EXHIBIT 2
(Part 2)

He said, you know, I don't think that you could make, Doug Rawlins from the Indian Self-Determination said, "You're not smart enough to go to school and so maybe you ought to be a secretary here at the Bureau of Indian Affairs."

And I said, "I wouldn't lower myself that small because I've got more intelligence than that of just being a secretary."

So I had $107 in my pocket, and I got my two daughters and my granddaughter and we got in our truck and went to a Salvation Army for two months, and then they finally gave us like $2,000.

Q That was in '98 or thereabouts?

A Yeah, '98, '99, I guess.

Q I didn't realize that you had gone to DQ in between the two times.

A Because you said living in Calaveras and so I didn't say Davis because I still lived in Calaveras and drove ninety miles one way every day to go to school.

Q That's a long, makes a long day. Now, when you graduated from Evergreen, what was your first job after graduating from Evergreen?

A After graduating from Evergreen?

Q Correct.

A In 1999, October, I got paid for being the

1 administrator of the Sheep Ranch Rancheria.
2 Q So you were given the position of
3 administrator, I'm sorry, in 1999?
4 A I wasn't given the position.
5 Q For lack of a better word I used given.
6 So you became the tribal administrator for the
7 California Valley Miwok Tribe in 1999?
8 A I was elected.
9 Q Okay. So in 1999 --
10 A May of 1999 we had an election with an unbiased
11 person there to count the votes, and I became elected
12 chairperson.
13 Q Is that the same thing as administrator?
14 A I was chairperson. And then the administrator
15 had to be part of the chairperson because we had so
16 small of a tribe that in order to get ourselves
17 organized the one with the credentials to do
18 administration was put forth in the job description, and
19 that was my job description.
20 Q So since May, 1999, has your employment been
21 entirely with the tribe, the California Valley Miwok
22 Tribe?
23 A Yes.
24 Q Now I want to go back to your years growing
25 up. While you were a minor, were you always living with

1 members of the Indian community?
2 MR. STEELE: Objection, relevance.
3 THE WITNESS: Yes.
4 MS. LUTHER: Q. And I guess more particularly
5 with, as far as you know, members of the Miwok
6 community, whether Jackson, Tuolumne, so forth?
7 A Yes.
8 Q Do you recall when you first met Yakima Davis,
9 Dixie, excuse me?
10 A When I first met him I was about four years
11 old when his mother, Merle Butler, and Yakima, Melvin,
12 and Richard came up to my grandmother's house in White
13 Pines, California, which is a mile out of Arnold.
14 Q And I'm sorry, you said Yakima came with his
15 brothers, with Melvin?
16 A With Melvin and Richard.
17 Q Have you ever met Tommy?
18 A Yes.
19 Q But he didn't come on that first visit that you
20 recall?
21 A I don't recall.
22 Q Okay. So that would have been around 1964?
23 A Yes.
24 Q What was your understanding, if any, of the
25 relationship between Merle Butler and Mabel Dixie?

MR. STEELE: Objection, foundation.

THE WITNESS: I just looked at 'em as elders, I had no understanding at that time.

MS. LUTHER: Q. Okay. Have you ever come to have an understanding as to whether or not they were married, whether by Indian custom or by California law?

MR. STEELE: Objection, foundation.

THE WITNESS: I always knew her to be married to Romie Dixie.

Q Did you ever meet Romie Dixie?

A Yes.

Q Do you have any knowledge as to whether or not Merle Butler was Indian?

MR. STEELE: Objection, foundation.

THE WITNESS: I know Merle Butler passed away within the last three years, and he was on the Tuolumne Rancheria, living on the Tuolumne Rancheria.

MS. LUTHER: Q. Did you have any feeling one way or the other as you were growing up, an assumption that he was Indian or non-Indian?

MR. STEELE: Objection, calls for speculation.

THE WITNESS: At that time I would, I, I couldn't say. I never heard him speak the language.

MS. LUTHER: Q. Did you hear anybody speak, what language are you speaking of?

A Miwok.
Q Okay. Did you have other members of your family that spoke Miwok, the Miwok language?
A My grandmother didn't even speak English until 1965.
Q So I take it your grandmother spoke the Miwok language?
A My mom speaks it. She tried to speak it at school and she was reprimanded.
Q Did you ever learn it?
A I speak it.
Q Good. Who did you learn it from?
A My mother, my grandmother, my grandfather, all my relatives, my uncles, aunts, cousins.
Q Of all your family members, excluding your daughters and your husband, who do you feel closest to?
MR. STEELE: Objection, don't answer that.
MS. LUTHER: The grounds for instructing her not to answer?
MR. STEELE: Yeah.
MS. LUTHER: No, I said what are the grounds?
MR. STEELE: We'll seek a protective order on that if you want to pursue that line of questioning.
MS. LUTHER: What's wrong with it?
MR. STEELE: That's way beyond the scope and

that's harassing.

MS. LUTHER: It's not -- I'm trying to avoid getting into the area that we've been talking about that is going to be, you know, difficult for you.

MR. STEELE: What's the area?

MS. LUTHER: Q. I'm just not even going to pursue it, I'm just asking of your mother's family who do you feel closest to? And I would assume that would be a person that, I would hope it would be a person that you'd feel good about as opposed to somebody you'd feel bad about.

MR. STEELE: Okay. I see what you're saying. Would it be the same thing to ask for the most contact with?

MS. LUTHER: That would be fine.

MR. STEELE: So if you rephrase it?

THE WITNESS: Can you rephrase it?

MS. LUTHER: Q. Sure. Of your mother's family, who do you have the most contact with at the present time?

A At the present time? My mother.

Q Cause she lives with you, correct?

A Correct.

Q Beyond your mother, who would that person be? Somebody that's not living with you do you have the most

contact with?

A I'm too busy.

Q Well, it might be that you don't have -- do you have contact with anyone?

A I work twenty hours a day, I don't have time to sit there and go find relatives and have contact with them. I work seven days a week, sometimes I get three hours of sleep.

This thing, being a chairperson and administrator in a small tribe, you gotta work all the time, and that's what I find myself doing.

Q Where, I guess another way, when was the last time you had any contact with members of your family apart from those who live with you or your two daughters?

MR. STEELE: Objection, vague as to what defines family.

THE WITNESS: I don't understand what, if I have contact with family what's that got, the closest contact?

MR. STEELE: Just answer the question if you understand it?

THE WITNESS: Yakima, I guess, that's family. I consider him family.

MS. LUTHER: Q. Do you have any brothers or

sisters?

A Yes.

Q How many?

A I have two brothers living and one sister.

Q And is your sister alive as well?

A Yes.

Q Would that be, would they be William, Michelle, and Daryl?

A Yes.

Q Are they members of any federally recognized tribe as far as you know?

A I don't know.

MR. THOMPSON: Can I interject something? You just looked at a document that listed her family members.

MS. LUTHER: That's correct.

MR. THOMPSON: Is that a document that we received?

MS. LUTHER: No, it is not.

MR. THOMPSON: Then why did we not receive that document?

MS. LUTHER: Because they're my personal notes.

MR. THOMPSON: Okay. So there's no PIA document that lists those individuals' names?

MS. LUTHER: Yes, there is.

MR. THOMPSON: And --

MS. LUTHER: We've talked about it before. We talked about it at the deposition two weeks ago.

MR. STEELE: So it was produced?

MS. LUTHER: (Attorney nodded head.)

MR. STEELE: Okay.

MR. THOMPSON: Let's go outside for a second.

MR. STEELE: Okay. Go off the record.

Is it accurate to say that that's your work product?

MS. LUTHER: The document came from your client, by the way.

MR. STEELE: Wait. Wait. Before we go on, I got the feeling that you put that together. You came up with your document based on what you got from a bunch of documents, is that true? You know what I'm saying?

MS. LUTHER: Right.

MR. STEELE: It's like a book report you did on a bunch of documents?

MS. LUTHER: I'm sorry?

MR. STEELE: It's like you compiled the information and put it on one sheet of paper yourself?

MS. LUTHER: Yeah.

MR. STEELE: That's, like a book report.

MR. THOMPSON: Excuse me.

(Thereupon there was a discussion off the record.)

MS. LUTHER: Q. Do you recall what the nature of the visit was in 1964 when you first met Yakima Dixie?

A When I first met Yakima?

MR. STEELE: Objection, relevance. Go ahead.

THE WITNESS: Just a family visit.

MS. LUTHER: Q. Did you see Yakima and other members of his family, and by other members I mean his brothers, his mother, Merle Butler, to the extent he was considered a family member, did you see them on a regular basis, like a couple times a year from that time forward?

A I couldn't actually say if Yakima was in there every time.

Q All right.

A I was too young.

Q Now, in 1964 you were living at that time, I guess, in Arnold, is that correct?

A That's correct.

Q And where were they living, as far as you know?

MR. STEELE: Objection, foundation. She was four.

THE WITNESS: I don't know.

MS. LUTHER: Q. When was the first time you ever went to Sheep Ranch Rancheria?

A I don't know the first date. Many times.

Q Okay. Give me the best approximation as to, say, the first time you went to Sheep Ranch.

MR. STEELE: Objection, vague, foundation.

MS. LUTHER: Q. Or the first time you recall going to Sheep Ranch?

A Sheep Ranch the town or what?

Q Sheep Ranch Rancheria.

A '64 to visit Mabel and Merle.

Q Oh, I thought they came to visit you. You actually went there?

A I've been there back and forth. It's family. Anyway Mabel is family.

Q How were you related to Mabel Butler and her children, excuse me, Mabel Dixie and her children?

A Mabel's mother is my grandfather's sister.

Q And who was your grandfather?

A My grandfather's Manuel Jeff.

Q I'm sorry?

A My grandfather's Manuel Jeff.

Q Manuel?

A M-A-N-U-E-L.

Q Manuel?

A Yes.

Q Thank you. When you were growing up, was there anyone who was considered to be the chief of your particular band of Miwok Indian?

MR. STEELE: Objection, vague. Definitely vague as to time.

THE WITNESS: When I was growing up, what do you mean?

MS. LUTHER: Q. Well, let me ask it this way. Was there anyone who was considered to be the chief of your family's tribal group, whatever it might be, when you were growing up?

A Well my grandfather is an descendent of chiefs which, if we go back I think like four or five generations the first chief was Charles Jeff, then there was a Indian Jeff, but he was later christened by the, sorry, for a better word, but by the white people as Jefferson Davis, but his name was Indian Jeff.

And then my grandfather's father was Johnny Jeff which was also a chief, and my grandfather is Manuel Jeff.

Q Was your grandfather considered by the Indian community, the Miwok Indian community to be a chief or a leader?

MR. STEELE: Objection, vague and foundation.

THE WITNESS: Chief and a medicine man.

MS. LUTHER: Q. Is he still alive?

A No.

Q Do you recall when he passed away?

A '97, I guess.

Q Do you know whether he ever became a member of a particular federally recognized tribe?

MR. STEELE: Objection, foundation.

THE WITNESS: I don't know what my grandfather did.

MS. LUTHER: Q. Do you know whether Merle Butler or Mabel Dixie or any of Mabel's sons at any time were considered to be a chief or a leader of any Miwok tribal group?

A Mabel, Merle, or any of her sons?

Q Correct.

A To be a chief or a leader of any recognized tribe?

Q No, of any Miwok group? And by that I'm also trying to include, for example, the Ione band in the days before it became federally recognized as well as the Calaveras band of Miwok Indians.

MR. STEELE: Objection, foundation, calls for speculation.

THE WITNESS: I know Mabel had moved to Tuolumne and had been on the Tuolumne Rancheria, and she died in Sonora.

MS. LUTHER: Q. Is that, I'm sorry, did you say she died at Tuolumne?

A She died in Sonora which is Tuolumne County.

Q As far as you know, did she actually live on the Tuolumne Rancheria?

MR. STEELE: Objection, calls for speculation.

THE WITNESS: Hearsay.

MS. LUTHER: Q. Well, you can tell me that too.

A Hearsay. I was just told where she lived. I didn't actually go and see physically if she lived there.

Q So you heard she was living on the rancheria at the time she died?

A I heard that she was at the Tuolumne Rancheria and she died in Sonora, that's all I know.

Q Oh, I'm sorry, okay. Sonora is one town that's sure changed a lot over the years.

During your lifetime, were there certain tribal celebrations or rituals or gatherings led by your grandfather when he was acknowledged as the chief?

MR. STEELE: Objection, relevance.

1 THE WITNESS: When we had celebrations, all
2 family members from all tribes came, and all people that
3 were considered elders were in charge of the
4 celebrations. There were some celebrations that women
5 and children were not even allowed to attend.
6 MS. LUTHER: Q. What kind of celebrations
7 would those be, as far as you know?
8 A Sacred.
9 Q I'm sorry?
10 A Sacred.
11 Q Okay. Were, I guess what I meant was were they
12 to celebrate a particular milestone in somebody's life,
13 or were they celebrations that were, or gatherings that
14 had a particular purpose?
15 MR. STEELE: Objection, that's compound and
16 vague.
17 THE WITNESS: We had celebrations to celebrate
18 the fall coming in or putting the bear to sleep, in the
19 springtime waking him up, putting him to sleep in the
20 wintertime.
21 But they had certain celebrations that were
22 just for the men and the elders that we were not allowed
23 to attend.
24 They had all kind of celebrations. They had
25 even celebrations for the women and coming of age,

mourning celebrations for people who passed.

MS. LUTHER: Q. About how often would these types of gatherings take place, you know, about once a month, once every other month or once a week?

A Many times. They could have different celebrations in Jackson and Tuolumne. It was all over. In the old days they even had a lot of groups that still went up to Murphees, Averies where the old roundhouses used to be. And they had all roundhouses in Rural Flat, Sheep Ranch, West Point.

Q There's a roundhouse at Sheep Ranch?

A Yes, in the old days.

Q When you say old days, what do you mean?

A When I was really, really young, and it was starting to fall apart.

Q Was it actually located on the rancheria or was it located off the rancheria but in the town of Sheep Ranch?

A No, it was in a different area. I think it was in land that the Indians used to own that got taken away.

Q Since you mentioned taken away, as far as you know, when was it taken away?

A I don't know, I was too young.

Q Was it in your lifetime or prior to your birth?

A Depends on what --

MR. STEELE: Asked and answered.

THE WITNESS: Depends on which land you're talking about.

MS. LUTHER: Q. Well the land you just mentioned that was taken away with the roundhouse?

A The old land? In the beginning there's paperwork in the archives that shows there was 160 acres in the Sheep Ranch area that was Indian land, and then somehow it went down to two acres, and now it's .92 of an acre. So I don't know when it got taken away, that would be in the bureau documents.

Q Have you ever seen a document that said that the United States owned 160 acres in trust for the Indians in Sheep Ranch?

A I seen one where one could have been or should have been negotiated, and then I don't know cause I can't find documents on it anywhere, it's not in the archives.

Q Just so you know, I haven't seen anything to that effect at all.

Have you located any documents that indicated that the rancheria itself, the Sheep Ranch Rancheria was surveyed to be two acres?

A Yes.

Q And what document is that?

A I can't recall unless it's right in front of me. I mean I didn't, I don't got a photographic memory, I just know that there's one that's in my possession that I got from the archives that shows it should have been two acres.

Q But my question was a little bit more specific. I have seen -- I agree with you, I have seen documents that indicated that the rancheria at one point was two acres or believed to be two acres, but my question was a little bit more specific as to a survey.

Have you ever found a survey of Sheep Ranch Rancheria that, where the survey found that the rancheria consisted of two acres?

A No.

MR. STEELE: Objection, vague. You ought to define survey before you have her answer that, before you ask the question.

MS. LUTHER: Q. Whether it's by someone who is a qualified surveyor, but a surveyor performed survey. Have you ever seen such a survey --

MR. STEELE: Do you know what a survey is?

MS. LUTHER: Q. -- that concluded that the Sheep Ranch Rancheria consisted of two acres?

MR. STEELE: If you don't understand survey --

THE WITNESS: No.

MR. STEELE: I'll state it more clearly for the record. My objection was if she didn't understand survey she shouldn't answer a question regarding survey.

MS. LUTHER: Q. You have a college degree, correct?

A Yes.

Q Okay. And is it your testimony that you do not know what a survey is, a land survey?

A It's my testimony that I'm not a special, or specialty or expert in land surveys.

Q I don't expect you to be. Do you have no understanding of what a land survey is, either as somebody with a college degree who is chairperson of a federally recognized tribe?

MR. STEELE: Objection, argumentative and harassing. Don't answer. If you want to define survey for her then ask away.

MS. LUTHER: I'm asking her if it's her testimony that she does not have a lay understanding of a land survey.

MR. STEELE: You haven't defined lay understanding. I'm curious what you mean by survey.

MS. LUTHER: Are you instructing her not to answer?

MR. STEELE: I believe you're harassing her. If you have it read back, and I'll object to it again, but the question you asked was argumentative and harassing.

MS. LUTHER: Do you understand the question?

MR. STEELE: And she's instructed not to answer that question. If you rephrase it she'd probably answer that.

MS. LUTHER: Do you understand the question?

MR. STEELE: Don't answer.

MS. LUTHER: Pardon?

MR. STEELE: Rephrase your question.

MS. LUTHER: Q. My question was, did you understand my question?

A No.

Q Is it your testimony that as a college educated woman who is apparently a tribal chairperson, that you do not have an understanding of what a land survey is?

MR. STEELE: Objection, argumentative and harassing. Especially object to the term "apparently the tribal chairperson."

MS. LUTHER: Q. You can still answer the question.

MR. STEELE: Don't answer.

THE WITNESS: No.

MS. LUTHER: Q. Pardon?

A I do not understand it.

Q You do not understand my question or you do not understand, have an understanding of what a land survey is? I just want to make sure I understand your answer.

MR. STEELE: Why don't you just define a survey here?

MS. LUTHER: Let her answer the question. If you have an objection, make an objection.

MR. STEELE: You're misleading the witness.

MS. LUTHER: I am not, I'm trying to understand what her answer was.

MR. STEELE: Why don't you describe what a survey is? And once she understands what a survey is she'll probably answer your question.

MS. LUTHER: This is my deposition, okay.

MR. STEELE: This is my witness, my client.

MS. LUTHER: It's my witness, your client, that's different.

MR. STEELE: I'm sorry, my client. Any witness period.

MS. LUTHER: Q. You said you don't know. Do you mean you don't know what a land survey is or you don't understand my question?

A I don't understand your question.

Q Okay. I'll say it again. Is it your testimony as a person with a college education and someone who holds herself out as chairperson of a federally recognized tribe, that you have no understanding of what a land survey is?

MR. STEELE: Objection, argumentative and harassing.

MR. THOMPSON: George, let's go outside.

MR. STEELE: And vague as to what type of survey you're talking about, that's what we're going round and round about. We're going to take a break.

(Thereupon there was a brief recess.)

MS. LUTHER: Q. After consulting with your attorney, do you have an answer for me?

MR. STEELE: Can you read back the question or rephrase the question --

MS. LUTHER: Madam Court Reporter.

MR. STEELE: -- or restate it?

(Thereupon the Reporter read back as requested.)

MR. STEELE: Objection, argumentative and harassing.

THE WITNESS: On the survey I want land, and on the survey I got it isn't like what is back at that time. And I don't know if by having a title with a

description of the land on this two acres down to one acre is considered a survey, that's why I don't understand what you mean by a survey.

MS. LUTHER: Q. Have you ever seen a document that purported to be a survey conducted by someone holding himself or herself out as a land surveyor?

A I can't be --

MR. STEELE: Objection, vague.

MR. THOMPSON: Can we stip to something because I'm thinking of the records that we have and I don't think there was a, what we would define, I think would define as a survey document. I don't think we've got a copy of that document. I think all we have are the title documents, so I think we could stip that we haven't seen any survey.

MS. LUTHER: Okay.

MR. THOMPSON: I think we can stip to that, the problem is I'm not sure. If I went back and looked at the documents, I remember we had title documents that said, you know, gave the description of the land and it said it was two acres, but I don't remember seeing anything with the drawings on there until after the fact.

MS. LUTHER: That's what I'm thinking, I just kind of, since she brought it up I wanted to make sure

that you didn't have a document because I'd certainly be interested in trying to figure out what happened to that extra acre myself, I mean the government is interested.

MR. THOMPSON: We'll stip to the fact that we don't know if there was a survey done, all we have is, I think, the same document you have that says two acres, and then all of the sudden it comes up when they, I guess, and I don't know if they surveyed it in '65. I don't know how it went from two to .92, we have no idea.

MS. LUTHER: One of the things -- let's go off the record for a second.

(Thereupon there was a discussion off the record.)

MS. LUTHER: Let's go back on the record and move on.

Q Have you ever talked with Yakima Dixie or any of his siblings about, or Merle Butler before he died about returning Sheep Ranch Rancheria to the tribe?

MR. STEELE: Objection, deliberative process privilege, don't answer.

MS. LUTHER: I'm talking about in your position as a chairperson talking to a member of the tribe.

MR. STEELE: And specifically that would be under the privilege.

MS. LUTHER: No, it wouldn't, it would be --

how could it be? It's simply, look, will you give the land back to the tribe? I'm paraphrasing obviously.

MR. STEELE: I think you need to define the timeframe at the very least.

MS. LUTHER: At any point in time.

MR. THOMPSON: Can we go off the record for just a second, because I don't want to be jumping in on the record on this unless you want me to.

MS. LUTHER: I don't. I just want an answer to my question.

MR. STEELE: Go off the record.

(Thereupon there was a discussion off the record.)

MS. LUTHER: Q. When did you, as the chairperson of California Valley Miwok Tribe, become aware that the Sheep Ranch Rancheria was not held in trust for the tribe by the United States?

A Can you repeat that again?

Q Sure. Since you became chairperson of the California Valley Miwok Tribe, when did you first become aware that the land known as Sheep Ranch Rancheria was not held in trust by the United States for your tribe?

(Thereupon there was discussion off the record between the witness and her counsel.)

THE WITNESS: No.

MS. LUTHER: Let me preface this a little bit.

Q You may not be aware, but when the government holds land in trust it holds it in trust for a particular beneficiary. And Indian land traditionally are held in trust either for a tribe or for an individual or individuals in the plural.

And as I understand your suit, you are taking the position that Sheep Ranch Rancheria is landless, correct -- excuse me, that California Valley Miwok Tribe is landless?

A Yes, California Valley Miwok Tribe.

Q Okay. When did you first become aware -- let me ask it this way.

Was there a point in time when you thought the California Valley Miwok Tribe actually had trust land?

MR. STEELE: Objection, calls for a legal conclusion.

THE WITNESS: That would have to be referred to the attorneys.

MS. LUTHER: Q. No, you still have to answer the question.

