final upon issuance). The Department contends that the AS-IA was not bound by those regulations in issuing the 2011 Decision, because he is free to reconsider "the wisdom of [his] policy on a continuing basis." Def. Br. at 16 (citing *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). This claim fails to distinguish between the Department's power to change its interpretation of the law on a prospective basis, and its ability to overturn prior adjudications affecting the rights of specific parties.

While *Brand X* may allow the Department to issue a new rule or policy that interprets the IRA in a way that is not consistent with its previous interpretation, that is not what happened here. The 2004 and 2005 Decisions finally adjudicated the Burleys' claim to have established a valid Tribal government under governing documents adopted without the participation of the rest of the Tribe's members. Those decisions are now final, and the AS-IA may not reconsider them at will based on a "different policy perspective" from his predecessors, as he states in his 2011 Decision [AR 002050].

Although administrative agencies do have inherent power to reconsider their own decisions, "this authority is not unlimited." *Prieto v. U.S.*, 655 F.Supp. 1187, 1191 (D.D.C. 1987) (citations omitted). Reconsideration must be timely—typically "within a short period after the making of the decision and before an appeal has been taken or other rights vested." *Id.* (quoting *Dayley v. U.S.*, 169 Ct.Cl. 305 (1965)). "[A]bsent unusual circumstances, the time period would be measured in weeks, not years." *Belville Mining Co. v. U.S.*, 999 F.2d 989, 1000 (6th Cir. 1993) (quoting *Gratehouse v. U.S.*, 512 F.2d 1104, 1109 (Ct. Cl. 1975).

In evaluating timeliness, Courts have also considered whether parties have relied on the original agency decision. "[B]arring a showing of error, an agency may reconsider its final decision only if the reconsideration is timely and the parties have not adversely changed their positions in reliance on that decision." *McAllister v. U.S.*, 3 Ct.Cl. 394, 398 (1983). *See also Prieto*, 655 F.Supp. at 1195 (finding that the BIA's reconsideration of Indian trust status of plaintiff's land was barred where plaintiff had relied on prior decision to invest in real property).

The motivation for the reconsideration is also relevant. Correction of an error may be a proper basis for reconsideration, assuming it occurs within a reasonable time and before reliance interests have arisen. But a change in policy is not a valid basis for reconsideration, even if "the

wisdom of [prior] decisions appears doubtful in the light of changing policies." *Belville*, 999 F.2d at 998 (quoting *Am. Trucking Ass'ns, Inc. v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958)) (other citations omitted). Other considerations may include the complexity of the decision, whether the decision was factually or legally based, whether the agency acted according to its general procedures for review, whether property interests had arisen through the initial decision, and the probable impact of an erroneous agency decision. *Id.* at 1001 (cataloguing cases).

In this case, the AS-IA attempted to reverse the 2004 and 2005 Decisions more than six and a half years after the 2004 Decision was made. This is simply not a short and reasonable time. Courts have routinely held that periods exceeding a few months are not timely. *See Belville*, 999 F.2d at 1001 n. 13 (cataloguing cases). Moreover, not only had the time for appeal of the 2004 Decision already run, but both Decisions had been challenged in court and upheld after lengthy litigation in *Miwok I* and *Miwok II.* In addition, Plaintiffs have relied on the 2004 and 2005 Decisions, engaging in extensive organization efforts that have invigorated the Tribal community and led to the development of a Tribal constitution and inclusive membership criteria. (AR 002140-002142) Reversing the 2004 and 2005 Decisions now would deprive the Tribe of its sovereign rights to define its own membership and form of government. It is difficult to think of a situation where reconsideration would be less timely or would have greater impact on vital interests that have developed in reliance on the agency's initial decision.

B. The 2011 Decision Unlawfully Exceeded The Scope of the Issues Raised By The Burleys' Appeal.

The AS-IA's reconsideration of the recognition of the Burley government, and of the need for full participation by the Tribe's members in any Tribal government, also was unlawful because it exceeded the scope of the appeal that the 2011 Decision purported to decide. The 2011 Decision decided an appeal that Ms. Burley had filed with the Interior Board of Indian

Appeals. *See California Valley Miwok Tribe v. Pac. Reg'l Dir., Bureau of Indian Affairs*, 51 IBIA 103 (2010); AR 002049 (2011 Decision). Such appeals are governed by the Department's general procedures for administrative appeals, found in 43 C.F.R. Part 4, except to the extent those procedures conflict with special rules for specific types of appeals, such as the BIA regulations found in 25 C.F.R. Part 2. *See* 43 C.F.R. § 4.1(b).