A I don't understand, because when I came into the tribe, when Yakima was elected chairperson they opened up for probate, I didn't figure that the tribe had land at that time. Why would they have a probate if

the tribe had land?

Q Okay. When was that?

A I think the probate got opened up again in 1998, maybe September, I'm not sure. I wasn't chairperson.

Q Could it have been earlier than that, like around 1990, '91?

MR. STEELE: Objection.

THE WITNESS: I don't know.

MS. LUTHER: Q. But you clearly remember hearing about a probate opening up concerning the land known as Sheep Ranch Rancheria?

A The Bureau of Indian Affairs instructed Yakima --

MR. THOMPSON: Let's hold off, let's take a break.

MS. LUTHER: She's in the middle of a response, counsel.

MR. THOMPSON: I understand.

MR. STEELE: She can take a break anytime she likes.

MR. THOMPSON: I understand.

(Thereupon there was a brief recess.)

MS. LUTHER: We have just had a colloquy off the record concerning the land known as Sheep Ranch

Rancheria.

Q And I gather from our colloquy that you have had some conversations with Yakima Dixie concerning that land, is that correct?

A That land as being?

Q Known as Sheep Ranch Rancheria.

A Are you talking about in a timeframe?

Q At anytime since you became a member of the California Valley Miwok Tribe, including the former capacity of the Sheep Ranch Rancheria of Miwok Indians of California?

A Well, it's complex because in the beginning when Yakima was elected chairperson he was told by the bureau to put in for a probate on the land to clear up the title.

And so we assumed that if it went into probate it must not belong to the land. But it took two years of fighting with the bureau because Carmen Facio kept saying that the Sheep Ranch Rancheria has land in the trust, and she kept going against Judge Hammett's decision.

So we bring in the attorneys to investigate this because we had no idea how it could be in the trust but yet be in the probate.

And so when I got the letter in 2001 is when

Dale Risling told California Valley Miwok Tribe that they were landless.

Q Who was the first attorney that you brought in to look at that issue for the tribe?

MR. STEELE: Objection, calls for attorney client privileged information.

MS. LUTHER: Q. Whether you retained the services of an attorney are not privileged information, counsel.

MR. STEELE: Sure, it could be. Don't answer.

MR. THOMPSON: Wait a minute, can we go off the record for a second?

(Thereupon there was a discussion off the record.)

MS. LUTHER: Back on the record.

Q Following our off the record colloquy, what attorneys -- and I'm only interested in the attorneys that were retained by the tribe. What attorneys were retained by the tribe to look at the issue of the tribe's land status?

A Geez, if it's to be with the land status, I can't really recall right off. I can name the names of our attorneys, but I can't really recall at this time if they were right there right on the land status.

Q Okay. David Rapport was one, correct?

A I can't recall, I'd have to look back at my documents in David Rapport's file to see if that's what he worked on.

Q Well, let me ask it this way. Do you recall what year the tribe first contacted an attorney with regards to the land issue?

A I can recall the first attorneys that we contacted, but it was on a lot of issues because we were just beginning to organize.

Q Okay. So you, was the land issue always one of the issues for the tribe along with organization when you consulted with counsel?

A Yes.

Q Okay. What year would that process have begun that you consulted with an attorney concerning organizing and land status?

A It would either be ninety -- ahh, I can't recall for sure, I would estimate '98.

Q Okay. Now, when you did realize that there was some question about the status of the land known as Sheep Ranch Rancheria being tribal land as opposed to individual land, did you ever speak with Yakima Dixie about, about having him give that land to the tribe, or transferring the title for that land to the tribe?

MR. STEELE: If you recall?

THE WITNESS: I can't recall.

MS. LUTHER: Q. Okay. When you were telling me earlier about these different kinds of rituals and celebrations that were held, some of which you were permitted to participate in and some you were not, do you recall any of those gatherings taking place on the Sheep Ranch Rancheria?

A Not in my era. I usually went there to visit, but it would be between going to Jackson and Tuolumne and Chicken Ranch.

Q We spoke of this off the record and I kind of would like to get it on the record.

Is it your understanding that Merle Butler only had one child?

A Yes.

Q And do you recall, it was a girl, I believe, is that correct?

A Yes.

Q And do you know her name?

A I can't pronounce, it's like Laquida or something like that.

Q And does she still go by the last name of Butler or does she have a different last name?

A I have no idea.

Q Okay. Have you had any contact with her over

the years?

A I've never met her.

Q Oh, okay. Do you have any idea where she even lives?

A I would assume you can contact Tuolumne.

Q Is it your understanding that she's a member of Tuolumne?

A No, I'm just assuming you can contact Tuolumne since that's where her father passed away.

Q Okay. Since discovering or realizing that the land known as Sheep Ranch Rancheria is individual land as opposed to tribal land, have you ever initiated any proceedings on behalf of the tribe for the return of that land or to challenge the probate, apart from this lawsuit obviously?

MR. STEELE: If you know?

THE WITNESS: The land is --

MR. STEELE: If you don't know, you don't know.

THE WITNESS: Yeah, I don't know. The land is always an issue. I don't know how to answer that because of the lawsuit.

MS. LUTHER: Q. Okay. Well let me ask it this way. The tribe itself has never tried to reopen the probate, correct?

A The tribe did reopen the probate with Yakima

Dixie being the chairperson in 1998.

MR. STEELE: Objection, move to strike that as lacking foundation. Now probate, the tribe didn't have standing for that, so whatever it is that's got to be Yakima.

THE WITNESS: Yakima is the one who said --

MR. STEELE: Go ahead and ask your --

THE WITNESS: Go ahead.

MS. LUTHER: Q. I think there might have been something else going on, you might be thinking of something else. But I'm talking about the actual, the probate of Mabel Dixie, whether the tribe has ever itself made any effort, I'm not even saying you could do it if you wanted to, but if you tried to reopen Mabel Hodge Dixie's probate for the purpose of getting that land back in the name of the tribe?

A I wouldn't even understand that. I don't understand. I wouldn't even understand it even to try to go do that.

Q Okay.

A I don't understand it.

Q I just want to make sure it's not my question you don't understand.

A Yeah.

Q You just don't understand the process of how

you would do that, to reopen a probate?

A No, that just never came up.

Q Okay. So you, as a tribe, the tribe has not tried to reopen the probate, correct?

A Me as the chairperson, I don't know, I don't know on that.

MR. STEELE: Well, have you as the tribe, since you've been in charge, tried to reopen, have you ever tried to reopen a probate?

THE WITNESS: No.

MS. LUTHER: Q. No?

A No.

Q Thank you.

MR. STEELE: Sorry about that.

THE WITNESS: I'm getting mixed up on Mabel and Yakima because all these probates, I don't know.

MS. LUTHER: Q. Because at the present time I guess they're now having to probate Richard --

A Yeah.

Q -- Dixie's estate and Tommy --

A When you said probate I don't know if you meant now or back then, so you guys threw me off.

Q I apologize. Has the tribe or you've personally taken, been involved in the probate of Merle Butler, Tommy Dixie, or Richard Dixie?

A The tribe or me personally?
Q Correct?
A Has been involved with the probate?
Q Of those three men.
MR. STEELE: Have you ever been to any probate?
THE WITNESS: No.
MR. STEELE: Okay. You see what I'm saying?
THE WITNESS: Yeah.
MR. STEELE: If you haven't been to any one at all, you haven't been to this one either.
MS. LUTHER: Q. I'm going to go back to your childhood again. While you were a minor, at anytime, are you aware of anytime your parents or any guardian sought services from the Bureau of Indian Affairs for you?
MR. STEELE: Objection, vague and lacks foundation.
THE WITNESS: I wouldn't know when I was a child.
MS. LUTHER: Q. Okay. You're not aware of whether anyone made a request for services for you? I'm thinking of the Johnson O'Malley lunch program, for example. Are you familiar with that program?
A Yes, I'm familiar with it.
Q Do you have any information as to whether

you've, you were a recipient under that program as a child?

MR. STEELE: Objection, foundation, vague, cumulative.

THE WITNESS: No, I don't recall at this time.

MS. LUTHER: Q. Okay. So would your testimony also be that you are unaware of the bureau ever denying services to you based on your status as an Indian at any time prior to turning eighteen years old?

MR. STEELE: Objection, foundation, vague.

THE WITNESS: I don't know if the Bureau of Indian Affairs gave me services or not. I went to school just like anybody else. If something was signed up or if we got something that was given, I wouldn't have known if it was from the church or from the bureau.

MS. LUTHER: Q. Okay. Since you became an adult, from the age of eighteen up until the present time, have you ever applied to the Bureau of Indian Affairs for services based on your status as an Indian?

A From?

MR. STEELE: Such as education?

MS. LUTHER: I'm sorry?

MR. STEELE: Such as education?

MS. LUTHER: Q. Anything.

A I applied when I became recognized.

Q Okay. And what do you mean by recognized?
A Because unless you're into a federally recognized tribe you can't receive any funding for school, you're on your own or you get student loans just like anybody else.
Q Okay. So I take it, I take it that at some point you became a member of a federally recognized tribe, correct?
A Correct.
Q And that tribe was the California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria Miwok Indians of California, correct?
A Correct.
Q And you've never been a member of any other federally recognized tribe, correct?
A Correct.
Q And once you became a member of the tribe now known as the California Valley Miwok Tribe, did you apply to the Bureau of Indian Affairs for services as an individual?
A Yes, for school.
Q Okay. And was your application accepted or granted?
A Yes.
Q All right. Have you ever been denied services

by the Bureau of Indian Affairs in an individual capacity?

A I've never went to the bureau as an individual.

Q Well, as an individual you applied for an education grant?

A You mean was I denied as an individual for something?

Q Correct, as opposed to a plan for a 638 grant on behalf of the tribe. I'm trying to make a distinction between services you might have requested on behalf of the tribe and services that you sought in your own individual capacity for Silvia Burley.

MR. STEELE: Do you understand the difference?

THE WITNESS: No.

MR. STEELE: She's talking about things that you requested not for the tribe but for you, whether it was, you know, education or child support or whatever it is, but just personal yourself, you know what I'm saying?

THE WITNESS: Have I ever been denied personally, me going down?

MR. STEELE: Let her reask the question if you understand the environment there.

THE WITNESS: Yeah, go ahead.

MS. LUTHER: Q. I was asking if you personally

have ever been turned down or denied services from the Bureau of Indian Affairs?

A As for being an adult?

Q Correct, after turning eighteen.

A Not as a federally recognized member.

Q Were you, did you ever apply for any services personally before you were a recognized member and turned down by the Bureau of Indian Affairs?

A I've never applied at the bureau before.

Q Okay. Are you aware of any other immediate members of your family, and by that I mean your mother, your grandparents, your brothers and sister, ever being denied services by the Bureau of Indian Affairs at any point in their lives?

MR. STEELE: Objection, foundation, calls for speculation.

THE WITNESS: I wouldn't know on their, what they do.

MS. LUTHER: Q. You've never heard that they were ever turned down for services by the Bureau of Indian Affairs, is that correct?

A In our culture we don't get into personal business.

Q Okay. I understand you've given me a reason but I actually need to have you say yes or no to the

1 question or that you don't know.
2 A No, I don't know.
3 Q Okay. And now I understand you have two
4 daughters and a grandson, is that correct?
5 A No.
6 Q It's not? Okay.
7 A I have two daughters and a granddaughter.
8 Q Oh, I apologize, I don't know why I thought it
9 was a grandson, I apologize.
10 Have your daughters or your granddaughter ever
11 been denied services from the Bureau of Indian Affairs
12 as far as you know?
13 MR. STEELE: Objection, vague as to services.
14 Just clarify that.
15 THE WITNESS: No, not as far as I know.
16 MS. LUTHER: Q. Have you, have your daughters
17 or granddaughter ever been members of any other tribe,
18 recognized or unrecognized?
19 A Recognized or unrecognized? Before we got
20 sanctioned -- oh, let me strike that.
21 Before we got recognized as federally
22 recognized Indians, we were receiving services from the
23 Indian Health Service in Jackson. And at that time to
24 receive services we had to go under the sanction of
25 Tuolumne.

And then before, I think it was in 1995 I sent a letter to Tuolumne and told them I no longer wanted to receive any services as being sanctioned under them, and if I had any affiliation I wanted it stopped for myself and my daughters. At that time my granddaughter wasn't there. I don't recall, I'm pretty sure it had to have been '95.

Q So to the extent that your daughters, you and/or your daughters were members of another group, would it have been the Calaveras band of Miwok Indian?

A Well we --

MR. STEELE: That mischaracterizes the prior testimony. Can you rephrase that?

MS. LUTHER: Well, let me ask it this way.

Q Were your daughters at any time accepted as members of the Calaveras band of Miwok Indian?

A We were sanctioned under Tuolumne which puts us just as, to get benefits like to go to the dentist.

MR. STEELE: Okay. But were they recognized?

MS. LUTHER: My question was a little different.

Q Regardless of whether the Calaveras band was federally recognized or not, were your daughters accepted as members of that band?

A No.

Q As chairperson of the California Valley Miwok Tribe, do you have any interactions on a tribe to tribe basis with any of the other Miwok Tribes?

A Yes.

Q And what is the nature of the interaction that you have with the other Miwok Tribes?

A Government to government.

Q But what does that mean for purposes of the California Valley Miwok Tribe?

A Well, you meet on forestry and, forestry programs. If they contact us to let them know that they had an election and who their new officials may be. If they have meetings going on about ICWA.

Q About, I'm sorry?

A Indian Child Welfare Act.

Q ICWA, okay.

A Any meetings with the Bureau of Indian Affairs that might be going on you get invitations to attend.

Q And do you attend those meetings with the, that the Bureau of Indian Affairs sponsors?

A Yes.

Q Now as I understand it, the Bureau of Indian Affairs actually conducts annual budget meetings, is that your understanding as well?

A Yes.

Q And have you attended every annual budget meeting since becoming chairperson of the tribe?
A Every one that I could afford to.
Q And how many was that?
A I don't, they've had numerous. Yearly for sure.
Q When did you become chairperson again?
A May 8th, 1999.
Q So you've been the chairperson now for about five years, almost five years, correct?
A Correct.
Q And so in those five years how many annual budget meetings with the Bureau of Indian Affairs do you recall attending?
A I can't recall at this time. I can't state for sure.
Q Has Yakima Dixie ever told you that he was denied services at any point in time by the Bureau of Indian Affairs?
A He told me he had requested for some things to be fixed and they never got back to him, as in something about his house.
Q Do you recall when you had that conversation with him?
A 1998, I would assume, I estimate 1998.

Q Okay. Did he tell you how long he had been waiting for the bureau to get back to him on his request?

A When Ray Fry came up he said ten years.

Q What do you mean when Ray Fry came up?

A When Ray Fry came up to a meeting in 1998, when we elected Yakima chairperson Ray Fry and Ben Golden were there, and he complained about something he requested for them to do and they never did it. I think it was sanitation.

Q Did Ray Fry indicate at that meeting why it had taken so long?

A He said he would look into it. I think it was just something like to drain the septic tank or something. I don't think it was, I don't know what it was, that was between them.

Q And do you also happen to know whether that application was submitted to -- or let me rephrase it.

Do you happen to know whether Yakima Dixie was requesting services from the Bureau of Indian Affairs or from Indian Health Service?

A Yakima indicated the Bureau of Indian Affairs.

Q Have you ever met or had contact with Dora Mata or Lena Shelton?

A I never met Lena Shelton. I know Dora, Dora

Mata.

Q How do you know her?

A As being Lena Shelton's daughter.

Q Have you actually met Dora Mata then?

A Yes.

Q Approximately how many times?

A She took me to the hospital when my daughter was born, 1979.

Q Okay. Sounds like you know her pretty well then?

A She smoked all the way and drove about 30 miles an hour, took us forever to get there, I know that.

Q Are you related to Dora Mata?

A I don't know.

Q Do you know whether Dora is currently a member of a federally recognized tribe?

A I don't know.

Q Have you ever had any conversations with her about being, about her becoming a member of the California Valley Miwok Tribe?

A Not conversations.

Q All right. Any written communication?

A Yes.

Q Okay. What is the nature of the written communication that you've had with her about that

subject?

A That's internal matters to the enrollment committee --

Q Okay.

A -- cause it's privacy, and in our constitution it says that we must keep our confidentiality about people and their nature of where they live, their name, their addresses, things like that.

MR. STEELE: That information would be subject to a protective order.

MS. LUTHER: Q. She is not currently a tribal member, correct?

A Tribal member of where?

Q California Valley Miwok Tribe?

A No.

MR. THOMPSON: Can we go off the record for a second? Try to answer your questions, try to help you here.

MS. LUTHER: All right.

(Thereupon there was a discussion off the record.)

MS. LUTHER: Q. Off the record we had a conversation and you indicated that Dora Mata was provided information about enrolling in the California Valley Miwok Tribe, is that correct?

A Yes.
Q And when was that information provided?
A I can only estimate, 2000, 2001, I'm not sure.
Q Okay. And did Ms. Mata follow through on that information, that is did the tribe hear anything further from her with regards to membership after that?
A No.
MR. THOMPSON: I think the tribe is willing to stip the enrollment process is open, that people who have requested enrollment information it has been explained to them what the process is and that the tribe has no pending applications for enrollment.
MS. LUTHER: Yeah, I want to ask some questions about that.
MR. THOMPSON: Okay. If it's getting to the enrollment process we're going to ask for deliberative process protection on that.
MS. LUTHER: Q. I take it that you take the position that the California Valley Miwok Tribe currently is an organized tribe, is that correct?
A That's correct.
Q Okay. What do you base that on, that conclusion on?
A Because we followed every rule and regulation that the bureau had put out there for us to follow as an

organized tribe.

Q Okay. And what rule in particular are you referring to?

A Have a constitution.

Q Okay.

A Have policies and procedures. Have ordinances.

Q Anything else?

A Complete audits. We have a mature status.

Q Is that for your 638 contracting, correct?

A I think if you were unorganized that they wouldn't give you mature status.

Q Says who?

A Pardon me?

Q Who told you that you could not have mature status unless you were an organized --

A I said I would think.

Q -- unless you were an organized tribe? Now you can answer.

A No one told us any different.

Q Well, nobody told you that only organized tribes get mature tribal status for 638 contracting, correct?

A Well --

MR. STEELE: If you remember?

MS. LUTHER: Nobody --

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MR. STEELE: Let's take a break.

THE WITNESS: We need to talk on that one, let's take a break on that one.

(Thereupon there was a brief recess.)

MS. LUTHER: Q. I don't know if you've had occasion to look at the complaint that was filed on behalf of the tribe at anytime recently, but I will represent to you that in the amended complaint that was filed on the tribe's behalf by David Rapport it indicates in there that your tribe has a potential membership of 250, do you recall that from your complaint?

A I recall it from the complaint.

Q Okay.

MR. THOMPSON: I think we got to stop for a second and go outside. I'm sorry, if I knew you were going to ask that question I would have --

THE WITNESS: That still goes for enrollment.

MR. THOMPSON: If I knew you were going there, I would have --

(Thereupon there was a discussion off the record.)

MS. LUTHER: Q. What does the tribe mean by 250 potential members?

A When David Rapport did the amendment on the

case, David Rapport came up with the 250 members. That's why David Rapport was fired because we couldn't figure out where the heck he came up with his numbers.

Q Is it your testimony that he never discussed that issue with you?

A I don't know where he came up with those numbers, that's my testimony.

Q What does the tribe consider to be -- well, I've got that.

Do you have a date in mind for when the California Valley Miwok Tribe became an organized tribe?

MR. STEELE: Objection, calls for a legal conclusion, but -- oh, no, no, I'm just getting another pen.

THE WITNESS: When?

MR. STEELE: Objection, vague. Why don't you rephrase it or we'll be sitting here for a while.

THE WITNESS: Yeah, I'm not sure at the question.

MR. STEELE: Perhaps you should ask when did they begin whatever steps constitute organization.

MS. LUTHER: Q. Is it your testimony that the tribe was organized at any point before you were elected as the tribal chairperson?

MR. STEELE: Objection, vague.

1 THE WITNESS: When I was elected as the tribal
2 chairperson we were still organizing.
3 MS. LUTHER: Q. So it would be the tribe's
4 position that organization occurred sometime after you
5 were elected, is that correct?
6 A That's correct.
7 Q And I believe you testified that you believed
8 the tribe was organized, in part, because it has a
9 constitution, correct?
10 A And because of mature status.
11 Q Right. I wanted to focus on the constitution
12 for a moment. Who participated -- well, let me ask it
13 this way.
14 Have you had more, has the tribe had more than
15 one constitution since you became the tribal
16 chairperson?
17 MR. STEELE: Objection, vague.
18 THE WITNESS: Since I became the chairperson?
19 Yes. Well --
20 MS. LUTHER: Well, let me ask it this way.
21 MR. STEELE: Are you referring to drafts of the
22 constitution?
23 THE WITNESS: Drafts?
24 MS. LUTHER: Q. No, I'm talking about final
25 documents. You may have had also a constitution that

had been amended, but I'm just, what I'm trying to find out is if you've had one final adopted constitution or whether you've had several or more than one final constitution that's been adopted?

A We had a first one and it was, it was sent back. And the second one, which is the one we adopted, I think like March 6th of 2000, and we've been going by that one ever since with the amendment.

Q How did the tribe go about -- what process did it use to draft the first constitution that was subsequently pulled back?

A Well, we went on the internet and we looked at other tribes with constitutions in our areas, Miwok Tribes. We looked at tribes from back east, Mohegans, Unitas, we looked at tribes in Florida. We looked at tribes Midwest. We looked at tribes IRA and non-IRA custom and tradition, and we had various consultants. We even talked with bureau employees. Bureau employees out of state like Nevada.

And we tried to get everything in there that would follow under Indian civil rights so that everything would be in compliance to try to fit the tribe for being such a small tribe at that time when we're getting our constitution going.

Q Who was consulted or who participated among the

tribal members?
A All of 'em.
Q And that would be yourself and your two daughters, correct?
A It would be the chairperson, the vice chairperson, the secretary treasurer, the tribal member.
Q Okay. But anyone other than yourself and your two daughters?
A Yakima Dixie.
Q Okay. Did he actually come to meetings and give input?
A Which constitution, both?
Q The first one I'm focused on right now.
A The first one, yes.
Q And how were your relations during that period of time with Yakima Dixie?
A As it is today.
Q Which is?
A I have no problem with Yakima Dixie.
Q Okay.
A Except for any threats that he might say to me, but I don't say anything to him.
Q Okay. Back at that time when you were working on the first constitution, did you have any difficulty interacting with Yakima Dixie?

A Yes.
Q In what way?
A He would have people from outside that would be in the jail that when we were having a meeting he would stop the meeting and the person from the jailhouse would get on the phone and threaten me.
Q And what?
A Threaten me from jail. And I have it even at our tribal office where we got a call from the prison and we took a picture of it to show the, the sheriffs that we were getting threatening calls from the Sheriff's Department. And it always happened to be on a day that we'd be having a tribal council meeting.
Q I guess I'm a little confused. Going back just to the period of time when you were working on the first constitution, was Yakima Dixie in jail when you were working on that first constitution?
A The biggest part of the time, but he still participated. He would send something to the tribe or to the bureau whether he rejected something or, I mean we sent anything that had to come up with the constitution to any address that we could find, and even to the bureau to forward it.
Q And then he responded back to you from jail or wherever he was, during that first draft I'm talking

now?

A Either through his attorneys or through the bureau.

Q Was he objecting to any of the provisions in the first constitution?

A I can't recall at this time.

Q I'm trying to remember because I know I have seen drafts of the tribal constitution, so I don't know if they were actually the drafted final adopted version, but at some point, and I think it's in the constitution, the tribe adopted a base roll, is that correct?

A Our base roll goes by the five members that organized the tribe that the bureau said had the rights to organize.

Q What -- to the best of your recollection, what did you hear anyone from the Bureau of Indian Affairs actually say about the tribe's base roll or the development of a base roll?

A That the five members that were there as of August, I think 6th, 5th or 6th, 1998, were allowed to participate in organizing the tribe as long as they were of age to do so.

Q Okay. Did anyone from the Bureau of Indian Affairs say anything specifically about the base roll?

A The Bureau of Indian Affairs are the first one

1 who wrote up our first resolution in 1998, they put down
2 the base roll.
3 Q Did Chris Vandluthen have anything to do with
4 the base roll?
5 A It says base roll five.
6 Q So it's your testimony that the Bureau of
7 Indian Affairs drafted the tribe's first ordinance --
8 A First resolution --
9 Q -- or resolution?
10 A -- to organize.
11 Q And I think that's where we might be kind of
12 mixing apples and oranges because I'm talking about a
13 base roll and you're talking about organizing and who
14 was entitled to organize.
15 And are you -- for you, is the group that could
16 organize the tribe the same as the base roll? Are those
17 the same thing in your mind?
18 (Thereupon there was discussion off the
19 record between the witness and her counsel.)
20 THE WITNESS: Yes. I'm not sure if it says
21 base roll, all I know is it says to organize the tribe.
22 I figured that's the base roll.
23 MR. STEELE: Okay.
24 MS. LUTHER: Q. Apart from drafting this
25 first resolution and telling you that the five members

present in August, '98, I think you said, can organize the tribe, has anyone from the Bureau of Indian Affairs ever said anything to you specifically about a base roll? And I want to separate that out from organizing.

A I can't recall at this time.

Q Let me ask you this. Never mind, I think you answered it actually.

Now at some point in -- strike that.

Has the tribe ever publicized in any way the fact that it was organizing?

MR. STEELE: Objection, vague.

THE WITNESS: What do you mean by publicizing?

MS. LUTHER: Q. Well, it could take a lot of different forms. Radio spots, newspaper, flyers, posted in public areas, letters to particular individuals that, you know, might be, who had already expressed an interest, perhaps, in assisting with the organization of the tribe?

A We have a website up to where anybody can counsel, I mean they can communicate with the tribe if there was any kind of information that they needed.

Q Was that up and running at the time you were organized?

A Our website? We've always been on, had a www. Anybody can get in touch with us through the tribal

1 council.
2 Q Do you remember when you first had the website?
3 A '99 or 2000.
4 Q Okay. But was it before or after the tribe, as
5 you put it, organized?
6 A Well, we had to go through to get all of the
7 enrollment forms and everything ready like that because
8 we couldn't barely well give anybody an application if
9 we didn't have one drafted and approved yet.
10 I can't specifically say any date without
11 looking at the file to know exactly when.
12 Q Okay. Let me stop you for just a minute
13 because I think we're on two different wavelengths
14 again.
15 When I'm talking about organizing, I'm actually
16 talking about back at the beginning when you were first
17 thinking about drafting a constitution and first
18 thinking about drafting membership ordinances and other
19 tribal ordinances and resolutions. And at that time
20 period I'm asking you if anything was done to publicize
21 the tribe's organizing?
22 A I don't recall.
23 Q Okay. Do you recall whether you might have
24 called anybody besides your two daughters or Yakima and
25 said, you know, "Hey, do you want to help us get the

tribe off the ground? Do you want to help us draft a constitution?"

A At that time --

MR. STEELE: Objection, foundation.

THE WITNESS: At that time when we were first organizing, Yakima was the chairperson, so I don't know. I don't know what he might have done when we were in the beginning of organizing.

MS. LUTHER: Q. But even after you became chairperson, did you initiate any effort, place phone calls, anything of that nature to involve people other than Yakima, Dixie, and your two daughters in drafting the tribe's constitution or ordinances?

MR. STEELE: Objection, it's vague and compound.

MR. THOMPSON: Yeah, I'm going to ask for a recess.

MS. LUTHER: Only one person.

MR. THOMPSON: Come on.

MR. STEELE: Okay. Take a break.

(Thereupon there was a brief recess.)

MS. LUTHER: Q. Do you have an answer for me?

MR. STEELE: Would you restate the question?

THE WITNESS: Yeah.

(Thereupon the Reporter read back as requested.)

MR. STEELE: Objection, vague, compound.

THE WITNESS: In the beginning here I was getting mixed up on organizing and enrollment. If it comes to the organizing, the Bureau of Indian Affairs had us go under the 638 contract and they gave us in our contract that we had to follow; you gotta get all your enrollment ordinances, your constitution, and everything in place.

And this, I think it was up in 2000 they had written a letter to me saying that it's possible that Melvin Dixie may be able to participate, but he would have to come to the tribe, which he never did.

And from day one, as far as I can remember as the tribal person, the Bureau of Indian Affairs had just told us to follow the requirements and stay in compliance in getting our government in order and everything for when enrollment comes up we'd have to have our applications and stuff, but they never specifically told us through numerous meetings all through 2000 to go out and find people to organize.

They said that you, your two daughters, Yakima, and possibly Melvin if he, if he came to the tribe are the ones that can organize, that's all I know.

MS. LUTHER: Q. At some point the tribe devised enrollment ordinances, correct, or at least an ordinance, correct?

A That's correct.

Q Has the tribe undertaken any effort to publicize its enrollment criteria?

A We had just finished our enrollment applications.

Q What do you mean by that?

A We had to draft up the application, get copies of it, and according to the requirements of our 638 contract we had to have that done in a specific amount of time, and we had just finished that.

Q My question was a little different. Have you ever publicized, apart from what might be on your website, have you ever tried to publicize the enrollment criteria?

A We were never required by the bureau to do so.

Q My question is different. Have you ever done it?

A No.

Q Okay. Have you ever, have you received any applications from anyone?

A No.

Q Have you provided applications to anyone?

A No one has inquired for an application to be provided to them.

Q So when you provided people like Ms. Mata with information about becoming a member, you didn't provide her with an application? I guess I'm confused.

A She didn't inquire that, to send an application. She didn't inquire for an application, we had no application at that time.

Q Okay. And you haven't contacted her since?

A She hasn't contacted us.

Q Do you recall whether you have, in fact, told people that when you did have an enrollment ordinance and criteria you would send them an application?

MR. STEELE: Let's take a break.

THE WITNESS: Okay.

(Thereupon there was a brief recess.)

MS. LUTHER: Q. Do you remember the pending question?

A No.

MR. STEELE: No, have her read it back.

MS. LUTHER: Could you please read it back?

(Thereupon the Reporter read back as requested.)

THE WITNESS: At this time we were waiting for an opinion from the Bureau of Indian Affairs because we

1 have a document through our 638 that said that there
2 would be a secretarial election. And at that time if
3 there's a secretarial election, the Bureau of Indian
4 Affairs puts out, publicizes that there would be an
5 election that, I guess, enrollment can come open and
6 stuff, I don't know how they do it. But we were under
7 the assumption that the bureau would call an election.
8 And we had a disagreement on the election
9 because the tribe wanted to stay custom and tradition,
10 and the bureau had said that they would, they would put
11 it down in our 638 that until an opinion came back from
12 the solicitor's office saying that we had to go under
13 IRA and hold an election, they would pretty much just
14 leave it, leave our contract alone, and they didn't
15 require us to publicize anything to do with enrollment
16 or anything like that until the opinion come back.
17 If the opinion come back and said you have to
18 have an election, then we'd have to have an election,
19 and then the bureau would publicize about the tribe and
20 the enrollment.
21 And we, till 2002 we still have not received
22 any opinion, and now we were told that we did not have
23 to go under IRA, we do not have to have an election, and
24 we just found that out last week.
25 MS. LUTHER: Q. Well, it's been longer than

that.

A It doesn't seem like it's been that long.

Q I know, time flies.

A A couple weeks ago, and that was the news we've been told.

Q Are you now taking steps to publicize your enrollment and to send out applications to people who have inquired in the past?

A Wouldn't that be for the election committee?

Q I'm sorry?

A Wouldn't that be for the enrollment committee?

Q I don't know, you tell me.

A As an internal -- enrollment is internal, that's our inherent right, and that would be asked of the enrollment committee.

Q And who's that committee?

A The enrollment committee?

Q Correct?

A Anjelica Paulk and Rashel Reznor.

Q And those are your two daughters, correct?

A Well, they do have titles.

Q I understand that, but they're also your two daughters, correct?

A Yes.

Q Do either of them live with you?

A No.
Q Does the tribe have an office?
A Yes.
Q And where is it presently located?
A 10601 Escondido Place, Stockton.
Q And is that also a residence?
A Yes.
Q And is it your residence?
A No, it's the tribe's.
Q Is the property maintained in the name of the tribe?
A Yes.
Q As fee land?
A Yes.
Q How much land are we speaking of?
A Where?
Q That the tribe owns in Stockton?
A One and a half acres.
Q And how many buildings are located on this property?
A One.
Q And do you live in that building?
A It has an office adjacent to it.
Q Okay. That's fine. I'm just trying to understand. So you have tribal offices and your

residence --

A Yeah.

Q -- on this property?

A (Witness nodded head.)

Q And how long has the tribe owned this land?

A I'd estimate almost two years.

MS. LUTHER: Okay. Okay. Let's go off the record.

(Thereupon there was a discussion off the record.)

(Thereupon the luncheon recess was taken.)

AFTERNOON SESSION

--oOo--

MS. LUTHER: Q. Does the tribe own any other land other than the land at, I have it written down somewhere, is it Escondido Place in Stockton?

A What do we consider other land? Like Yakima's land?

MR. STEELE: No, not Yakima's.

THE WITNESS: No. No.

MS. LUTHER: Q. I'm not asking you about --

A No.

Q Okay. Since you became a member of the California Valley Miwok Tribe, where have the tribal offices been located?

A Arnold, California, Tracy, California, 10601 Escondido Place, Stockton.

Q And --

A In the beginning, since I became a member it was also at Yakima's Dixie's residence.

Q At Sheep Ranch Rancheria?

A At Sheep Ranch.

Q But on the land known as Sheep Ranch Rancheria?

A Yes.

Q And in Tracy was there any other address other than the address on Widow Court?

A No.
Q When the tribal offices were in Tracy, did the tribe own that property in Tracy?
A No.
Q So in the time that you've been a member of the tribe, is the property in Stockton the first and only property that the tribe has ever owned independent of whatever gets resolved with the property known as Sheep Ranch Rancheria?
A Yes.
Q Apart from any conversations you may have had with your attorneys, has anyone inside or outside of the Bureau of Indian Affairs or within or without your tribe, has anyone ever told you that the tribe was ever terminated?
A I don't recall.
Q I received your tribe's objections to the interrogatories, I didn't receive any responses so I'm going to ask you about some of those.
I understand that the tribe has an Indian artifact program, is that correct?
A Yes.
Q What is that program?
A It's a program that is a non-paying program and it works with culture, the transportation, like

1 California Transportation in case there's cultural areas
2 in which the Miwoks were, and if they want to put up a
3 subdivision or something they want to make sure if that
4 site had any cultural, any culture that is, to the
5 Miwoks that might be sacred or susceptible to being
6 overlooked as written down, because the culture through
7 the Miwoks didn't keep a lot of things on paper, it's
8 just passed down that that might have been where a
9 roundhouse was. So it, the program works with the
10 Heritage Commission.
11 Also with our saving our language, saving all
12 our traditions as in our songs, our, knowing our
13 ceremonies, teaching 'em to grandkid, the tribal
14 members. Knowing where old, old roundhouses and places
15 used to be that have no sites now that showed that
16 anything was there.
17 So it's mostly heritage and culture and
18 tradition, keeping it going, keeping it living.
19 Q And within the tribe, who is the contact person
20 for the artisan program?
21 A As administrator I overlook it, but we, as the
22 tribal council, appointed Mildred Burley as the
23 representative since she is the individual that knows of
24 a lot of old culture before my time.
25 Q What is his name again?

A Her name.
Q Her name, I'm sorry?
A Mildred, M-I-L-D-R-E-D B-U-R-L-E-Y.
Q The mother, I'm sorry.
A It's on the internet.
Q Speaking of which, I have actually tried to access the website from time to time, I've never been able to get it to come up.
A That's because the bureau up in Washington kept having a hard time with the server. So if you go on www.californiavalleymiwoktribe-nsn.gov, now it comes up Nancy Sam Nancy dot G-O-V. It's there on the business card.
Q I didn't get one, you gave one to her, you gave one to the court reporter.
Are there any other employees who have been hired to promote the artisan program?
A We don't have any employees through the artisan program.
Q Okay.
A It's a non-paying job.
Q So your mother does not receive any compensation?
A There's a resolution that if she picks up materials, because we still make pine needle baskets and

things as materials to keep cultural alive, if she has to spend any money for, like, gas to go and pick these things up, if it's out of the county or anywhere in the county she'll get reimbursed for that, but nothing else.

Q So basically she gets reimbursed for expenses?

A Yeah, as long as it pertains to the program of picking up, you know, hunting, gathering, you know, things like that, gathering things, materials.

Q Is there any other program that the tribe operates that deals with the history besides the artisan program?

A No other programs.

Q Maybe I should ask you, what programs does the tribe have?

A The programs, have ICWA, higher education, forestry, realty, safety. We have a maintenance program for the vehicles and the property, keeping the property up. I can't recall right now, there might be others.

Q Does the tribe have employees?

A Yes.

Q Okay. How many?

A Four.

Q I'm sorry?

A Four.

Q And what are their names?

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A Their names or their positions?
Q Their names and positions.
A Silvia Burley, administrator.
Anjelica Paulk, A-N-J-E-L-I-C-A, P-A-U-L-K, assistant administrator.
Rashel, R-A-S-H-E-L R-E-Z-N-O-R, Rashel Reznor is the tribal secretary.
And Tiger Paulk, T-I-G-E-R P-A-U-L-K is a maintenance engineer.
Q Are each of these positions salaried positions then?
A Yes.
Q And does the tribe employ consultants?
A Yes.
Q Obviously you've got attorneys. And what consultants does the tribe currently employ besides your counsel?
A Our financial manager.
Q Just one?
A Yes.
Q Okay. What else?
A That's it at this time.
Q Okay. Now the tribe's ICWA program, I presume that benefits your granddaughter, is that correct?
A No, we had the ICWA program, if someone calls

in and they have a case to where some kids say that they're Miwok Indians and they're going to court because they got taken away from their family, and they write to us to see if maybe they're in our tribe or if we have any idea of what tribe they might be in. My granddaughter does not, she's not in the ICWA program.

Q Okay. My understanding was that ICWA was -- I understand that application of ICWA, I understood that it also had some other broader implications. I wasn't trying to suggest anything about your granddaughter.

What does the tribe do in the area of education?

A Education? We have higher education and it's out there to any tribal member that would want to get a higher education to learn just broader skills. Even if Yakima wanted to get an education, even if he wanted a GED there would be money there to where if he wanted to pursue that area he could do so.

Q Has any tribal member taken advantage of that program?

A Yes.

Q And who is that?

A Well at this time I'd have to go back into the files, I couldn't say right off my head, I just know that they have or it has been forward. I just can't --

Q There are only four people that would be eligible for higher education?

A But then you're probably going to ask me what time and I don't know what date.

Q No, no, I was just wondering if anybody had?

A Yes, Rashel Reznor.

Q I'm sorry, you said Michelle?

A Rashel.

Q Oh, Rashel. And then how does the tribe get involved with forestry?

A Forestry calls to see when they want to clearcut land and it comes back down to they want to see if there's any cultural or heritage, and so they want to confer with the tribe to show that they're in compliance with the tribes of California.

Q What is the current requirement for membership? What is the current criteria?

A You'd have to look on the application, I couldn't say right off.

Q Well, you're the tribal chairperson and you don't know what the criteria for being a member of the tribe?

MR. STEELE: Objection, argumentative.

THE WITNESS: I know that we have an application, I'd have to look at the application. I

1 couldn't say right off every single thing, it's not in
2 front of me. I work seven days a week, sometimes twenty
3 hours a day, I couldn't tell you right this time. I'd
4 have to look at the application.
5 MS. LUTHER: Q. Is it your understanding that
6 in order to be a member of the tribe that one of the
7 requirements, it might even be the only one, but at
8 least one is that you have to be related to someone on
9 the base roll?
10 MR. STEELE: Objection, asked and answered, she
11 said she doesn't remember.
12 THE WITNESS: I'd have to look at the
13 application.
14 MS. LUTHER: Q. So it might be that you don't
15 have to be related to somebody on the base roll, you
16 don't know?
17 A I can't answer, I don't know.
18 MR. THOMPSON: Can I interject that it's
19 probably in the enrollment ordinance which has been
20 provided to the bureau. And I have a copy of the
21 document if you want to put it in evidence and ask
22 questions.
23 MS. LUTHER: You have a copy with you?
24 MR. THOMPSON: You want to put it into evidence
25 and ask questions on it?

MS. LUTHER: Sure, that would be great. Thanks. I'll go make a copy so you can put it back in your binder.

MR. THOMPSON: Let me be sure this is the approved ordinance as you remember it.

Getting back to the signature page here.

THE WITNESS: Yes.

MR. THOMPSON: Okay.

MS. LUTHER: I'll be right back.

(Thereupon there was a discussion off the record.)

(Thereupon Exhibit number 1 was marked by the Reporter for identification.)

MS. LUTHER: Q. What was the process by which you actually became a member of the tribe?

A I was asked to forward documents to the then spokesperson of the Sheep Ranch Rancheria.

Q And who was that?

A Yakima Dixie.

Q And so what document did you send him?

A I gave 'em to him, I don't recall what all documents he wanted, that was five, six years ago, I don't know.

Q Okay. And what happened next?

A He went to jail.

Q That wasn't exactly what I meant.

A Well he went to jail and so it got quiet. And then in '98 I had been talking with Margaret Dalton, I think from Jackson Rancheria, and she said that she knows of a guy named Raymond Fry down at the Bureau of Indian Affairs, and go talk to Ray, maybe Sheep Ranch Rancheria reopened, she heard a rumor Yakima Dixie was out.

And I said, "Oh, great, Yakima Dixie, I've been corresponding with him for three years now, and yeah, I'll go down and talk to Ray then."

And I went down to the bureau. And Ray took me in to meet with him and he said yes, that Mr. Dixie is back home, it's confirmed, he just spoke to him the other day, and if I was interested in speaking with him that I should give him a call.

And I asked him if he had his number, and he gave me his number.

Q Okay. But then did you call Mr. Dixie?

A Yes.

Q And what transpired in that conversation?

A He asked me to come by.

Q And did you?

A Yes.

Q What happened when you went by? I take it you

1 went to the Sheep Ranch Rancheria?
2 A I went to Mr. Dixie's residence in Sheep Ranch.
3 Q At that time was it at the land known as Sheep
4 Ranch Rancheria or somewhere else?
5 A No, it was at the place, the Sheep Ranch. He
6 said yeah, that he had, he had gone over the documents
7 and that he had talked to the bureau and it was
8 confirmed that his grandma and my grandpa were brother
9 and sister, and with all the other documents that he got
10 that that was enough for him to say that I am related
11 and that I am Miwok. And with my background that he had
12 no problem with bringing me and my daughters and my
13 granddaughter in as tribal members of the Sheep Ranch
14 Rancheria.
15 Q So at that point he brought your whole family
16 in or that --
17 A Yeah.
18 Q Did he put that in writing to you?
19 A We called -- well not we, he called the bureau
20 and said that we had come by and that he had accepted us
21 and what did he need to do.
22 And I don't know exactly who he spoke to, if it
23 was Ray, Brian, Brian Golding or Dale Risling, I have no
24 idea. And they said he'd have to write down in writing
25 who he accepted as members into the tribe, and it would

have to be on a piece of paper, the names, and he'd have to sign it, and he'd have to have us bring it down to the bureau.

Q And so did he do that?

A He signed it. Well, he had me write it but he signed it. At that time I didn't know if he could write or not, I thought since he didn't want to write it out maybe he didn't know how to write. But I don't know.

Anyway, so I spelled it out and he signed it. And I went to the bureau with my, then it was my youngest daughter Anjelica.

And the bureau said that we'd have to go back to Mr. Dixie because there was nothing on there to prove who he was actually bringing in as in birthdates, we forgot to write birthdates down, because maybe it was Silvia Burley that's like ninety years old or something.

So we went back up and Mr. Dixie had us, had, he dictated to me what he wanted to have said. So I wrote it down, and we wrote in the names and the birthdates and the date. And I think at that time that might have been August 6th, because I think the first date was August 5th.

And then we took 'em back down and they said that that was fine, that's all they needed, and there was no restrictions or anything put on it, and that we

1 were tribal members.
2 Q During any of your conversations with Yakima
3 Dixie at that time, did he indicate to you whether he
4 considered his own brothers to be members of the tribe?
5 A No, he said his, he said Richard and Tommy were
6 dead, and as far as he was concerned Melvin was dead
7 because he hadn't seen his brother for 25 years.
8 Q Did he say anything about Melvin and whether
9 Melvin would be --
10 A No.
11 Q -- a member? Did he ask if you had any
12 brothers or sisters?
13 A No.
14 Q Or about your parents?
15 A No.
16 Q Did you ever determine whether or not Mr. Dixie
17 knew how to read and write?
18 A Yes.
19 Q And when was that?
20 A He wrote letters to me before then, in between
21 '95 and '98, that's why I couldn't figure out why he
22 didn't want to write then. I thought, well maybe he can
23 write in cursive but he couldn't spell or type, I don't
24 know. I thought maybe he just didn't want to write.
25 Q Well the letters you got from him before, how

can you be sure that he was, in fact, the one who wrote them as opposed to maybe somebody else?