Section 4.318 of the Department's appeal regulations limits the scope of review for IBIA appeals to "those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. While 43 C.F.R. § 4.318 also states that "except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate," this does not allow the Secretary to reopen final agency actions that have already been subject to appeal and judicial review. Nor does the 2011 Decision make any kind of findings about manifest injustice or error that could justify the Decision's sweeping reversal of prior decisions.

In deciding Ms. Burley's appeal and issuing the 2011 Decision, the AS-IA acted as a "deciding official" within the meaning of the BIA's regulations. 25 C.F.R. §§ 2.4(c), 2.20(f). Section 2.4 of those regulations states: "The following officials may decide appeals: . . . (c) the Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20 of this part." Section 2.20(f), in turn, provides, "When the Board of Indian Appeals, in accordance with 43 C.F.R. 4.337(b), refers an appeal containing one or more discretionary issues to the [AS-IA] for further consideration, the [AS-IA] shall take action on the appeal consistent with the procedures in this section. The appeals regulations in 25 C.F.R. Part 2 "appl[y] to all appeals from decisions of the Bureau of Indian Affairs," except to the extent another regulation or statute provides a different

appeal procedure. 25 C.F.R. § 2.3(a), (b). There is no basis in the regulations for Defendants' claims that the AS-IA's "broad authority" over Indian affairs allows him to ignore these regulations. *See Oglala Sioux Tribe*, *supra*, 603 F.2d at 713 (an agency must follow its own regulations).

C. The Department Has Failed To Show Why the 2011 Decision Should Not Be Vacated For Mootness And Improper Reliance On *Ex Parte* Communications.

The 2011 Decision should have dismissed Ms. Burley's appeal as moot because the BIA's proffered assistance with Tribal organization, which the appeal challenged, is no longer needed. The Tribe itself has identified the members of the Tribal community and involved them in the process of developing a Tribal government. (AR 002138-002142, 002265-002275, 002297-002313). The Tribe does not seek to compel the Department to take any particular action, to hold any meetings or otherwise assist the Tribe in its efforts to hold a Tribal election. The Tribe will continue to undertake Tribal actions as needed.

The 2011 Decision also violated the Department's regulations prohibiting any decision based on information not open to inspection by all parties to an appeal. The AS-IA's office received a secret communication from Ms. Burley's lobbyist in March 2010, while the AS-IA was considering Ms. Burley's appeal, that outlined the position taken in the 2011 Decision. (AR 001997) The AS-IA withheld that document from the other parties to the appeal, including Plaintiff Yakima Dixie, in violation of the Department's appeals regulations. 25 C.F.R. § 2.21(a), (b); 43 C.F.R. § 4.24.

The Department has offered no explanation or argument on these issues and has therefore waived any arguments it might have. *Bd. of Regents of Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (holding that "issues not raised until the reply brief are waived" because failure to make specific arguments in an opening brief deprives the other party of an opportunity

to respond). *See also Novak v. Capital Mgmt. & Dev.. Corp.*, 570 F.3d 305, 316 n. 5 (D.C. Cir. 2009) (appellant waived argument "by waiting until its reply brief to make it") (citations omitted).

CONCLUSION

The Defendants 2011 Decision, if upheld, will destroy the Tribal community it previously recognized and defended. It will deprive the Tribe's members of their cultural heritage. The decision to make a 180-degree turn from the prior Department decisions that properly protected this community is without merit, legally and morally. It abdicates the Defendant's responsibilities to this Tribe and its members. For all the reasons set forth above, Plaintiffs respectfully request that the Defendants' motion for summary judgment be denied and that Plaintiffs' motion for summary judgment be granted.

Respectfully submitted,

___/s/_____

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Dated: April 27, 2012

CERTIFICATE OF SERVICE

I certify that on April 27, 2012, I caused the foregoing **PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND PROPOSED ORDER** 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