A Because actually when he end up writing to me on Christmas cards it came out the same way. It was the same, the same cursive, and I actually seen him write in front of me too.

Q Okay. I noticed that the ordinance that has been marked as Exhibit 1 -- well, let me ask you this first.

As far as you know, is the document marked as Exhibit 1 the tribe's current enrollment ordinance?

A Yes, to my knowledge of today.

Q At the time that this document was drafted, was anyone other than the four adult individuals designated on the base roll invited to participate in drafting this document?

A Sure.

Q Who?

A We had, not written correspondence, well some written but mostly verbal with the bureau, like Brian Golding, Ray Fry, Dale Risling, Doug Rollins, Claudette, I think her last name is Rogers, I'm not sure. But the Bureau of Indian Affairs with Ron Jaeger, Jan DePina-Whipple, other consultants that were in the, employed by the tribe through contract. Attorney that's dead.

Q I'm sorry?
A We have an attorney that died.
Q Oh.
A Our other attorney. It was, it's been, it just didn't come up, there it is, it took a long time to come up with anything that had to do with government documents, and it was always back and forth with the bureau because we wanted to make sure that we were in compliance all the way.
Q And what did, what did Ray Fry tell you to the best of your recollection?
A Mostly it's like you can go on and go on-line, or you can contact other tribes and see what their ordinances are like, or they would see if anybody, they might have some models or draft ordinances that they could possibly have Brian send to us, things like that.
Q Did you ever ask for some samples to be sent?
A Yes.
Q And did you receive any?
A Yes.
Q And what did Brian Golding tell you about drafting?
A "Here's your documents that you requested."
Q Okay. Did you have any other conversations with him?

A Many, but I can't say right now, I just know there were many.

Q All right. Dale Risling, what did he have to say to you about drafting the enrollment ordinance?

A Mostly with Dale if I went down to meet with him he would say to, you should confer with tribal ops. I would ask him if he would have any idea because he used to be the chairperson of the Hoopa and I thought that maybe he could help us.

Q Ron Jaeger, what did you talk with him about with regard to the enrollment ordinance?

A Just what ideas that he would have as being in the PRO which comes to the Pacific Regional Office. If there was any comments or any suggestions that he could put towards us, because we wanted to have a full rounded view of not only the bureau at the central California agency level, but the PRO too, because I wanted to introduce myself as the chairperson of the tribal council to show that we wanted to be open for any comments or anything through their office also besides the central Cal.

Q So it doesn't sound like he had anything to say to you about drafting the enrollment ordinance?

A He mostly said as long as it's not violating any Indian civil rights, that's what his idea was on it.

Q Okay. And what did Jan Whipple-DePina say to you about drafting the --

A That it was in the contract and that we had to keep our ordinances in order as to the, like the election ordinance, the enrollment ordinance; and to make sure that everything was proper; and just that if we ever need any help that they would be there to try to put us in the right direction.

Q Okay. Anything else that anyone at BIA said to you about drafting the enrollment ordinance?

A Only that it was required.

Q Do you have any knowledge as to whether Ms. Reznor or Ms. Park had any conversations with people at the Bureau of Indian Affairs concerning the drafting of the enrollment ordinance?

MR. STEELE: Objection, foundation, calls for speculation.

THE WITNESS: They were there at the same meetings.

MS. LUTHER: Q. Okay. So they were with you at the time?

A Yeah.

Q Okay. Does the tribe have any traditions of its own that are independent from the surrounding Miwok Tribes?

MR. STEELE: Objection, vague, ambiguous.

THE WITNESS: Pretty much all of the Miwok have the same tradition except the only difference is our language. And what I might say in my language as I was brought up to hear it might be different from, I mean it might be the same word but they might pronounce it different as in Ione, but all of our culture is the same.

MS. LUTHER: Q. Are there particular celebrations or cultural events that you celebrate just as the California Valley Miwok Tribe?

MR. STEELE: Objection, vague, ambiguous.

THE WITNESS: We have our traditions and we would like to celebrate 'em, we just don't got a lot of time.

Q Not if you're working twenty hours a day or whatever.

A I'm used to getting sued with Yakima with frivolous lawsuits, so there goes a lot of my time doing cultural stuff.

Q That happened, to my understanding, only once?

A We just got another one dismissed, so that's twice now.

Q That's the administrative appeal that he filed with the bureau, correct?

A Yes.

Q Okay. I know probably it all seems like the same thing to you, you know.

MR. THOMPSON: It is.

MS. LUTHER: Q. Another challenge, I understand that.

Are any non-Indians eligible for enrollment in the tribe?

A Can you repeat that?

Q I was just reading in section 5.010, criteria for enrollment. Under voting members it says, "All linear forebearers such as parents, grandparents, etcetera, of the persons identified in section 5.0101 --" you can look at it if you like.

A Uh-huh.

Q It says page thirteen at the very top. And it appears to identify all voting members as consisting of the base enrollees, all linear descendants of the persons identified on the base roll, but then it also says all linear forebearers such as parents, grandparents, etcetera of the persons on the base roll.

Do you see that?

A Uh-huh.

Q And so my question, obviously your granddaughter, your granddaughter and your daughters

have forebearers who seem to be, may be non-Indian, I don't know if they are or not, is that the case?

MR. STEELE: Objection, calls for a legal conclusion, also lacks foundation.

THE WITNESS: Do you mean on their part if there's someone that is not of Miwok, is that what you're meaning?

MS. LUTHER: Q. Yeah, because it suggests to me, it says all linear forebearers of the person identified on the base roll. For example, your husband, is he at all Indian?

MR. STEELE: No, don't answer.

MS. LUTHER: Q. As far as you know?

MR. STEELE: Why don't you rephrase the question? I mean I think I knew what you were going for at first.

MS. LUTHER: It may have just been something that the tribe overlooked, kind of one of those unintentional things, but let me start off by asking you this.

Q Who is Anjelica's father?

A Tiger Paulk.

Q And is Mr. Paulk Indian to the best of your knowledge?

MR. STEELE: I'm going to have to stop that

line of questioning. I mean I know what you're going for, and I think if you reask the question.

MR. THOMPSON: Can we come off the record for a second?

MS. LUTHER: Pardon?

MR. THOMPSON: Can we go off the record for a second?

(Thereupon there was a discussion off the record.)

MS. LUTHER: Let's go back on the record. Off the record the parties stipulated that the enrollment criteria insofar as voting members could be read to permit non-Indians to be enrolled voting members.

MR. THOMPSON: Can we say non-Miwoks?

MS. LUTHER: Sure, non-Miwoks.

MR. THOMPSON: Okay.

MS. LUTHER: Wouldn't it also potentially apply to non-Indians as well?

MR. THOMPSON: Well, if they're -- yeah. But it would be non-Miwoks would be eligible, because it could be Indians, her father was part Shawnee, and could be Shawnee members.

MS. LUTHER: I understand that.

MR. STEELE: One thing, before we enter a stipulation like that I'd like to look at this entire

1 document in its totality because I don't know what else,
2 and I don't recall off the top of my head what else is
3 in this document that might obviate the conclusion that
4 we're looking for here, because I don't think we can
5 tell just from that particular paragraph.
6 MS. LUTHER: I can certainly ask it different.
7 Q Was there ever any discussion or proposal to
8 include non-Miwoks as tribal members?
9 A Gee, I can't recall at this time. This
10 document was prepared a long time ago, I'd have to read
11 over it. I can't think of right today at this moment,
12 I'm too tired.
13 Q Let me ask you to, or do you recall whether
14 there was ever any intent to include non-Indians as
15 tribal members?
16 MR. STEELE: Objection, I'm going to object to
17 that as the deliberative process privilege, so you don't
18 have to answer.
19 MS. LUTHER: Q. Is it the policy of the tribe
20 to admit non-Indians as members?
21 MR. STEELE: Calls for a legal conclusion.
22 Answer if you know.
23 THE WITNESS: That I --
24 MR. STEELE: If you know, you know; if you
25 don't, you don't know.

THE WITNESS: Yeah, I don't know.

MS. LUTHER: Q. You don't know?

A I don't know.

MR. THOMPSON: I'd like to go off the record and talk to my client for a second.

(Thereupon there was a discussion off the record.)

MS. LUTHER: Q. Does the tribe have an ordinance for disbursing the Indian gaming revenue sharing fund that it receives?

A An actual ordinance?

Q Or resolution, a document, policy?

A Yes. Yes.

Q Okay. And how is that payment disbursed among, in the tribe?

MR. STEELE: Objection, vague.

THE WITNESS: I'd have to have the actual policy or resolution in front of me, but if there are disbursements, it goes to every tribal member that's above eighteen.

Q Okay. In equal shares or --

A Yes.

Q Now I take it that the tribe holds council meetings, is that correct?

A Yes.

Q How often?
A Monthly, unless there's a special meeting that has to come up.
Q When was the last time Yakima Dixie participated?
A What do you mean by participated?
Q Attended.
A That would have been August of 1999, August 28th.
Q Has he ever tried to participate by telephone?
A No.
Q Why were the tribal offices moved from, I think you said Arnold down to Tracy?
A I can't recall at this time.
MR. STEELE: Object, the question is vague and ambiguous.
MS. LUTHER: Q. Would Yakima Dixie be eligible to attend tribal council meetings if he is not a member of the tribal council?
A He's been giving threats to blow my head off, so I would be too nervous to be in the same area with him since he's already showed he'd murdered once.
Q He's done what?
A He murdered my uncle that had ties to that land up there who was at one time put on as a person that

should receive some of that land, and he told me that he wanted to live on that land, and in 1978 Yakima murdered him.

Q When did that happen?

A 1978, '77, '78, somewhere in there.

Q And was that Leonard Jeff?

A Yes.

Q And have you reported his threat to local law enforcement?

A Yes.

Q And do you know whether any action was taken?

A I know that Yakima got special treatment by the Sheriff's Department up there in Calaveras County that says if he wanted to go make a casino deal a Sheriff was standing on hand to take him to it. That's all I got out of them, that was in the newspaper.

Q When was the last time he made such a threat to you?

A He made a threat to my attorney.

Q Well, my question was to you.

A He made a threat about me to my attorney.

Q When was the last time he made a threat directly to you?

A I can't recall if it was in 2000 or 2001.

Q And approximately how many times has he

threatened you directly?
A Estimation, twice.
Q And then you mentioned a threat that was made against you to your attorneys, correct?
A Correct.
Q And how many times have you heard from other people that Yakima has threatened you?
A I can't recall. I can recall that he, that, getting the threats, I just can't recall exactly was, which consultant had heard cause they had spoken with him or when he would advise one of his attorneys to call us and they would relay what he said.
Q Now when I said, when I say threatened you, I mean actually threaten you with physical bodily harm as opposed to threatened to challenge your chairpersonship or, you know, threaten to take the tribe back, something like that. Do you understand the distinction?
A Yes.
Q Okay. So has he threatened you with bodily harm twice?
A Yes.
Q And has he threatened you with bodily harm through other individuals?
A Through my attorney. I can't recall for sure on the other ones that were said.

Q Okay. When he made the threat to you personally, did he do that to your face or over the phone or in a letter? How did he deliver the threat?

A Phone.

Q Both times?

A Phone once, to my face once.

Q What, to your recollection, led up to him making the two threats directly to you?

A There's this guy named Bill Martin and this guy named Chad Everone, and another guy I can't think of his name right now, but they told him that if he had that land all to himself, which they figured even if it wasn't in trust, in trust, something about the old rancheria, they could put a boxing place up there and he could be making millions just for one person. If he could kick out the rest of the tribe that he would become a multimillionaire.

So he told me that he would rather see me dead, and it would be easy enough to blow me away. Since he blew away my uncle, it would be no problem blowing away a woman.

And at that same time is when I no longer took it as, as something that would be just hearsay since he told me that it didn't bother him the first time to kill someone.

Q I'm sorry, it didn't --
A It didn't bother him the first time to kill someone that had one leg, so it wouldn't bother him to kill someone that was a woman.
Q Was that what was behind both of the threats as far as you know?
A That was probably behind, why we moved from Arnold to Tracy. Arnold is only seven miles from Sheep Ranch.
Q Have the tribe provided any benefits to Yakima Dixie?
A The tribe has sent him, I think two or three letters, I'd estimate two or three letters. The one says that we will, if he would send a bill to the tribe, as if it was PG&E, water, heating, as in propane or wood, that the tribe would pay for that for him.
And the tribe sent another letter that there's money in the higher education if he wanted to pursue any kind of a higher education as in a GED or anything.
Q Anything else?
A Oh, medical.
Q I'm sorry?
A Medical, if he needed any medical help.
Q Did you receive -- anything else? I want to make sure I get a complete list.

A Anything else is he got the same amount of any revenue sharing distributions that might have went out.

Q Okay. Anything else?

A I can't recall anything else right now.

Q Now, has he accepted any of the checks that the tribe has sent him for his revenue sharing?

A Oh, sure, he's accepted 'em. He's received 'em.

Q Okay. I guess I had been led to understand that he was returning them or not cashing them or something?

A Well, he accepted 'em, whether he cashed 'em or not I hadn't seen 'em be cashed.

Q They haven't been cashed?

A (Witness shook head.)

Q Is that a yes or a no?

A They have not been cashed as far as I know today.

Q Not a single one?

A You'd have to refer that to the financial manager.

Q And has he sent you any letters in response to your letters to him about, you know, paying the utility bills or getting a higher education or medical?

A No.

Q Does the tribe print its own enrollment cards?
A The tribe is setting up a computer system to where they will have the enrollment cards with the I.D.s.
Q What does the tribe use at the present time as a means of identifying the members as tribal members?
A We had enrollment cards that were back from winter court that just showed your, I think it was a photo and just tribal affiliation and information like that.
Q Has one ever been sent to Yakima Dixie?
A He has known it was available, he hasn't contacted us.
Q So the tribe hasn't sent him one because it hasn't received a request for one?
A Right. He does not want his personal information put out there. He doesn't, he hasn't provided us a picture, a photo I.D. or any of his personal information.
Q Have the tribe done any work in the area of tribal law development?
A The closest we have there is it enacted a resolution for a, like a hearing dispute grievance for a tribal Administrative Law Judge to come in to hear any disputes, otherwise you have tribal council dispute

hearing that any members can come to.

Q When was that resolution enacted?

A Oh, the first one I think, to estimate would be 2000, 2001.

Q Okay.

MR. THOMPSON: Can I get a clarification on what do you mean by tribal, did you say tribal laws or?

MS. LUTHER: I said tribal law development, the development of tribal laws.

MR. THOMPSON: Like gaming ordinances, would that be gaming ordinances, regs and --

MS. LUTHER: Only to the extent that they establish law for the tribe.

MR. THOMPSON: The tribe has a gaming ordinance approved by the NIGC. They have an enrollment ordinance, they have a election ordinance, policies and procedures ordinance, dispute resolution ordinance. Since, since they don't have any land they don't have any land ordinances, but we can stip to those, that they definitely have those documents.

MS. LUTHER: Right.

Q Has the tribe identified a date on which it contends that it became a terminated tribe?

MR. STEELE: Objection, calls for a legal conclusion.

Don't answer that.

MS. LUTHER: Sure she does. Are you directing her not to answer?

MR. STEELE: Uh-huh.

MS. LUTHER: Why, on what grounds?

MR. STEELE: Calls for a legal conclusion.

MS. LUTHER: That's not a basis for instructing her not to answer.

MR. STEELE: Rephrase the question.

MS. LUTHER: It's pretty simple.

Q Does the tribe maintain that it was terminated as of a certain date?

MR. STEELE: Calls for a legal conclusion. I'm instructing her not to answer. If you want to rephrase the question, you can probably get the answer.

MS. LUTHER: Nope, I'll call the magistrate. Obviously it's an issue in this case.

(Thereupon there was a discussion off the record.)

MS. LUTHER: Why don't you repeat the question to the witness?

(Thereupon the Reporter read back as requested.)

MR. STEELE: Calls for a legal conclusion. That's my objection.

THE WITNESS: Yes.

MS. LUTHER: Q. And what date is that?

A I would estimate about 1966 when, '66, '67 when Mabel Hodge Dixie got the deed to the land.

Q Okay. So, okay. And the tribe takes the position that at some point it was restored and terminated, is that correct?

MR. STEELE: Objection, vague, compound, and calls for a legal conclusion.

THE WITNESS: The tribe takes the stand that it was terminated and rebrought it back in administratively somewhere back in the 1990s, I guess, it came back up on the Federal Register, I think 1994.

MS. LUTHER: Q. Have you ever checked the Federal Register list prior to 1994?

A There's nothing.

Q I've got 'em, they're on every single list since the list came out in 1979.

A We'd like to have a copy of 'em because we can't seem to get 'em. We went down to the archives in San Bruno and they said there's documents that the bureau has not released.

Q Federal Register isn't published by the Bureau of Indian Affairs, I can tell you exactly where to find them, they're in the court library downstairs.

MR. THOMPSON: We'll stip that the Sheep Ranch Rancheria has been listed off and on by the Bureau of Affairs since 1967, we'll stip to that.

MS. LUTHER: I won't because it's always been listed.

MR. THOMPSON: We'll stip to that.

MS. LUTHER: You'll stipulate that the bureau has always consistently made --

MR. STEELE: No. No.

MR. THOMPSON: What I'm saying is that the chairperson may not personally know of all those federal registry, I'm saying we don't have any problem with the fact that that may be the fact.

MR. STEELE: I'd sure like to see something before '73 though. I've heard about '79 and I've seen '94 on.

MS. LUTHER: And I've given you '72.

MR. STEELE: '72 is probably the one I'm thinking about when I say '73.

MS. LUTHER: So I guess my question again to you is on what date do you contend that the tribe regained status as a federally recognized tribe?

MR. STEELE: Objection, foundation, calls for a legal conclusion.

MR. THOMPSON: If she doesn't know, she doesn't

CVMT-2011-000486

1 know.
2 THE WITNESS: Yeah, I don't know for sure.
3 MS. LUTHER: Q. And you mentioned before that
4 you felt that the tribe had been administratively
5 restored, what did you mean by that?
6 A By being here would --
7 MR. STEELE: Objection, calls for a legal
8 conclusion.
9 Go ahead.
10 THE WITNESS: By being in depositions and
11 listening to Amy Dutscke with her letter of 1995 that
12 she signed talking about keeping the Sheep Ranch
13 Rancheria on as a restored or, I don't know, I just know
14 a letter of 1995 by Amy Dutscke.
15 MS. LUTHER: Q. When do you contend that the
16 tribe was first recognized as a federally recognized
17 tribe? I'm talking about before termination ever
18 happened?
19 MR. STEELE: Objection, calls for a legal
20 conclusion, also lacks foundation.
21 Go ahead.
22 THE WITNESS: I would estimate 1916.
23 MS. LUTHER: Q. What happened in 1916?
24 A They talked about Indians being up in the Sheep
25 Ranch area and that we're homeless, and this they put on

the Sheep Ranch Rancheria, got land for.

MS. LUTHER: I'm going to look at my notes, and I think we're done after all this time.

MR. THOMPSON: Can we go off the record for a second?

(Thereupon there was a discussion off the record.)

EXAMINATION

BY MR. GEORGE L. STEELE, ESQ., Counsel on behalf of the Plaintiff, CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA:

Q Okay. Hi, Silvia.

A Hi.

Q Now, the tribe has a 638 contract with the federal government, right?

A That's correct.

Q Have you been told by the Bureau of Indian Affairs that that contract is a mature contract?

A Yes.

Q Were you told by anyone at the Bureau of Indian Affairs that the tribe had to be organized before they could be considered a mature contract tribe?

A Yes.

Q Do you remember who at the Bureau of Indian Affairs told you that?

A Yes.
Q And who was that person?
A I hate to get that person in trouble, but --
Q Okay. Withdraw the question.
MS. LUTHER: I want to know the answer.
MR. STEELE: Okay. I'll, it's coming back to you in a minute.
MS. LUTHER: That person won't get into trouble, they won't.
MR. THOMPSON: Yes, they will.
MR. STEELE: We'll come back to you in a second.
Q Okay. Have any non-Indians ever applied for enrollment with the tribe?
A Not through the California Valley Miwok Tribe itself, but non-Indians were enrolled through Yakima Dixie, he brang in some people to be known as Caucasian and Indians from Nevada which are Piute.
Q Now, did he enroll them or had he attempted to enroll them?
A He attempted to enroll them as the Sheep Ranch band of Miwok Indian members, and he sent it to the Bureau of Indian Affairs CCA, and they said that this did not have the right signatures of that, of the California Valley Miwok Tribe tribal council, so they

sent the documents back to Yakima.

Q Okay. Now, did the California Valley Miwok Tribe ever consider those applications?

A They were never actually sent to the tribe.

MR. STEELE: Okay. All right. That's all for me.

MR. THOMPSON: Am I allowed to ask questions?

MS. LUTHER: No, you are not. One person only.

MR. THOMPSON: So I can write 'em out for --

MR. STEELE: I'll disappear. He can either hand 'em to me or I can leave.

MS. LUTHER: No, one attorney at a, per deposition per side, or per client.

FURTHER EXAMINATION

BY MS. DEBORA G. LUTHER, ESQ., Counsel on behalf of the UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; GALE NORTON, SECRETARY OF INTERIOR; and AURENE MARTIN, ACTING ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS:

Q Now, who told you, who at the Bureau of Indian Affairs told you that the tribe had to be recognized to have a mature 638 contract?

A Sunshine Jordan from the Self Indian --

Q Who?

A From the Self Indian Determination, Indian Self-Determination. Her name is S-U-N-S-H-I-N-E, J-O-R-D-A-N.

Q And when did she have this conversation with you?

A Last month. We asked her when we got the paper back signed by Dale Risling that said that we are now a mature, had mature status.

Q And insofar as Mr. Dixie attempting to enroll members in the tribe, do you have any firsthand knowledge of whether those individuals were Indian or not?

A From the documents that the bureau had forwarded to show that Yakima Dixie had done this, we had sent a FOIA, and that's the only way the tribe found out that anybody had tried to go through Yakima to be enrolled. And the bureau blocked out all of their information except that they were from Nevada or known people that we know of that are not Indian descent.

Q How would you know whether they are of Indian descent or not?

A Because the one guy that threatened me from jail was Rocky McKay, and I went to Sonora and got his birth certificate, and his mother and father are both listed on there as Caucasian.

Q Okay. Is that the only basis?
A For that person.
Q For -- okay. That you make the determination that he is not Indian?
A Yes.
Q And then the rest of the people you say are Piutes?
A Yes, from Nevada.
Q Was Rocky McKay the only, in your opinion, non-Indian that Yakima Dixie tried to enroll?
A I wouldn't, I can't really recall right now how many people he tried to bring. I think he's done it a couple times. That would probably have to go back to the bureau because they actually have the information that was sent to them firsthand.
MS. LUTHER: That's all I have. Are you done?
MR. STEELE: Nope, I've got a short list here.

FURTHER EXAMINATION

BY MR. GEORGE L. STEELE, ESQ., Counsel on behalf of the Plaintiff, CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA:
Q Are we ready?
A No. Yes.
Q Okay. Now, has the BIA ever told the tribe to

open enrollment?

A The BIA told us to set up our ordinances and our applications, they never told us to go out and open enrollment.

Q Okay. Have they, did the BIA ever tell you to publish a notice of open enrollment in any newspaper, periodical or the like?

MS. LUTHER: I would object, vague and ambiguous as to open enrollment.

MR. STEELE: Q. If you understand?

A There has been no time since I've been chairperson that I can recall the bureau telling us to publish anything about opening enrollment.

Q Now, did -- have you ever heard of any other tribe publishing enrollment solicitations?

MS. LUTHER: Vague and ambiguous.

THE WITNESS: No, but I seen Jackson firsthand go from seven up to 35.

MR. STEELE: Q. Did they publish an enrollment?

A No.

Q Okay. You did send the enrollment ordinance, the tribe's enrollment ordinance to the BIA, correct?

A We complied with the contract 638 that said any ordinances or policies and procedures that the tribe had

completed to be sent annually to the Bureau of Indian Affairs.

Q So the enrollment ordinance was sent?

A Yes.

Q Did they give you any comments or comments amounting to disapproval about your enrollment ordinance?

A No.

Q Okay. Do you remember if Yakima Dixie challenged your tribal leadership in the year 2000?

A Yes.

Q And what happened? What were the events that amounted to that challenge?

A Yakima Dixie was a vice chairperson in which he participated in a election of May of '99, and he served as a vice chairperson for about seven, eight months. And he had no problem with being a vice chairperson or being in the tribe until this issue about Proposition 1A come up about making millions of dollars in a casino, and some backers named Bill Martin.

And he took it to the Bureau of Indian Affairs and had a meeting with Ray Fry, Dale Risling -- no, Ray Fry, Brian Golding, and I don't know who else, and bring up allegations.

And it came down to they end up sending me a

letter in 2000, I'm not sure what month, and they had told me that if Yakima Dixie had any valid truths to his allegations to bring the documents forward. And in the letter they said that they had not received.

And they told him to take it to the tribal forum because it's an internal matter. And at that time they asked us if we would give Yakima extra time since in their eyes the time had already run out. And --

We said yes, we'll give him an extra thirty days to bring it to the council.

Q And then what happened?

A Thirty days went by, he didn't take any new documentation to the bureau, he never contacted the tribe, and so we sent him a letter saying that since your allegations are unfounded that this is, this case is now closed.

Q And was that the end of it or was there more?

MS. LUTHER: I'm sorry?

MR. STEELE: Q. And was that the end of it or was there more?

A No, then we end up getting summons from court that Yakima wanted to take it to court, and he did not want to come to the tribe. He said that the bureau was, I guess, in cahoots with me and put me in charge of the Sheep Ranch Rancheria, and so he wanted to take it to a

tribal, not tribal, he wanted to take it to a federal court about the chairmanship or something, I don't remember anymore.

Q He filed a suit in federal court?

A Yes.

Q And what was the outcome of the suit?

A It was dismissed because there was not enough merit to it. He, all he complained about was things that he had no proof.

MS. LUTHER: Calls for a legal conclusion.

MR. STEELE: Q. Okay. Now, other than what you've testified to earlier, has Yakima Dixie had any other people threaten you?

A Yes.

Q Who?

A He had Rocky McKay threaten me. And Melvin Dixie wrote on a paper that he did not consider me part of the tribe, and that, that in his eyes I was like, just, I don't know. That letter is so far back.

Q What was the basic meaning of the letter to you?

A The basic meaning to me was, anyway, that he could get rid of the tribal members and just have him and his brother go in and make this casino deal was all he cared about.

Q And when did you receive this?
A I'm not sure. Actually I think it went to the bureau in 2000. The bureau told Melvin to contact the tribe about any matters he might have and about maybe getting an application to join in the tribe, and he had never directly come to the tribe, he always went to the bureau.
Q Now did Melvin ever submit an application to the tribe?
A No, not till this day he never has.
Q Did you ever make efforts to obtain Melvin's address from the BIA?
A Yes, I've got a letter that I wrote to the bureau and I said that since you sent us documentation to where you wiped out all of Melvin's personal information, even his phone number and his address, and the tribe cannot contact him, can you please forward our information to him that he can get in touch with the tribal council, the administrator at any time to receive an application.
Q And did they do that?
A I don't know.
Q Did you ever hear from Melvin after that?
A No, I never have.
Q Okay. Now, had you received any information

from the BIA regarding people wanting to enroll in the tribe?

A Yeah, any letters that went down to the bureau, the bureau would forward 'em to me.

Q Okay. About how many interested folks were there, if you remember?

A I can't recall for sure. Less than ten.

Q Okay. To your knowledge, have people contacted the BIA about enrolling in the tribe that the BIA has not informed the tribe about?

A We've put in two FOIA's about has there been any contact that had to do with the Sheep Ranch Rancheria or California Valley Miwok Tribe on any matter, and we have never received anything back yet. And we've got letters, I think, from 2001, 2002. The FOIA's have never been answered, so I don't know.

MR. STEELE: Okay. Thank you. That's it.

MS. LUTHER: I don't have any response to that, I think we're done. Thank you.

(Thereupon the foregoing deposition was concluded at 3:53 p.m.)

_____

DATE

_____

SILVIA FAWN BURLEY

DOCUMENT NO. 44

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814

IN REPLY REFER TO

MAR 2 6 2004

Certified Mail No.7003 1680 0002 3896 9127
Return Receipt Requested

Ms. Sylvia Burley, Chairperson
California Valley Miwok Tribe
10601 Escondido Pl.
Stockton, California 95121

Dear Ms. Burley:

This letter acknowledges our February 11, 2004, receipt of a document represented to be the tribal constitution for the California Valley Miwok Tribe. It is our understanding that the Tribe has shared this tribal constitution with the Bureau of Indian Affairs (BIA) in an attempt to demonstrate that it is an "organized" tribe. Regretfully, we must disagree that such a demonstration is made.

Although the Tribe has not requested any assistance or comments from this office in response to your document, we provide the following observations for your consideration. As you know, the BIA's Central California Agency (CCA) has a responsibility to develop and maintain a government-to-government relationship with each of the 54 federally recognized tribes situated within CCA's jurisdiction. This relationship, includes among other things, the responsibility of working with the person or persons from each tribe who either are rightfully elected to a position of authority within the tribe or who otherwise occupy a position of authority within an unorganized tribe. To that end, the BIA has recognized you, as a person of authority within the California Valley Miwok Tribe. However, the BIA does not yet view your tribe to be an "organized" Indian Tribe and this view is borne out not only by the document that you have presented as the tribe's constitution but additionally, by our relations over the last several decades with members of the tribal community in and around Sheep Ranch Rancheria.(Let me emphasize that being an organized vis-à-vis unorganized tribe ordinarily will not impact either your tribe's day-to-day operations but could impact your tribe's continued eligibility for certain grants and services from the United States).

Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence that such general involvement was

attempted or has occurred with the purported organization of your tribe. For example, we have not been made aware of any efforts to reach out to the Indian communities in and around the Sheep Ranch Rancheria, or to persons who have maintained any cultural contact with Sheep Ranch. To our knowledge, the only persons of Indian descent involved in the tribe's organization efforts, were you and your two daughters. 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 have inherited an interest in the Rancheria. We are also not aware of any efforts to involve Indians(such as Lena Shelton) and their descendents who once lived adjacent to Sheep Ranch Rancheria or to investigate the possibility of involving a neighboring group. We are aware that the Indians of Sheep Ranch Rancheria were in fact, part of a larger group of Indians residing less then 20 miles away at West Point. Indeed, at your February 23, 2004 deposition, you yourself testified you were at one time of the West Point Indian Community; we understand as well, that you had siblings residing there for many years. The BIA remains available, upon your request, to assist you in identifying the members of the local Indian community, to assist in disseminating both individual and pubic notices, facilitating meetings, and otherwise providing logistical support.

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

Base membership rolls are used to establish a tribe's cohesiveness and community at a point in time in history. They would normally contain the names of individuals listed on historical documents which confirm Native American tribal relationships in a specific geographical region. Since tribes and bands themselves did not usually possess such historical documents, therefore, tribal base rolls have included persons listed on old census rolls, Indian Agency rolls, voters rolls, etc. Our experience with your sister Miwok tribes (e.g., Shingle Springs Rancheria, Tuolumne Rancheria, Ione Band, etcetera) leads us to believe that Miwok tradition favors base rolls identifying persons found in Miwok tribes stretching from Amador County in the North to Calavaras and Mariposa Counties in the South. The Base and Enrollment criteria for these tribes vary; for example, Amador County tribes use the 1915 Miwok Indian Census of Amador County, El Dorado County tribes utilize the 1916 Indian Census Roll, tribe(s) in Tuolumne County utilize a 1934 IRA voters' list. The base roll typically constitutes the

cornerstone of tribal membership and based upon our experience, has been the basic starting point and foundation for each of the Miwok tribes in our jurisdiction, i.e., the Ione Band of Miwok Indians, Shingle Springs Rancheria and Tuolumne Rancheria.

We must continue to emphasis the importance of the participation of a greater tribal community in determining membership criteria. We reiterate our continued availability and willingness to assist you in this process and that via PL 93-638 contracts intended to facilitate the organization or reorganization of the tribal community, we have already extended assistance. We urge you to continue the work that you have begun towards formal organization of the California Valley Miwok Tribe.

If we can assist your efforts in any way , please contact Raymond Fry, Manager, Tribal Services, at (916) 930-3794.

Should you wish to appeal any portion of this letter, you are advised that you may do so by complying with the following:

This decision may be appealed to the Regional Director, Pacific Regional Office, Bureau of Indian Affairs, 2800 Cottage Way, Sacramento, California 95825. In accordance with the regulations in 25 CFR Part 2 (copy enclosed). Your notice of appeal must be filed in this office within 30 days of the date you receive this decision. The date of filing or notice is the date it is post marked or the date it is personally delivered to this office. Your notice of appeal must include your name, address and telephone number. It should clearly identify the decision to be appealed. If possible attach a copy of the decision. The notice of and the envelope which it is mailed, should be clearly labeled "NOTICE OF APPEAL." The notice of appeal must list the names and addresses of the interested parties known to you and certify that you have sent them copies of the notice.

You must also send a copy of your notice to the Regional Director, at the address given above.

If you are not represented by an attorney, you may request assistance from this office in the preparation of your appeal.

If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

Sincerely,

Dale Risling, Sr.
Superintendent

CC: Pacific Regional Director
Debora Luther, Assistant US Attorney
Myra Spicker, Deputy Solicitor
Yakima Dixie-Tribal Member

DOCUMENT NO. 45

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

ORDER NO. 3252

SIGNATURE DATE: April 9, 2004

Subject: Authorities Delegated to the Principal Deputy Assistant Secretary - Indian Affairs

Sec.1 **Purpose.** The authority described in this Order expands the authority of the Principal Deputy Assistant Secretary - Indian Affairs to include the exercise of certain program and administrative authorities of the Assistant Secretary - Indian Affairs.

Sec. 2 **Authority.** This Order is issued in accordance with the authority provided by Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended.

Sec. 3 **Delegation of Authority.** The authority of the Secretary is hereby delegated through the Assistant Secretary - Indian Affairs to the Principal Deputy Assistant Secretary - Indian Affairs to execute all documents, including regulations and other Federal Resister notices, and perform all other duties relating to federal recognition of Native American tribes, taking land into trust for gaming purposes, and other gaming matters. This delegation is in addition to the authorities delegated to the Principal Deputy Assistant Secretary - Indian Affairs in 209 DM 8.

Sec. 4 **Re-delegation.** Subject to the limitations in Section 204 (a) of Public Law 94-579 and the limitations in 200 DM 1, these authorities may be further delegated.

Sec. 5 **Expiration Date.** This Order is effective immediately. It will remain in effect until its provisions are converted to the Departmental Manual or until it is amended, superseded, or revoked, whichever occurs first. In the absence of any of the foregoing actions, the provisions of this Order will expire and be considered obsolete on June 1, 2005.

/s/ Gale A. Norton
Secretary of the Interior

SO#3252 4/9/04

DOCUMENT NO. 46

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ORIGINAL
FILED
APR 30 2004
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH RANCHERIA OF ME-WUK INDIANS OF CALIFORNIA, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GAIL NORTON, SECRETARY OF INTERIOR, DAVID ANDERSON[1], ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, Defendants.	CASE NO. CIV.S-02-0912 FCD/GGH DECLARATION OF BRIAN GOLDING, SR., IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT DATE: May 14, 2004 TIME: 10:00 A.M. COURTROOM: 2

I, BRIAN GOLDING, SR., declare:

1. I have been an employee of the Bureau of Indian Affairs since October 1997, when I was hired as a Tribal Operations Specialist. Currently, I serve half-time as a Tribal Operations Specialist in the Branch of Tribal Operations at the Central California Agency of the Bureau of Indian Affairs ("BIA") as well as half-time in the same position at the Pacific Regional Office of the BIA . I have personal knowledge of the facts set forth in this declaration.

[1] Former Assistant Secretary Neal A. McCaleb has retired from federal service. David Anderson is now the Assistant Secretary for Indian Affairs. Pursuant to Fed.R.Civ.P. 25(d), Mr. Anderson is substituted as defendant in place of Mr. McCaleb.

2. The Central California Agency ("CCA") provides assistance and information to approximately 54 tribes situated in Central California, including the California Valley Miwok Tribe, which was formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians ("the Tribe"). CCA also maintains historical files pertaining to the tribes in our geographical jurisdiction, including files relating to the government's efforts to comply with the California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 (Aug. 18, 1968), *as amended*, Pub.L. 88-419, 78 Stat. 390 (Aug. 11, 1964). With respect to the Sheep Ranch Rancheria and its tribe, CCA has records dating back to 1915 and the records of this office are more extensive than those maintained by the Pacific Regional Office.

3. I have searched CCA's records to determine whether any objections were received in response to public notice of the election to be held on the issue of whether a plan should be drafted to distribute the assets of the Sheep Ranch Rancheria. I could find no record of any objections. I also searched for any records establishing that a conservatorship had been established for Mabel Hodge Dixie and did not find any. I searched for any records showing that notice had been published in the Federal Register confirming the final distribution of the assets of the Sheep Ranch Rancheria and confirming the termination of the federal-tribal relationship. Again, I did not find any. 4. I have searched the records of this office and have not found any record reflecting or suggesting that the Bureau of Indian Affairs ("BIA") has ever deemed Sheep Ranch Rancheria to be a terminated tribe. To the contrary and based upon the records of this office, the termination of the tribe was never completed and federal recognition was never withdrawn from this tribe. The earliest publication of federally recognized tribes of which I am aware is a booklet published in 1972 entitled "American Indians and Their Federal Relationship." The Sheep Ranch Rancheria is listed therein as a recognized tribe. In my search of the records of CCA, I have not found any record showing that a Notice of Termination was ever published in the Federal Register or other letter or notice stating the federal government's intention to terminate services to and/or relations with the Sheep Ranch Rancheria. For this reason and others, BIA does not view this tribe as a "restored" tribe, which is a term of art that refers to a tribe once acknowledged as a federally-recognized tribe, then was "terminated," and subsequently "restored" to federal recognition.

5. Among other things, termination would mean that tribal members would no longer be eligible to receive any services from the federal government based on their status as Indians. I have searched available records to determine whether services were ever denied to Mabel Hodge Dixie or her four sons since 1967, and found no such records. I did not discover any records demonstrating that BIA ever denied anyone any services on the grounds that the Sheep Ranch Rancheria was a terminated tribe. With respect to federally recognized tribes that are unorganized, have no formal government structure and/or have no formal enrollment document or list of members and where a distribution plan was prepared for the Tribe, such as Sheep Ranch Rancheria, it has been BIA's practice to acknowledge the distributees listed on the plan and their lineal descendants as putative members of the tribe. Pursuant to this practice, Yakima Dixie was and has been acknowledged by BIA as a putative member of the Tribe.

6. I am familiar with the "Report of Population by Tribe" dated February 8, 1989, that I understand appears as Plaintiff's Exhibit 29. As indicated on this report, the data thereon was derived from 1987/88 Labor Force Report, a document I have not located at this time. Each one of the tribes listed on this "Report of Population by Tribe" is a federally-recognized tribe. That "zero" is reported for Sheep Ranch Rancheria does not mean the Tribe is or was terminated. Instead, this report, which continues to be prepared today, is based on the service population area that was defined at that time in accordance with 25 C.F.R. § 20.1(r)(1989). Population "on" the reservation refers to persons living on trust land; population "off" reservation refers to persons living in "areas or communities adjacent or contiguous to reservations." 25 C.F.R. § 20.1(r)(1989). Consequently, the information contained in this "Report of Population by Tribe" means that BIA was unaware of tribal members living on the Sheep Ranch Rancheria or adjacent or contiguous thereto as of February 1989. It does not mean that there were no tribal members and is not used for that purpose.

7. I am familiar with the letter sent by Raymond Fry on November 26, 1997, which I understand appears as Plaintiff's Exhibit 30. I drafted this letter for Mr. Fry's signature. In stating that the Tribe "is not presently engaged in a government-to-government relationship with the United States," this office intended to convey that we did not have any ongoing or regular contact with

anyone on behalf of the Sheep Ranch Rancheria of Me-Wuk Indians, as the Tribe was then known. Based on the records of this office, the Tribe was unorganized, lacked any formal government structure or governing documents, and consisted of a loosely knit community of Indians in Calaveras County. The Tribe had not engaged in contracting for services under the Indian Self-Determination Act and no one affiliated with the Tribe had requested any services or assistance from this office, apart from a request from one individual for housing assistance. Essentially, at that time, the Tribe kept to itself. In no way was the letter intended to suggest that the Tribe had no members or that the Tribe did not exist or had been terminated or, in any way, was ineligible for services or recognition from the federal government as a tribe.

8. Based on the records of this office and my own personal knowledge since coming to work for the Bureau of Indian Affairs, the Sheep Ranch Rancheria of Me-Wuk Indians, also known as the California Valley Miwok Tribe, has never been restored to federal recognition precisely because its federal recognition was never severed or ended. Certainly, the letter dated July 26, 2000, that served to introduce Ms. Burley to Assistant Secretary – Indian Affairs Kevin Gover, which I understand is plaintiff's exhibit 32 in support of its summary judgment motion, was not and is not intended to suggest that the tribe is a restored tribe. Within the BIA, this letter does nothing more and nothing less than simply introduce Ms. Burley. Moreover, this office does not have authority to restore federal recognition to tribes.

9. At the present time, the Bureau of Indian Affairs acknowledges Silvia Burley as the authorized representative of the California Valley Miwok Tribe with whom government-to-government business is conducted. However, the BIA does not view the Tribe to be an organized tribe and, therefore, declines to recognize Ms. Burley as a "tribal chairperson" in the traditional sense as one who exercises authority over an organized Indian tribe.

10. BIA recently received from Silvia Burley a document purporting to be the tribe's Constitution. Attached hereto as Exhibit "a" is a true and correct copy of that document. BIA has declined to accept the document as evidence that the Tribe is now organized. Attached hereto as Exhibit "b" is a true and correct copy of BIA's response to the Tribe concerning the constitution.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of April 2004 in Sacramento, California.

BRIAN GOLDING, Sr.

Apr-29-04 04:24pm From-U.S. ATTORNEY'S OFFICE 916 554 2900 T-329 P.006/006 F-153

DOCUMENT NO. 47

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CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GALE NORTON, SECRETARY OF INTERIOR, AURENE MARTIN, ACTING ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS, Defendants.	CASE NO. CIV.S-02-0912 FCD/GGH DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF THEIR COUNTER MOTION FOR SUMMARY JUDGMENT DATE: May 14, 2004 TIME: 10:00 a.m. COURTROOM: 2

INTRODUCTION

The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians, *has never been terminated.* Therefore, it is not a *restored* tribe within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(iii), which is the force propelling this litigation.

Plaintiff's argument appears to focus on two erroneous bases for assuming that the Tribe was once terminated: (1) unrestricted title to the 0.92 acre Sheep Ranch Rancheria passed briefly to a member of the small tribe, Mabel Hodge Dixie and (2) there appear to have been no tribal members

in the 1980's and early 1990's. Plaintiff errs. First, although Sheep Ranch Rancheria was scheduled for termination, termination was never fully effected and the relationship between the United States and the rancheria (and its residents) was never severed. Plaintiff offers nothing other than conjecture to support its argument to the contrary.[1]

Secondly, plaintiff contends that a trust relationship is somehow imposed by 25 C.F.R. Part 151, which governs the process by which the United States accepts land into trust on behalf of federally-recognized tribes. No special trust responsibility is imposed by the regulations themselves. Indeed, whether the Secretary of the Interior will accept land into trust is discretionary. But, more importantly, as plaintiff has never submitted a land acquisition application, Part 151 is irrelevant to this case.

DISCUSSION

A. THE UNITED STATES HAS NOT BREACHED ANY TRUST DUTY TO THE TRIBE; RATHER, ANY BREACH WAS A BREACH OF ITS DUTY TOWARDS MABEL HODGE DIXIE IN FAILING TO OBTAIN A CONSERVATOR.

With the exception of providing a conservator for Mabel Hodge Dixie and publishing a

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[1] Plaintiff argues that there were no tribal members until 1992 or thereabouts. If that were true, which BIA disputes, this Court would be justified in determining that administrative error caused the Tribe's name to be added to the list of federally-recognized tribes, order the Tribe's name stricken from the list, and instruct Ms. Burley to seek re-recognition through the tribal acknowledgment process found at 25 C.F.R. Part 83. However, the Bureau of Indian Affairs ("BIA") consistently has had communication with members of this tribe who have continued to live in the area. BIA recognizes this Tribe as a duly constituted, loose-knit Tribe that has not formally organized. Silvia Burley, who became a tribal member in 1998 at age 38, maintains otherwise, in light of the tribal constitution that she drafted and adopted on the strength of her vote and the votes of her two daughters. Declaration of Brian Golding, Sr, filed simultaneously herewith, at Exhibit "b". The tribal constitution permits only the lineal descendants and lineal ancestors of Yakima Dixie and Silvia Burley to be voting members of the tribe. As Mr. Dixie, who was born in 1940, is not believed to have any living lineal descendants or ancestors, Silvia Burley and her descendants will control the tribe. Based on nearly 100 years of interaction with the Tribe, BIA believes that the tribal community constituting this Tribe is substantially larger than is portrayed in the Burley constitution. *Id.* at Exhibit "c". Indeed, under the terms of the Burley constitution, Silvia Burley's three living siblings are ineligible to be voting members, Yakima Dixie's living brother is likewise ineligible, and other Indians known to live in or near Sheep Ranch and to whom Mr. Dixie and Ms. Burley are related likewise are ignored.

Notice of Termination, the BIA complied with the requirements of the California Rancheria Act, *as amended*, and the distribution plan for the Sheep Ranch Rancheria. However, recognizing that it had not obtained a conservator and given the United States' abandonment of the Termination policy, BIA never completed the termination of the Sheep Ranch Rancheria and, therefore, none of its tribal members experienced the difficulties attendant to the termination of other rancherias. To the extent that the government breached any duty, that duty was owed not to the Tribe but to *Mabel Hodge Dixie*, now deceased for over 30 years, for the appointment of a conservator for her. The government has not breached any duty towards the *Tribe*.[2]

The California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 (Aug. 18, 1968), *as amended*, Pub.L. 88-419, 78 Stat. 390 (Aug. 11, 1964)("Rancheria Act"), enacted by Congress, provided for the severance of special services and relations between the United States and certain peoples based upon their status as Indians. As explained in *Duncan v. United States*, 667 F.2d 36, 38 (Ct.Cl. 1981), *cert. denied*, 463 U.S. 1228 (1983)("*Duncan II*"),

> Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use. . .in the early years of [the 20th] century. * * * [The Rancheria Act] provided for termination of the special status (as Indian lands) of various California rancherias upon approval by a majority of the affected Indians of a final distribution plan. * * * Under the [Rancheria] Act, termination of the Rancheria ended the rights of the Indians to receive special federal services qua Indians, and exposed Rancheria lands to state tax liability and regulations.

Id. at 38-39.

The severance (or "termination") was conditioned upon the performance of certain final services by the United States as may be negotiated with the Indians or deemed necessary by the Secretary of the Interior, relating to sanitary systems, roads, vocational assistance, etc. 1958

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[2] Whether by fluke or design, the termination of Sheep Ranch Rancheria was nearly complete but for the appointment of a conservator for its sole distributee, Mabel Hodge Dixie. Consequently, the Tribe received the "benefits" of Termination and then some – the Tribe and its members remained recognized while its sole distributee received a trust allotment of land, a new house, sanitation facilities, and fencing – without the unfulfilled promises attendant to the termination of such rancherias as Hopland Rancheria.

Rancheria Act at § 3, *as amended.* Following the satisfaction of these services, the Indians were to receive unrestricted title to the land according to a mutually agreed plan of distribution of the assets of the rancheria. *Id.* at § 2, *as amended.*

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In the original 1958 Rancheria Act, termination was mandatory for 41 California rancherias and did *not* include Sheep Ranch Rancheria. *Id.* at § 1; 25 C.F.R. § 242 at n.1[3]. In the 1964 amendment to the Rancheria Act, termination or "the distribution of assets of a rancheria" was made available to all California rancherias and reservations upon the request "by majority vote of the adult Indians of a rancheria" or those holding assignments thereon. 1964 Rancheria Act at § a.

Amended regulations promulgated in 1965[4] set out the process by which a request for termination could be made and the ensuing process of terminating relations. 25 C.F.R. Part 242 (Defts' Exhibit __). First, "[u]pon receipt of a written request from an adult Indian or Indians of an unorganized rancheria," the BIA was to prepare a list of Indians eligible to vote on whether or not the distribution of rancheria assets should take place. *Id.* at § 242.3(a) & (c). "Eligible voters" were deemed to be the adult Indians from among the following:

(1) Those who have allotments on the rancheria or reservation.

(2) Those who hold formal assignments.

(3) Those who reside on the rancheria or reservation pursuant to an informal assignment.

(4) Those not in the above categories who have resided for a period of at least three consecutive years immediately preceding receipt of the request [for termination] on the rancheria or reservation not set aside for a designated group of Indians.

(5) The dependent members of the immediate families of those Indians [identified above].

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[3] A complete copy of 25 C.F.R. Part 242 (1971) is appended hereto at Exhibit __.

[4] Regulations first were promulgated to implement the 1958 Rancheria Act. These regulations were amended and renumbered following the 1964 amendments. *Kelly v. United States Dept. of Interior*, 339 F.Supp. 1095, 1100 (E.D.Cal. 1972)(3-judge court).

Id. at § 242.3(a).[5] After the list of eligible voters was prepared, it was to be published once weekly for three consecutive weeks in a local newspaper for the purpose of providing notice and opportunity for persons "to protest. . .the omission of a name from the list or the inclusion of any name thereon." *Id.* at § 242.3(d). Following the resolution of any protests, an election was to be held among the eligible voters "on the issue of whether a distribution plan is to be developed," or, put another way, whether the rancheria and its residents should be terminated. *Id.*

If a majority of the eligible voters voted in favor of termination, a plan for the distribution of the assets of the rancheria was to be drafted and approved by the Secretary of the Interior and the persons designated in the distribution plan as "distributees." *Id.* at § 242.4. The distribution plan also was to include any services, *e.g.,* housing, water, sanitation, that the United States and the Indians agreed were needed and that the United States would perform before termination. [cite]

Those persons whose names appeared on the distribution plan (the "distributees") would be entitled to participate in the distribution of the assets of the rancheria. *Id.* at § 242.4(b). The distributees were to consist of those persons identified under § 242.3 and any additional persons added with the joint approval of the majority of the adult Indians, the person(s) to be added, and the United States. *Id.*

Once a distribution plan was approved, the regulations required a copy to be mailed or delivered to each distributee and each person claiming an interest in the rancheria's assets, posted in a public place on the rancheria, and published once weekly for three consecutive weeks in a local paper. *Id.* at § 242.5. After a period of time for receiving and resolving any objections to the distribution, a final distribution plan again would be sent to each distributee and a referendum held on whether to accept or reject the distribution plan. *Id.* at § 242.7. When the Secretary of the Interior was satisfied that the government had carried out the provisions of the distribution plan, a notice was required to be published in the Federal Register to declare that the rancheria and its distributees and their dependents no longer eligible for government services based upon their status as Indians. *Id.* at

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[5] Persons who met the criteria of § 242.3(a) but were members of another rancheria were ineligible to vote. 25 C.F.R. § 242.3(c).

§ 242.12. At that time, the cessation of all relations, including responsibility for former trust lands, between the federal government and the designated Indians, based on their status as Indians, would be effective.

In the instant case, each of the above steps were followed:

1. A written request was received from Ms. Dixie, who resided on the Sheep Ranch Rancheria, to commence the termination process. *See* Pltf's Exhibit 6 (Mabel Dixie gave the BIA agent a letter requesting distribution of the assets).
2. BIA determined that Mabel Hodge Dixie likely was the only person eligible to vote on whether the assets of Sheep Ranch Rancheria should be distributed and BIA published appropriate notice thereof and solicited any objections to the proposed voters list. Pltf's Exhibits 7-8.
3. No objections were received to the proposed list of voters for the election on whether Sheep Ranch Rancheria should be terminated. Golding Declaration.
4. Ms. Hodge voted in favor of termination. Pltf's Exhibit 9.
5. A distribution plan was prepared, which named Mabel Hodge Dixie as the sole distributee. Pltf's Exhibit 10. The plan was approved by the United States and by Ms. Dixie. *Id.*
6. Notice of the approval of the distribution plan was published and posted. Defts' Exhibit C.
6. No objections were received to the plan of distribution. Defts' Exhibit D.
7. A referendum was then held and Ms. Dixie, the sole eligible voter, accepted the distribution plan. Pltf's Exhibit 12.
8. A survey of the land was prepared. Defts' Exhibit A.
9. A new home was built for Ms. Dixie. Pltf's Exhibit 21.
10. Sanitary facilities, including domestic water, were installed for Ms. Dixie. *Id.*
11. Notice of the appraised value of the home was given to Ms. Dixie as well as a deed

conveying title.[6] Pltf's Exhibits 17 & 18.

12. A fence was placed around the property. *See* Pltf's Exhibit 21 ("All actions required under the Plan for Distribution of the Assets of the Sheep Ranch Rancheria were completed....").

The federal-tribal relationship with Sheep Ranch Rancheria likely would have been terminated but for two undisputed facts: (1) No conservator was ever appointed for Ms. Hodge, as required by the Rancheria Act, and (2) no Notice of Termination was published, as required by the Sheep Ranch Rancheria Distribution Plan. Thus, in essence, the Sheep Ranch Rancheria – as it existed in the mid-1960s – received the benefits of termination in the form of a formal land allotment held in trust free from taxation, a new home, sanitary and water facilities, and fencing without losing its tribal sovereign rights and without loss of eligibility for services.

1. The Approval of the Distribution Plan and Issuance of Title to the Rancheria Lands Did not Legally or Factually Effect the Termination of the Rancheria

Plaintiff argues that the Rancheria Act made termination effective upon the issuance of the property deed and the approval of the distribution plan. Pltf's Brf. at 4. This argument flies in the face of the unambiguous language of the Rancheria Act, its implementing regulations and the contractual distribution plan for the Sheep Ranch Rancheria.

Congress, in unambiguous terms, laid out in its 1964 amendment to the Rancheria Act a process by which Indians of various California rancherias could request an end to federal supervision and relations. Pursuant to that Act, the Department of the Interior and BIA had a duty to make its provisions known to the rancherias and, upon request, begin the process of ending relations and distributing the assets of the rancherias. Bearing in mind the general trust responsibility owed to the

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[6] There is some discrepancy over whether the deed actually was delivered to Ms. Dixie based on internal BIA memoranda stating that the deed was not delivered, Exhibit __, and the absence of a signed receipt for the deed from Ms. Dixie, Pltf's Exhibit 17. However, as there is a copy of a letter to Ms. Dixie signed by a BIA official stating that the deed was hereby delivered, Pltf's Exhibit 18, and as the probate judge found that the deed had been delivered, Pltf's Exhibit 28, defendants do not contest delivery of the deed to Ms. Dixie.

Indians, *United States v. Mitchell*, 463 U.S. 206, 225 (1983), the government had a duty to follow the various mandates in the Rancheria Act and act in the best interests of the Indians in doing so *before* effecting the cessation of any relations with or services to the rancheria Indians.

One of the mandates of the Rancheria Act provides:

> *Before* conveying or distributing property pursuant to this Act, the Secretary of the Interior *shall* protect the rights of individual Indians who are. . .in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such Indians in courts of competent jurisdiction. . . .

Rancheria Act at § 8 (Pltf's Exhibit 3) (emphasis added). Plaintiff skips this provision in § 8 entirely and focuses only on § 10, which provides:

> After the assets of a rancheria. . .have been distributed pursuant to this Act, the Indians who receive any part of such assets. . .shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians [and], all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them. . . .

Therefore, pursuant to § 8, if a rancheria decides to terminate relations with the United States and one of its members is in need of a guardian or conservator, distribution and "termination" cannot apply unless or until a conservator is appointed. Put another way, appointment of a conservator or guardian, where one is required, is a predicate to termination. *But see Taylor v. Hearne*, 637 F.2d 689 (9th Cir.), *cert.denied*, 454 U.S. 851 (1981).[7]

Next, both the Sheep Ranch Rancheria distribution plan and the regulations applicable to the

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[7] In *Taylor*, plaintiff was a distributee who received title to a parcel on the Auburn Rancheria. He failed to pay his property taxes and Placer County took the land to cover the tax deficiency. Taylor sued to recover the land, arguing that § 3 of the Rancheria Act set a "condition precedent" to the effective transfer of title and, in the face of noncompliance with § 3, the United States could not convey good title. Both the district court (E.D.Cal., Judge Wilkins) and the Ninth Circuit rejected this argument. However, while *Taylor* may appear on first blush to apply to the instant case, the facts and issue in *Taylor* and in the instant case are very distinct: In *Taylor*, the issue was whether the transfer of title was effective; in the instant case, the issue is whether the federal trust responsibility for the Indians of Sheep Ranch Rancheria was extinguished when title transferred to Mabel Dixie. In *Taylor*, the United States expressly repudiated its trust responsibilities for the Auburn Rancheria by publishing a "Notice of Termination" in the Federal Register in 1967. *Taylor*, 637 F.2d at 690 (citing 32 Fed.Reg. 11,964 (1967)). In the instant case, the United States has never repudiated its trust responsibilities for the Sheep Ranch Rancheria. Golding Declaration; Facio Dep. at __:__. *See* discussion *infra* re terminating trust relationships.

termination of Sheep Ranch Rancheria required the publication of a "notice" or "proclamation" of termination before termination could be effective. 25 C.F.R. § 242.12 (Defts' Exhibit __); Pltf's Exhibit 10 at 3. The distribution plan, which was a contract between the United States and Mabel Hodge Dixie, expressly required publication in the Federal Register of a notice of termination following the distribution of the assets and "Mrs. Dixie *shall thereafter* not be entitled to any of the services performed by the United States for Indians because of their status as Indians." *Id.* (emphasis added).

Therefore, because a conservator was not appointed for Mabel Hodge Dixie and because no Notice of Termination was published in the Federal Register, as required by the Rancheria Act, its implementing regulations and the Distribution Plan for the Sheep Ranch Rancheria, the federal-tribal relationship cannot be deemed terminated by any "operation of law," assuming *arguendo* that a fiduciary relationship could be so terminated. We turn now to a discussion of whether, as a factual matter, the United States repudiated its trust relationship with the Sheep Ranch Rancheria.

2. In the absence of any Notice to the Rancheria and its Distributee of the Termination of the Federal Trust Relationship, the Relationship Endures Uninterrupted.

As plaintiff is quick to point out, there exists a general trust relationship between the United States and the Indians, a relationship that first was articulated nearly 200 years ago, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), and remains still today, *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 n.3 (2003). *See* pltf's brf. at 15-16. Therefore, in carrying out the provisions of the Rancheria Act, the United States was called upon to act with "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). As the Court explained in *Seminole Nation*,

> [m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Id. at n.12 (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)(Cardozo, C.J.)). However, in order to repudiate a trust relationship, there must be some affirmative *act* of repudiation that informs the ward that the fiduciary relationship no longer exists. That is, "breach of trust traditionally [occurs] when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, ___ F.3d ___, 2004 WL 746687 at *6 (Fed.Cir. Apr. 7, 2004)(copy attached hereto at Exhibit __). "Repudiation" occurs "by express words or by taking actions inconsistent with [the trustee's] responsibilities as trustee." *Id.*; *Philippi v. Philippe*, 115 U.S. 151, 157 (1885). In the context of terminating federal Indian relations, this repudiation occurred when (1) the government refused services to the Indians because federal-tribal relations were terminated and/or (2) the government gave notice to the Indians, via letter or notice in the Federal Register, that they were no longer eligible to receive government services available to Indians *qua* Indians. Especially where, as here, the cessation of the trust relationship depended upon the occurrence of several separate events, *e.g.*, delivery of title, installation of water and sanitation facilities, housing construction, appointment of a conservator, etc., some further act signifying the trustee's repudiation of the trust relationship is required.

In the several California Rancheria cases that have been litigated, the United States had effected a clear repudiation of the trust relationship. In the case of Robinson Rancheria, the termination of which was litigated in *Duncan v. Andrus*, 517 F.Supp. 1 (N.D.Cal. 1977)("*Duncan I*") and *Duncan II*, the United States published a termination notice in 1965. *See Duncan II*, 667 F.2d at 41 n.7 (parties stipulated that the trust relationship existed between the United States and the Robinson Rancheria "until publication of a termination notice for the Rancheria in 1965"). With respect to the Hopland Rancheria, which led to *Smith v. United States*, 515 F.Supp. 56 (N.D.Cal. 1978) and *Hopland Band of Pomo Indians*, 855 F.2d 1573 (Fed.Cir. 1988), BIA wrote to the Tribe in 1973 and advised that "the distributees must be considered 'terminated' even though no 'Notice of Termination' has been issued." Pltf's Exhibit 23. In this same letter, the Indians of Hopland Rancheria were denied housing assistance by BIA. *Id.* In *Table Bluff v. Andrus*, 532 F.Supp. 255, 261 (N.D.Cal. 1981), the United States "concede[d] that plaintiffs were improperly divested of their

status as Indians, along with the rights and privileges which accompany that status." *See also* Defts' Exhibit __ at 12 (Department of Interior publication stating that the Table Bluff Rancheria was terminated, effective Apr. 11, 1961). Therefore and consistent with the law of trusts, the United States in the foregoing matters informed the rancherias in clear, unambiguous terms that the trust relationship was ended.

Finally, plaintiff erroneously claims that an internal BIA letter directive issued in 1966 by the head of the BIA conclusively establishes that the Sheep Ranch Rancheria was terminated. Pltf's Brf at 4, citing Pltf's Exhibit 19. However, the cited evidence fails to support plaintiff's position. It is simply a statement of policy that does not address the requirements of the Rancheria Act itself with

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respect to the appointment of a conservator. Moreover, a statement of policy cannot contradict or override the absence of facts demonstrating that the Tribe was denied services or recognition.

In the instant case and in spite of its failure to have a conservator appointed for Mabel Dixie, the government ultimately did not fail in its fiduciary duty either to Ms. Hodge or to the tribe. The property was distributed in accordance with the terms of the Rancheria Act, *as amended*, and its implementing regulations.[8] It is undisputed that Mabel Hodge Dixie was the "distributee" who was to receive unrestricted title to the rancheria.[9] Pltf's Undisputed Fact Nos. 13, 16, & 20; Pltf's Exhibit 10. It is also undisputed that both Ms. Dixie and the BIA determined that she was in need of a conservator yet none was ever appointed for Ms. Dixie. Pltf's Undisputed Fact Nos. 17-19. Although it is further undisputed that title passed to Ms. Dixie briefly, *id.* at nos. 20-22, the *cessation* of relations between the United States and the Rancheria would have violated the Rancheria Act in

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[8] As part of the United States' plenary authority over Indian matters, *United States v. Wheeler*, 435 U.S. 313, 319 (1978), Congress is empowered to determine if, when and how relations may cease with the Tribes, *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[9] Despite two opportunities to object to the distribution of the assets of the Sheep Ranch Rancheria, including the designation of Ms. Dixie as the person eligible to receive the assets, no objections were received nor were any additional names proposed as eligible to share in the distribution. Defts' Exhibit __; declaration of Brian Golding, Sr.

the absence of the appointment of a conservator for Ms. Dixie. Instead, BIA *continued* in its role as fiduciary for Ms. Dixie by maintaining the property as a trust parcel and, given the shift in Administration policy *against* termination of tribes[10], apparently discontinued any efforts to carry out

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the terms of the Act.[11] No proclamation of termination, as required by 25 C.F.R. § 242.12, was published in the Federal Register nor was any other notice given that would put a reasonable person on notice that the trust relationship had been repudiated. Golding Declaration. Indeed, on every published list of federally-recognized tribes, the Tribe appears as a recognized tribe. Defts' Exhibit __ at 10 ("American Indians and Their Federal Relations," published in 1972 by the Department of the Interior); 44 F.R. 7235, 7236 (Feb. 6, 1979); 45 F.R. 27828, 27830 (Apr. 24, 1980); 46 F.R. 35360, 35362 (July 8, 1981); 47 F.R. 53130, 53133 (Nov. 24, 1982); 48 F.R. 56862, 56864 (Dec. 23, 1983); 50 F.R. 6055, 6057 (Feb. 13, 1985); 51 F.R. 25115, 25117 (July 10, 1986); 53 F.R. 52829,

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[10] In March 1968, President Johnson announced "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination." Pub.Papers, pt. I, at 343 (Lyndon B. Johnson)(text appended hereto as Exhibit __). At the same time, President Johnson established the National Council on Indian Opportunity to *inter alia* promote Indian involvement in federal program planning for Indians. E.O. No. 11,399, 3 C.F.R. 717, *reprinted* in 25 U.S.C. prec. § 1 (1976) and 82 Stat. 220 (1968). By 1970, when President Nixon was in office, termination was no longer the Administration's policy. In a strong message to Congress on July 8, 1970, President Nixon proclaimed that "this policy of forced Termination [of Indian tribes] is wrong." 6 Pres.Doc. 94 (1970), *reprinted in* 116 Cong. Rec. S23258-262 (July 8, 1970). By 1973, Congress began a process that continues today of legislatively restoring recognition to those tribes whose status as federally-recognized tribes was terminated in the 1950's and 1960's. *See, e.g.,* 25 U.S.C. §§ 903 *et seq.* (1973 restoration of the Menominee Tribe).

[11] The only realistic breach-of-trust claim that the Tribe has is the government's failure to cease relations with the Tribe as Ms. Dixie had requested on behalf of the rancheria, which could arguably be effected now that Ms. Dixie is deceased! However, unilateral termination has long been repudiated by the United States. *See e.g.,* 25 U.S.C. § 2501(f)("Congress repudiates and rejects. . .any policy of unilateral termination of Federal relations with any Indian nation"). Moreover, it is evident that the Tribe no longer is interested in termination.

52831 (Dec. 29, 1988)[12]; 58 F.R. 54364, 54368 (Oct. 21, 1993)[13]; 60 F.R. 9250, 9253 (Feb. 16, 1995)[14]. In contrast, rancherias that were effectively, if wrongfully, terminated were listed in "American Indians and Their Federal Relations" either as "termination pending[15]" or as "terminated since 1958." Defts' Exhibit __ at 10-12. Those rancherias listed in the latter category included an effective date of termination. *Id.* at 11-12.

Not only did the federal trust relationship between the Rancheria and the United States continued unabated and *uninterrupted*, plaintiff did not suffer the harms that befell the terminated rancherias: Upgrades were made to the property at Sheep Ranch Rancheria with the construction of a new home for Mabel Dixie and the installation of fencing, domestic water and sanitation facilities; the property remained in trust status and was never lost through sale to non-Indians or taken for the nonpayment of taxes; those affiliated with Sheep Ranch Rancheria have not been denied federal services or benefits available only to Indians; etc. These were very real injuries sustained by the peoples of other rancherias. *See Duncan I & II, supra*; *Hopland Band, supra*; *Table Bluff, supra.*

It would be a miscarriage and misapplication of the federal trust responsibility for this Court to hold that termination occurred here solely as a matter of *law*; termination must be established as a matter of both law and fact. Because plaintiff has adduced no *facts* to support their theory of termination, summary judgment must be denied. Indeed, had the United States moved forward with the termination of the Rancheria in the absence of the appointment of a conservator for Ms. Dixie, plaintiff may well have a claim for breach of trust and/or violation of the Rancheria Act. But under the uncontroverted and materially relevant facts presented by the parties, termination of this

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[12] No list was published in 1984 or 1987.

[13] No list was published between December 29, 1988, and October 21, 1993. *See* 58 F.R. at 54364.

[14] No list was published between October 21, 1993, and February 16, 1995. *See* 60 F.R. at 9250.

[15] One rancheria, Middletown Rancheria, is listed as "termination pending" but includes the additional annotation that it was "named in [the 1958 Rancheria Act] but has made no progress toward termination)." Defts' Exhibit __ at 10.

particular tribe did not occur. Because the government has adduced facts supporting the continued recognition of the Tribe, judgment must be entered in favor of the United States.

B. FEDERAL LAND ACQUISITION REGULATIONS, IN AND OF THEMSELVES, DO NOT IMPOSE A FIDUCIARY DUTY, FOR WHICH REASON DEFENDANTS HAVE NOT BREACHED ANY DUTY TO THE PLAINTIFF.

BIA's land acquisition regulations do not impose or create any fiduciary duty. In fact, whether the United States will accept land into trust is discretionary in the absence of a Congressional mandate to the contrary. *Confederated Salish and Kootenai Tribes v. United States*, 343 F.3d 1193, 1194-95 (9th Cir. 2003); *City of Roseville v. Norton*, 348 F.3d 1020, 1031 (D.C.Cir. 2003), *cert. denied sub.nom, Citizens for Safer Communities v. Norton*, ___ U.S. ___, ___ S.Ct. ___, 72 U.S.L.W. 3539 (Apr. 5, 2004). Moreover, even assuming *arguendo* that a fiduciary duty did exist, the Tribe in the instant case has not submitted a land acquisition application!

In order to establish a specific fiduciary duty, there must be a corpus over which that duty is exercised. *United States v. Mitchell*, 463 U.S. at 225. As the Supreme Court explained in *Mitchell*,

> a fiduciary relationship necessarily arises when the Government assumes. . .elaborate control over forests and property belonging to Indians. *All of the necessary elements of a common-law trust are present:* a trustee (the United States), a beneficiary (the Indian allottees), and *a trust corpus* (Indian timber, lands, and funds).

Id. (emphasis added). While there is also a "general trust relationship between the United States and the Indian people," *id.*, there must still be a "substantive source of law that establishes specific fiduciary or other duties," *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). *See also Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). ("[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *Pit River Tribe v. Bureau of Land Management*, ___ F.Supp.2d ___, 2004 WL 415224 at *15-16 (E.D.Cal. Feb. 13, 2004)(Levi, J.)(copy appended at Defts' Exhibit N)(same).

Pursuant to 25 C.F.R. § 151.9 and as plaintiff concedes, a written request must be submitted to the Secretary of the Interior for the taking of land into trust on behalf of a tribe. The request must

identify a parcel of land to be taken into trust and must identify the party on whose behalf the land is taken into trust. *Id.* The request must also provide information sufficient to determine that additional requirements of Part 151 are met, *e.g.*, § 151.11 sets out information required for off-reservation acquisitions whereas § 151.10 sets out information required for acquisitions within or contiguous to a reservation. § 151.9. But there is no provision in these regulations or their authorizing statutes "that establishes specific fiduciary or other duties" for the processing of an application, assuming one were submitted. *Navajo Nation*, 537 U.S. at 506. When and if a land acquisition application is approved and the United States accepts title to land on behalf of the Tribe, *then* a fiduciary relationship arises with respect to the land. But no fiduciary duty is created by a tribe's submission of an application and no fiduciary duty towards the California Valley Miwok Tribe is created under the statutes authorizing the regulations at Part 151 .

But all of the foregoing is irrelevant inasmuch as the Tribe has yet to submit a land acquisition application or request. The only document produced by plaintiff that remotely meets this criteria is a settlement document, Pltf's Exhibit 39, which not only is incompetent evidence under Fed.R.Evid. 408 but was provided not to the Secretary of the Interior or her designated representative but to her counsel of record in the instant litigation. Moreover, nothing in this exhibit, which consists of two cover letters from the Tribe's two sets of counsel as well as a proposed settlement stipulation, even requests that it be provided to the BIA for consideration as an application under Part 151. That the settlement proposal is not intended to do "double duty" as a land acquisition application is underscored by the Tribe's request in January 2004 for information from BIA for the purpose of submitting an application under Part 151. Deft's Exhibit I.

Last but not least and assuming *arguendo* that plaintiff had submitted a land acquisition application, the administrative appeals remedies set for th in 25 C.F.R. Part 2 and 43 C.F.R. Part 4 must be exhausted before seeking judicial review under the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* Plaintiff's amended complaint contains no claim for judicial review of a land acquisition application submitted under 25 C.F.R. Part 151 or any mention of exhausting

prerequisites to suit, as required by Fed.R.Civ.P. 9(c).[16]

For the foregoing reasons, there has been no breach of trust as to any land acquisition application under 25 C.F.R. Part 151.

CONCLUSION

Ultimately, plaintiff's argument rests on a large unfounded assumption: That the BIA must have terminated the Sheep Ranch Rancheria simply because it had a distribution plan and title was temporarily transferred to Mabel Hodge Dixie. But, just because the Rancheria was *supposed* to have been terminated does not mean that it actually ever *was* terminated. There must be an affirmative act that informs the Tribe that the United States no longer intends to fulfill its fiduciary role. That act never happened.

To the extent that the Tribe maintains that it lost its land in violation of federal law, it did not. The land is held in trust for the heirs of the one person deemed eligible to receive title under the Rancheria Act and its implementing regulations. Congress, in the exercise of its plenary authority, determined that the land should be distributed at the request of a majority of the adult Rancheria Indians. Ms. Dixie, the only person authorized to vote on whether to accept the terms of the Rancheria Act, voted in favor of accepting its terms. No one submitted any challenge to her eligibility to vote and no one submitted any additional persons to be considered eligible to vote. Even assuming *arguendo* that plaintiff's argument is remotely timely, plaintiff is unable to show that the two persons it deems eligible to vote, Lenny Jeff and Merle Butler, met the eligibility criteria set out in 25 C.F.R. Part 242.

Although the United States did not intend to transfer title to Mabel Hodge Dixie until a private person could be appointed as conservator for her, the United States, in furtherance of its

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[16] Plaintiff also suggests, wholly without evidentiary support, that defendants "conditioned the performance of their statutory duties on the Tribe's installation of Yakima Dixie as Tribal Leader." Pltf's Brf. at 20. This statement not only is completely unfounded but is untrue. For the reasons set forth in BIA's response to the tribal Constitution submitted by Silvia Burley, BIA continues to maintain that the California Valley Miwok Tribe is an unorganized tribe. Golding Declaration at Exhibit "c".

responsibilities as trustee for the Indians, continued to maintain the property on the government's land records as trust property, *albeit* as an individual land allotment favoring Mabel Hodge Dixie rather than as a communal land holding.[17] Furthermore, the United States did not end or terminate the federal trust relationship with the Rancheria, which continues today.

Finally, plaintiff cannot establish any trust obligation to process a land acquisition request under 25 C.F.R. Part 151 when no request has been properly submitted.

Respectfully submitted,

DATED: April 29, 2004

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[17] In essence, the United States claimed the role of conservator for Ms. Dixie and, in that role, continued to hold the 0.92 acre parcel as restricted, trust property. Mitchell Declaration. The property remains in trust status today for the heirs of Mabel Hodge Dixie. *Id.*

DOCUMENT NO. 48

ATTACHMENT C

FILED

JUL - 1 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA

Plaintiff,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GAIL NORTON, SECRETARY OF THE INTERIOR, NEAL MCCALEB, ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS,

Defendants.

_____/

NO. CIV. S-02-0912 FCD GGH

MEMORANDUM AND ORDER

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This matter is before the court on motion to dismiss filed by defendants, the United States of America, United States Department of the Interior, Gail Norton, Secretary of the

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Interior, and Neal McCaleb[1], Assistant Secretary of the Interior for Indian Affairs (collectively the "government"). Plaintiff, California Valley Miwok Tribe, (the "Tribe" or "plaintiff") opposes the government's motion. The court heard oral argument from parties' counsel on June 10, 2004.

BACKGROUND

In 1916, pursuant to a federal statute which authorized the purchase of land for landless California Indians, the Bureau of Indian Affairs ("BIA") acquired in trust for the Tribe approximately two acres of land, subsequently referred to as the "Sheep Ranch Rancheria" (the "Rancheria"). In 1935, the Department of Interior ("DOI") conferred on the Tribe the status of a federally recognized tribe.

Beginning in the 1940's the federal government's policy toward small tribes changed in favor of terminating tribal status and transferring lands in fee to tribal members. This policy was codified in the California Rancheria Act, Pub. L. 85-671, 72 Stat. 619 (1958), as amended by Pub.L. 88-419, 78 Stat. 390 (1964) ("Rancheria Act"). The Rancheria Act sets forth the procedure for distribution of trust lands to tribal members and for the termination of federally-recognized tribal status. Rancheria Act § 1(a). Pursuant to the Rancheria Act, the government, upon request by tribal members, shall prepare a plan for distributing tribal lands ("Plan of Distribution"). Prior to distribution, the Rancheria Act requires the government to make

[1] Since the filing of this lawsuit, Neal McCaleb has retired from federal service. David Anderson, the current Assistant Secretary for Indian Affairs, has substituted as defendant in place of McCaleb. Fed. R. Civ. P. 25 (d).

certain improvements to distributed land. Generally, upon approval of the Plan of Distribution and conveyance of title from the government to the designated tribal members, federally-recognized tribal status is terminated.[2] After termination of federally-recognized tribal status, tribal members are no longer entitled to services based on their status as Indians.[3]

In accordance with the Rancheria Act, in 1966 officers of the BIA contacted the Tribe to discuss termination of its tribal status and distribution of tribal lands. At that time, BIA listed Mabel Hodge Dixie as the only Indian living on the Rancheria. On February 9, 1966, the Tribe held an election at which Mabel Hodge Dixie voted in favor of distribution. Subsequently, a deed to the Rancheria was executed to Mabel Hodge Dixie and recorded in Calaveras County on April 26, 1967. According to the Tribe, the issuance of the deed and approval of the distribution plan terminated the Tribe's status as a Federally recognized Tribe as well as the trust status of the Rancheria property, which was then held in fee simple by Mabel Hodge Dixie.[4]

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[2] It is arguable that tribal status may not be terminated where the government does not satisfy the conditions of the Rancheria Act, which include, *inter alia*, making improvements to roads and installation of irrigation or domestic water systems. (See Letter dated February 16, 1966 from BIA Commissioner James E. Officer to Leonard Hill, BIA Area Director, Sacramento, California, attached as Exh. 14 to Opp'n.)

[3] Of modern significance, only federally recognized tribes are eligible to operate gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq.

[4] The government contends that the Tribe's federally-recognized status was never terminated. (Reply in Support of Motion to Dismiss at 7.)

Allegedly, BIA soon realized that conveyance of the property was a mistake as a result of the failure to appoint a conservator for Mabel Hodge Dixie prior to conveyance of the property. To rectify its error, BIA allegedly attempted to reestablish the trust by having Mabel Hodge Dixie execute a quitclaim deed in favor of the United States. Plaintiff asserts that these and subsequent events left uncertain plaintiff's status as a federally recognized tribe.

Through this litigation, plaintiff seeks to obtain a judicial determination that Distribution Plan excluded members of the Tribe and that the termination of the Tribe violated the Rancheria Act and that the Tribe was restored to federal recognition in 1994. In addition, the Tribe requests a mandatory injunction directing the government "to accept into trust as a restoration of Reservation Lands any fee interests in San Joaquin or Calaveras County owned by the tribe on the date the judgment is entered or which are thereafter acquired up to 240 acres, subject to reasonable approval of title and determination that the lands are not contaminated." (First Amended Complaint at 14-15.)

STANDARD

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may by motion raise the defense that the court lacks "jurisdiction over the subject matter" of a claim. Fed. R. Civ. P. 12(b)(1). It is well established that the party seeking to invoke the jurisdiction of the federal court bears the burden of establishing the court's subject matter jurisdiction. Stock

West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989).

On a motion to dismiss pursuant to Rule 12(b)(1), the standards the court is to apply vary according to the nature of the jurisdictional challenge. A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of jurisdiction contained in the complaint as insufficient on their face to demonstrate the existence of jurisdiction ("facial attack"), or may be made as a "speaking motion" attacking the existence of subject matter jurisdiction in fact ("factual attack"). Thornhill Publishing Co. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the motion constitutes a facial attack, the court must consider the factual allegations of the complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1981); Mortensen, 549 F.2d at 891. If the motion constitutes a factual attack, however, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Thornhill, 594 F.2d at 733 (quoting Mortensen, 549 F.2d at 891).

In situations "[w]here a jurisdictional issue is separable from the merits of a case," the court "may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." Thornhill, 594 F.2d at 733. If, however,

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> the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.

Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). In ruling on a jurisdictional motion in which factual issues also go to the merits, the court should apply the standard used to determine motions for summary judgment brought pursuant to Rule 56. Id.

ANALYSIS

It appears that the primary goal of the instant complaint is to obtain an order from this court compelling the government to take into trust up to 240 acres of land which will be eligible for the construction and operation of Class III gaming facilities, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA")

Toward that end, the Tribe has asserted two causes of action in the complaint: (1) violation of the Rancheria Act ("Rancheria Act") for failure to appoint a guardian for Mabel Hodge Dixie prior to distributing the trust property in violation of § 8 of the Rancheria Act, and (2) breach of fiduciary duty for conveying trust property to Mabel Hodge Dixie in 1967 without first installing a domestic water system, in violation of § 3(c) of the Rancheria Act. Essentially, both claims allege that the Sheep Ranch Rancheria was illegally conveyed to Mabel Hodge Dixie, thus terminating the tribe's federally recognized status and leaving the tribe landless. As a remedy for this illegal conveyance, the

1 tribe seeks an order from this court directing that land be taken
2 into trust on its behalf.
3 However, lands taken into trust after October 17,1988, the
4 effective date of IGRA, are excluded from Class III gaming
5 activities, with certain exceptions. 25 U.S.C. § 2719(a). One
6 such exception exists for lands which are taken into trust as
7 part of "the restoration of lands for an Indian tribe that is
8 restored to Federal recognition." 25 U.S.C. §
9 2719(b)(1)(B)(iii). The Tribe's prayer for declaratory relief
10 "that the Distribution Plan excluded members of the tribe"; "that
11 the termination of the tribe violated the Rancheria Act"; and
12 "that the tribe was restored to federal recognition in 1994"
13 appear directed toward satisfying the requirements of section
14 2719(b)(1)(B)(iii).
15 The government contends that the present action is an effort
16 by the Tribe "to avoid certain restrictions in [IGRA] by bringing
17 this 'pre-emptive' litigation strike." (Motion to Dismiss at 1.)
18 According to the government, the Tribe's claims should be
19 dismissed because the government has not waived its sovereign
20 immunity from suit. The government also alleges that the statute
21 of limitations has passed on plaintiff's claims for breach of
22 trust and violation of the Rancheria Act, which are based on the
23 1967 conveyance of the Sheep Ranch Rancheria to Mabel Hodge
24 Dixie.
25 I. Sovereign Immunity
26 "The United States, as a sovereign entity, is immune from
27 suit unless it has consented to be sued." Cominotto v. United
28 States, 802 F.2d 1127, 1129 (9th Cir. 1986). In the absence of a

waiver of sovereign immunity, the court lacks subject matter jurisdiction over a claim against the sovereign. The plaintiff bears the burden of proving such waiver. Id. In order for the plaintiff to sustain this burden, the waiver of immunity must be clear on the face of the statute creating the cause of action. United States v. Idaho, 508 U.S. 1, 6-7 (1993). Waivers of sovereign immunity must be strictly construed in favor of the sovereign and will only be found where the waiver is unequivocal. United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1990).

According to the government, the only basis for a waiver of sovereign immunity asserted in the complaint is the Administrative Procedures Act. (Motion to Dismiss at 5.) However, the Tribe raises additional bases for waiver of sovereign immunity in its memorandum in Opposition to the Government's Motion to Dismiss.

A. Administrative Procedures Act

The Administrative Procedures Act ("APA") constitutes a limited waiver of the government's sovereign immunity for actions "in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702. While only final agency actions are reviewable, 5 U.S.C. § 704, agency action unlawfully withheld or unreasonably delayed may be compelled by a reviewing court. 5 U.S.C. § 706(1). However, agency action that is committed to agency discretion by law is not reviewable under the APA. 5 U.S.C. § 701(a)(2).

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It appears to be the government's position that plaintiff cannot obtain the relief requested - an order compelling the government to take land into trust - without first filing a fee-to-trust application with the Secretary of the Interior and allowing the administrative process to take its course.[5] According to the government, no such application has been filed, and consequently, the government contends review under the Administrative Procedures Act is premature.

According to the Government, the Band never initiated the administrative process by filing a fee-to-trust application, and consequently, there is no "final agency action" subject to review under the APA. The Tribe disputes this, asserting that it filed "numerous written requests and attempted to replace the land that was unlawfully distributed by the Government." (Opp'n at 18.) The three documents to which the Tribe refers are three letters, dated August 28, 2000, November 9, 2000, and November 28, 2000 from David Rapport, counsel for the Tribe, to Kevin Gover, Assistant Secretary of Indian Affairs for the United States Department of Interior ("letters"). The government disputes that said letters satisfied the requirements of 25 C.F.R. § 151.9, which provides that:

> [An] Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. *The request need not be in any special form but shall set out the identity of the parties, a description of the land*

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[5] Under the usual procedure for taking land into trust, a Tribe submits a fee-to-trust application to the Secretary of the Interior in accordance with 25 C.F.R. § 151.9. Upon the filing of a fee-to-trust application, the Secretary has a duty to act upon the application. 25 C.F.R. 151.10.

> *to be acquired, and other information which would show that the acquisition comes within the terms of this part."*

25 C.F.R. § 151.9 (emphasis added).

If the letters identified by the Tribe constitute "written requests for approval," the government had a mandatory duty to act on such requests. 25 C.F.R. § 151.11 ("secretary shall review all requests and shall promptly notify the applicant in writing of his decision."). See also Confederated Tribes of the Cools, Lower Umpqua and Suislaw Indians v. United States, 1988 WL 135757 at *4 (D.Or. Nov. 29, 1988)(failure to act on request to take land into trust violates agency's own regulations and constitutes abuse of discretion.) An agency that unlawfully withholds or unreasonably delays action it has a duty to take can be compelled to act under the Administrative Procedures Act. 5 U.S.C. § 706(1).

The letters fail to comply with the requirements of 25 C.F.R. § 151.9 in that they do not provide a description of the land to be acquired, or other information necessary for the Secretary to determine whether the acquisition is appropriate under section 151. Section 151.10 requires the Secretary to evaluate the appropriateness of the acquisition in the context of specific enumerated factors including, *inter alia*:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
> (b) The need of the individual Indian or the tribe for additional land;
> (c) The purposes for which the land will be used;
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
> (e) If the land to be acquired is in unrestricted fee

> status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10

As an initial matter, none of the letters specifically identify the property the Tribe seeks to have taken into trust. (See August 28, 2000 letter, Exh. 28 attached to Opp'n) ("*If* the tribe can acquire suitable land in Calaveras or San Joaquin Counties. . ."; Nov. 28 2000 Letter, Exh. 30 to Opp'n) ("The Sheep Ranch Rancheria requests that the United States do belated justice by stipulating to a judgment requiring the United States to take *some property* into trust for the tribe in San Joaquin County . . ..") At the point when these letters were filed, the Tribe had not yet narrowed down its request to a single county, let alone an identifiable parcel. Without such information, the Secretary would be unable to evaluate the appropriateness of the acquisition pursuant to 25 C.F.R. 151.

Moreover, the letters clearly indicate they were sent in an effort to obtain agreement from the Secretary to acquire land in trust in settlement of prospective litigation, in lieu of compliance with the administrative process outlined in 25 C.F.R. 151. (See August 28, 2000 Letter, Exh. 28 attached to Opp'n) ("If the Tribe can acquire suitable land . . ., a federal

court can compel the Secretary to accept that land in trust for the Tribe without full compliance with the substantive or procedural provisions of 25 C.F.R. Part 151.") Decisions with respect to settlement of prospective litigation are within the Secretary's discretion.

The court finds that the letters fail in both substance and spirit to comply with 25 C.F.R. § 151.9 and were not "written requests" on which the Secretary had a duty to act.[6] The Tribe has identified no statute obligating the Secretary to take action on letters seeking out-of-court settlement of anticipated litigation. In the absence of a mandatory duty to act, the Secretary's alleged inaction is not reviewable under the 5 U.S.C. § 706(1).

B. Alternative Bases for Waiver of Sovereign Immunity.

In opposition to the Government's motion to dismiss, the Tribe asserts three alternative bases on which to find the government waived sovereign immunity.

1. Inherent Subject Matter Jurisdiction

The Tribe asserts that this court has inherent subject matter jurisdiction over this case by virtue of the trust relationship between the tribe and the Government. Tribes, like all litigants asserting claims against the United States, must show "that Congress has waived sovereign immunity for

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[6] On January 5, 2004, the Tribe filed a formal written request "that the Federal Government take land into trust for the California Valley Miwok Tribe" which requests information with regard to "the requirements for a fee-to-trust application and provides detailed information as to the approximately 84.5 acres of land in San Joaquin County the Tribe seeks to have taken into trust. (January 5, 2004 Letter from Silvia Burley to Clay Gregory, Acting Director - PRO/BIA, Exh. 2 to Motion to Dismiss.)

1 plaintiffs' cause of action, that Congress has created
2 substantive rights on which to base plaintiffs' claims, and that
3 a proper remedy is available. See Hill v. United States, 571
4 F.2d 1098, 1102-03 (9th Cir. 1978); Cobell v. Babbitt, 52 F.
5 Supp. 2d 11, 20 (D. D.C. 1999).
6 To support its position, the Tribe relies on United States
7 v. Mitchell, 463 U.S. 206 (1983). However, Mitchell address the
8 separate issue of whether a claim against the government for
9 breach of trust creates a substantive right to money damages.
10 In Mitchell, the Quinault Tribe and individual owners of
11 allotted lands within the Quinalt Indian Reservation filed an
12 action in the Court of Claims against the United States to
13 recover damages for breach of fiduciary duty in the management
14 of tribal lands. The Court of Claims found that the government
15 was subject to suit, and the government filed a petition for
16 certiorari, which was granted. The Supreme Court held that the
17 Tucker Act, 28 U.S.C. § 1491, provided a waiver of sovereign
18 immunity for suits over which the Court of Claims has
19 jurisdiction, but did not create a substantive right to damages,
20 which must be found in other statutes and regulations. The
21 Court found that the various statutes and regulations which
22 afforded the United States full responsibility for managing
23 Indian lands created a fiduciary relationship between the
24 government and the Tribe, giving rise to substantive claims for
25 damages. Consequently, the Court held that the Court of Claims
26 possessed subject matter jurisdiction over the claim and the
27 Tucker Act provided the necessary waiver of sovereign immunity.
28 /////

Mitchell holds that the Tribe has a substantive right to file a suit for breach of trust. However, the Tribe still must demonstrate that government has waived sovereign immunity. Nowhere does Mitchell hold otherwise.

2. Ultra Vires Exception

The Tribe next argues that the conduct of officials at the Department of Interior falls within the ultra vires exception to the bar of sovereign immunity because said officials "acted outside the scope of their delegated authority by conditioning review of the Tribe's request for land acquisition on the appointment of Yakima Dixie as Tribal leader." (Opp'n at 21.) Plaintiff has not pled ultra vires acts in the complaint nor does the complaint contain any reference to the facts - defendant's alleged insistence on Yakima Dixie's appointment as Tribal leader - which would form the basis of a cause of action alleging ultra vires acts. Accordingly, the Tribe cannot invoke the ultra vires exception to avoid the bar of sovereign immunity.

3. 28 U.S.C. § 1361

Finally, the Tribe asserts that Congress waived sovereign immunity by virtue of the Mandamus Act, 28 U.S.C. § 1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. However, the Ninth Circuit has held that the Mandamus Act does not operate as a waiver of sovereign immunity. Smith v. Grimm, 534 F. 2d 1346 n.9 ("The mandamus statute, 28 U.S.C. § 1361, is not a consent

to suit by the sovereign.") (citing White v. Administrator of General Services Administration, 343 F.2d 444 (9th Cir. 1965); United States v. Transocean Air Lines, Inc., 386 F.2d 79, 81 (5th Cir. 1967), cert. denied, 389 U.S. 1047, 88 S.Ct. 784, 19 L.Ed.2d 839 (1968) (judgment against the United States due to an attorney's lien held barred by sovereign immunity). See also, 16 James Wm. Moore, et al., Moore's Federal Practice ¶ 105.42[3] (majority position seems to be that the Mandamus Act is not a waiver of sovereign immunity.)

II. Statute of Limitations

Alternatively, the government argues that the six-year statute of limitations applicable to the APA has long since expired on plaintiff's claims that government breached its fiduciary duty and violated the Rancheria Act as a result of the 1967 conveyance to Mabel Hodge Dixie.

Defendant asserts that, under the six-year statute of limitations applicable to claims brought under the Administrative Procedures Act, the Tribe's claims for breach of fiduciary duty and violation of the Rancheria Act are time barred.[7]

Section 2401(a) provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first

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[7] While the Tribe asserts separate claims for breach of trust and violation of the Rancheria Act, both arise out of the same event, the alleged improper conveyance of the Sheep Ranch Rancheria and alleged termination of the Tribe's federally-recognized status. For purposes of determining if the statute of limitations has expired, the analysis is identical. As a result, the court analyzes the two claims concurrently.

accrues."[8] This statute of limitations is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity. Spannaus v. Department of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987). As such, it must be strictly construed. Section 2401(a) applies with equal force to suits brought by Indian Tribes against the government for breach of trust or breach of fiduciary duty. United States v. Mottaz, 476 U.S. 834, 842 (1986).

A claim "first accrues" for purposes of section 2401(a) when "all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action and the plaintiff was or should have been aware of their existence." Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988). Once a cause of action accrues and the statute of limitations begins to run, a plaintiff has six years in which to file an action and no more. Id. at 1578 (noting that tolling may be used to delay accrual of the cause of action, but only in rare cases can it be used to extend statutory period once the cause of action has accrued.)

---

[8] Plaintiff erroneously asserts that the applicable statute of limitations is 28 U.S.C. § 2501. That statute applies only to monetary claims against the United States filed in the United States Court of Federal Claims. 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.") Section 2401(a) is the parallel statute of limitations applicable to civil claims, other than those in contract, filed in district court. However, both statutes of limitations are six years and have been interpreted identically. See Hopland, 855 F.2d 1573, 1577 n.3 (finding "no distinction between the companion statutes of limitations found at section 2401(a) and 2501.").

A. Date of Accrual

The court first must ascertain when the Tribe's cause of action first accrued. Plaintiff asserts that the government breached its trust duties by approving the Distribution Plan and conveying title to the property (and arguably therefore terminating the Tribe) without first satisfying the provisions of the Distribution Plan which required the installation of sanitary systems on the property and by failing to appoint a conservator for Mabel Hodge Dixie prior to engaging in negotiations to convey title to the Sheep Ranch Rancheria to her.

Defendant asserts that any cause of action for breach of trust accrued in 1967 upon approval of the Distribution Plan and conveyance of title to Mabel Hodge Dixie. At that time, all actions by defendant breaching the trust had occurred. The Distribution Plan was adopted and the title conveyed without a conservator being appointed and without fulfillment of the Distribution Plan's provision for installation of sanitary system. Members of the tribe, including Mabel Hodge Dixie, were or should have been aware of the occurrence of these events.

Alternatively, defendant argues that the cause of action accrued no later than:

- 1972 when the BIA listed the SRR as a federally recognized tribe.
- 1979 when the government published the name of the tribe in the federal register. See Shiny Rock Mining Corp. v. United States, 906 F.2d 1362 (9th Cir. 1990) (publication of withdraw of lands from mining in federal register gave plaintiff constructive notice of

the withdrawal and commenced statute of limitations on their claim.)

- April 14, 1993 when the government attempted unsuccessfully to reopen the probate estate of Mabel Hodge Dixie to remove the SRR from her estate.

Under any of these alternative accrual dates, the statute of limitations on of plaintiff's claim for breach of trust would have expired.

Plaintiff argues that cause of action did not accrue in 1967 because, the government took the position that the quitclaim deed executed by Mabel Hodge Dixie overturned the original conveyance. The court need not decide the effect of the Mabel Hodge Dixie's quitclaim deed on the accrual date of the instant cause of action. Assuming *arguendo* that the execution of the quitclaim deed somehow did forestall accrual of this cause of action, it would have been postponed until no later than April 14, 1993, when the Administrative Law Judge denied the government's effort to reopen Dixie's estate. Even under this most generous interpretation of the date of accrual, plaintiff's claim falls outside the six-year statute of limitations period.

In opposition, plaintiff argues that the cause of action could not have accrued as of April 14, 1993 because the Tribe was not aware that the land in fact had been conveyed to Mabel Hodge Dixie and had lost trust status until it received formal notification to that effect from government on February 22, 2001. (February 22, 2001 Letter from Dale Risking, Sr., to Sylvia Burley, Exh. 33 to Opp'n.) As noted, *supra*, a cause of action does not accrue under 28 U.S.C. § 2401(a) until the

1 plaintiff knew or should have known of the events which fix the
2 alleged liability of the defendant. Hopland, 855 F.2d at 1577.
3 Ignorance of rights which should be known is not enough.
4 Japanese War Notes Claimants Ass'n of Philippines, Inc. v.
5 United States, 373 F.2d 356, 359 (Ct.Cl. Feb 17, 1967), cert.
6 denied by, 389 U.S. 971 (1967), reh'g denied by, 390 U.S. 975
7 (1968), Art Center School v. United States, 142 F.Supp. 916,
8 921, 136 Ct.Cl. 218, 227 (1956); Thomas v. United States, 125
9 Ct.Cl. 76, 80 (1953); Dion v. United States, 137 Ct.Cl. 166
10 (1956). Plaintiff must either show that defendant has concealed
11 its acts with the result that plaintiff was unaware of their
12 existence or it must show that its injury was 'inherently
13 unknowable' at the accrual date Id. (quoting Urie v. Thompson,
14 337 U.S. 163, 169 (1949)).
15 There is no question but that a cloud hung over title to
16 the Rancheria property as a result of the government's
17 conveyance to Mabel Hodge Dixie and subsequent efforts to
18 rescind that conveyance by inducing Mabel Hodge Dixie to execute
19 a quitclaim deed in favor of the United States. At that time,
20 the government took the position, as expressed in the quitclaim
21 deed, that the April 26, 1967 conveyance to Mabel Hodge Dixie
22 "was not intended to pass title nor did said deed actually pass
23 title" to the property. (September 6, 1967 Quitclaim Deed, Exh.
24 18 to Opp'n.) The Tribe has a strong argument that, as a result
25 of the government's position, it was not aware that the
26 government's allegedly illegal conveyance of the property to
27 Mabel Hodge Dixie caused the tribe or its members any injury.
28 If title never in fact passed to Mabel Hodge Dixie, title to the

1 property remained with the United States in trust for the tribe
2 and the Tribe's status was never terminated.
3 The subsequent inclusion of the property in Mabel Hodge
4 Dixie's probate estate created further uncertainty. Obviously,
5 if the property was reconveyed to the United States in 1967, it
6 did not belong in Mabel Hodge Dixie's estate and should not
7 descend to her heirs through intestacy. On the other hand, as
8 the probate proceedings of Mabel Hodge Dixie's estate apparently
9 has not been finalized and deeds have never been issued to her
10 heirs, this event alone may not have been sufficient to apprise
11 the Tribe of the injury caused by the April 26, 1967 conveyance.
12 As a result of these errors, and in order to harmonize its own
13 records with respect to ownership of the property, the
14 government sought a decision from an administrative law judge to
15 reopen Mabel Hodge Dixie's estate and remove the property, thus
16 affirming the government's position that the original conveyance
17 was void.
18 On April 14, 1993, the administrative law judge denied the
19 government's request. The judge found that (1) the April 26,
20 1967 conveyance did pass title to the property from the United
21 States to Mabel Hodge Dixie, (2) "the government's role in
22 preparation, execution, and acquisition of the quitclaim deed .
23 . . raises serious questions as to the quality of the title
24 received," (3) that there appears to have been no consideration
25 for the deed, and (3) even if the deed was a valid conveyance,
26 "the recitations made in the deed were a material
27 misrepresentation of the facts, no matter how innocently made,
28 leading Mabel Hodge Dixie to execute the quitclaim deed." (April

14, 1993 Order Denying Relief Requiested in Petition to Modify Order Dated November 1, 1971, Exh. 23 to Opp'n.) As a result of his findings, the judge denied the government's request to remove the property from Mabel Hodge Dixie's probate estate. That decision, which was not appealed by the government, precludes the government from seeking to remove the property from Mabel Hodge Dixie's estate, and consequently, from asserting ownership for the benefit of the Tribe. Certainly after issuance of this decision the Tribe was aware that the 1967 conveyance to Mabel Hodge Dixie had caused injury to its interest in the property.

During oral argument counsel for the Tribe referred to the fact that a deed on file with the Calaveras County Recorder's office still lists the property as owned by the United States. It appears the deed to which counsel referred is the September 6, 1967 quitclaim deed executed by Mabel Hodge Dixie in favor of the United States. According to the Tribe, the continued recordation of this quitclaim deed demonstrates that, even after the 1993 administrative law judge decision, the status of the land was still an open question. Thus, counsel argues, the Tribe could not have understood the extent of its injury - and its cause of action could not have accrued - until the government formally notified the Tribe of its landlessness in 2001. However, the 1993 decision by the administrative law judge cast serious doubt on the legal effect of the 1967 quitclaim deed. The presence of this deed in the chain of title does not lessen the impact of the 1993 decision, which put the Tribe on notice of the injury to its trust land. See Hopland,

855 F.2d at 1577 ("It is not necessary that the plaintiff obtain a complete understanding of all the facts before the tolling ceases and the statute begins to run.") (quoting Japanese War Note Claimants, 373 F.2d at 359.

Alternatively, the Tribe argues that the cause of action could not have accrued as of April 14, 1993 because the Tribe "had no living members until it began reorganization in 1998" who could have been aware of the events which fixed the government's liability. This simply does not appear to be the case. There were and are tribal members, or putative tribal members, who had standing to sue on behalf of the tribe, including Yakima Dixie, Mabel Hodge Dixie's son who was born in 1940 and unsuccessfully attempted to intervene in this action. To the extent plaintiff is asserting that there were no members because the Tribe was unorganized at the time, this argument was rejected by the Federal Circuit in Hopland. The reasoning of that case is persuasive and is adopted by this court. Plaintiff's reference to a February 8, 1989 Report of Population by Tribe which indicates that the government was unaware of any Sheep Ranch Tribal members as of 1987-1998 does not establish that no members or putative members existed who could have filed suit on the Tribe's behalf. (Exh. 20 to Opp'n; Record p.134.) It merely demonstrates that the government had no knowledge of any tribal members.

B. Continuing Claim Doctrine

Finally, plaintiff argues that this cause of action remains viable under the 'continuing claim' doctrine. As described in Hopland, the continuing claim doctrine provides that, where the

government has a mandatory duty to provide a benefit to tribal members, periodic denial of such benefits resulting from the termination of federal status could result in a suit for damages which would periodically accrue for as long as the tribe's status remained unlawfully terminated. Hopland, 855 F.2d at 1581.

Plaintiff asserts that the government has continued to violate its fiduciary duty to the tribe by failing to cure the tribe's landlessness after it unlawfully conveyed the property to Mabel Hodge Dixie in 1967. However, as a prerequisite to invoking the continuing claims doctrine, plaintiff must demonstrate that the source of substantive law he relies upon "can fairly be interpreted as mandating compensation by the federal government for the damage sustained." Hopland, 855 F.2d at 1581 n.5.) Plaintiff has pointed to no substantive law supporting the proposition that the government has a continuing duty to cure the tribe's landlessness, which is breached on an ongoing basis so long as the tribe remains landless. Under this interpretation, the statute of limitations in Section 2401(a) would have no effect in actions by Indian tribes for unlawful conveyance of trust lands. Such a result is inconsistent with prior Supreme Court holdings that section 2401(a) applies with equal force to actions by Indian Tribes. See United States v. Mottaz, 476 U.S. 834 (1986).

Accordingly, the court finds that plaintiff's cause of action for breach of trust and violation of the Rancheria Act are untimely. Since the statue of limitations, 28 U.S.C. § 2401(a), is a precondition to the United States' waiver of

sovereign immunity, this court lacks subject matter jurisdiction over these claims.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss is GRANTED. The clerk of the court is instructed to close the file.

IT IS SO ORDERED.

DATED: June 30, 2004.

FRANK C. DAMRELL, JR.
United States District Judge

DOCUMENT NO. 49

ATTACHMENT 7

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 11 2005

Mr. Yakima K. Dixie
Sheep Ranch Rancheria of MiWok Indians of California
11178 Sheep Ranch Rd.
P.O. Box 41
Sheep Ranch, California 95250

Dear Mr. Dixie:

I am writing in response to your appeal filed with the office of the Assistant Secretary – Indian Affairs on October 30, 2003. In deciding this appeal, I am exercising authority delegated to me from the Assistant Secretary – Indian Affairs pursuant to 209 DM 8.3 and 110 DM 8.2. In that appeal, you challenged the Bureau of Indian Affairs' ("BIA") recognition of Sylvia Burley as tribal Chairman and sought to "nullify" her admission, and the admission of her daughter and granddaughters into your Tribe. Although your appeal raises many difficult issues, I must dismiss it on procedural grounds.

Your appeal of the BIA's recognition of Ms. Burley as tribal Chairman has been rendered moot by the BIA's decision of March 26, 2004, a copy of which is enclosed, rejecting the Tribe's proposed constitution. In that letter, the BIA made clear that the Federal government did not recognize Ms. Burley as the tribal Chairman. Rather, the BIA would recognize her as "a person of authority within California Valley Miwok Tribe." Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal Chairman. I encourage you, either in conjunction with Ms. Burley, other tribal members, or potential tribal members, to continue your efforts to organize the Tribe along the lines outlined in the March 26, 2004, letter so that the Tribe can become organized and enjoy the full benefits of Federal recognition. The first step in organizing the Tribe is identifying putative tribal members. If you need guidance or assistance, Ray Fry, (916) 930-3794, of the Central California Agency of the BIA can advise you how to go about doing this.

In addition, your appeal to my office was procedurally defective because it raised issues that had not been raised at lower levels of the administrative appeal process. In May 2003, you contacted the BIA to request assistance in preparing an appeal of the BIA's recognition of Ms. Burley as tribal Chairman. You specifically stated that you were not filing a formal Notice of Appeal. In June 2003, you filed an "Appeal of inaction of official," pursuant to 25 C.F.R. §2.8, with the Central California Agency Superintendent challenging the BIA's failure to respond to your request for assistance. In August 2003, you filed another "Appeal of inaction of official"

with the Acting Regional Director challenging the failure of the Superintendent to respond to your appeal of the BIA's inaction. Your appeal with my office, however, was not an "Appeal of inaction of official." Rather, your "Notice of Appeal" challenged the BIA's recognition of Ms. Burley as tribal Chairman and sought to nullify the Tribe's adoption of her and her family members. Those issues were not raised below. They are not, therefore, properly before me.

In addition, your appeal appears to be untimely. In 1999, you first challenged the BIA's recognition of Ms. Burley as Chairman of the Tribe. In February 2000, the BIA informed you that it defers to tribal resolution of such issues. On July 18, 2001, you filed a lawsuit against Ms. Burley in the United States District Court for the Eastern District of California challenging her purported leadership of the Tribe. On January 24, 2002, the district court dismissed your lawsuit, without prejudice and with leave to amend, because you had not exhausted your administrative remedies by appealing the BIA's February 2000 decision. After the court's January 24, 2002, order, you should have pursued your administrative remedies with the BIA. Instead, you waited almost a year and a half, until June 2003, before raising your claim with the Bureau. As a result of your delay in pursuing your administrative appeal after the court's January 24, 2002, order, your appeal before me is time barred.

In light of the BIA's letter of March 26, 2004, that the Tribe is not an organized tribe, however, the BIA does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time. I understand that a Mr. Troy M. Woodward has held himself out as an Administrative Hearing Officer for the Tribe and purported to conduct a hearing to resolve your complaint against Ms. Burley. Please be advised that the BIA does not recognize Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum. Should other issues arise with respect to tribal leadership or membership in the future, therefore, your appeal would properly lie exclusively with the BIA.

Sincerely,

Michael D. Olsen
Principal Deputy
Acting Assistant Secretary - Indian Affairs

Enclosure

cc: Sylvia Burley
Troy M. Woodward, Esq.
Thomas W. Wolfrum, Esq.
Chadd Everone

DOCUMENT NO. 50

C.A. No. 04-16676

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLEE
UNITED STATES OF AMERICA

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50 F.R. 6055, 6057 (Feb. 13, 1985) 7, 37

51 F.R. 25115, 25117(Jul. 10, 1986) 7, 37

53 F.R. 52829, 52831 (Dec. 29, 1988) 7, 37

58 F.R. 54364, 54368 (Oct. 21, 1993) 7, 37

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FEDERAL RULES

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BRIEF FOR FEDERAL APPELLEE

UNITED STATES OF AMERICA

OPINION BELOW

The decision of the district court (Honorable Frank C. Damrell, Jr.) is reproduced in the appellant's Excerpts of Records ("ER") at tab 48. This decision issued after a hearing held on June 10, 2004. Appellee's Supplemental Excerpts of Record (hereafter, "SER") at 208-257.

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court - Because there was no waiver of sovereign immunity, the district court held that it lacked subject matter jurisdiction over this suit. ER at tab 48, pp. 7-15. *The plaintiff/appellant has not raised this issue on appeal.* Alternatively, the Court held that the suit is untimely. Only this latter ruling of the court has been briefed by appellant to this Court.

In her first amended complaint, plaintiff predicated jurisdiction on 28 U.S.C. §§ 1331, 1337, and 1361, and on the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. SER at 2.

B. Jurisdiction of the Court of Appeals - The district court's order granting the government's motion to dismiss was entered on July 1, 2004. ER at tab 48. Final judgment also was entered on July 1, 2004. SER 207. The Notice of Appeal was filed timely on August 25, 2004. ER at tab 49. However, this Court lacks subject matter jurisdiction over plaintiff's claims for the same reason the district court dismissed the claims, *i.e.*, the United States has not waived its sovereign immunity.

ISSUES PRESENTED FOR REVIEW

The United States agrees with the issues framed by Silvia Burley in her opening brief (hereafter "AB") at 2.[1]/ In addition, the following two issues are germane and are briefed herein:

1. Whether this Court should summarily affirm the district court's decision on the grounds that Silvia Burley does not challenge in her brief the district

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[1]/ At one time, Silvia Burley was recognized as the interim tribal chairperson for the California Valley Miwok Tribe, and the Secretary of the Interior duly recognized an interim governing body for the Tribe. *See* 28 U.S.C. § 1362 (federal courts have jurisdiction over suits brought by tribes "with a governing body duly recognized by the Secretary of the Interior"). However, on March 26, 2004, the Secretary withdrew her recognition of the Burley governing body, *see* SER 121-124, for which reason Burley may no longer prosecute this appeal in the name of the Tribe. She may, however, prosecute this appeal in her own name for which reason the United States will herein refer to the appellant as "plaintiff" or "Silvia Burley."

court's alternate determination that it lacks subject matter jurisdiction on the grounds that sovereign immunity has not been waived.

2. Whether Silvia Burley raised tolling or estoppel in the district court, thus preserving these issues for appellate review.

STATEMENT OF THE CASE[2]/

A. Nature of the Case

This appeal, brought in the name of the California Valley Miwok Tribe, is not prosecuted by an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," 28 U.S.C. § 1362, but by Silvia Burley who presently is recognized only as a spokesperson on behalf of a recognized, but unorganized, tribe.[3]/ Significantly, no appeal has been taken of the BIA's decision to recognize Ms Burley as a tribal spokesperson, rather than interim tribal chair. Therefore, the decision is final and Ms. Burley's standing to prosecute this appeal

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[2]/ Appellant's Statement of the Case and Statement of Facts, AB at 2-14, contain numerous unproven allegations and misstatements, most of which are irrelevant to this appeal. Those allegations and misstatements that are relevant are addressed in the government's Statement of Facts *infra*.

[3]/ Up until this past year, BIA believed that the Tribe was organizing and duly recognized an interim tribal governing body led by Silvia Burley. After the briefing was completed on dispositive motions in the district court in Spring 2004, the time lapsed for administratively appealing the decision to recognize Ms. Burley only as a tribal spokesperson, no administrative appeal was taken from that decision, and the decision, therefore, became final. SER 275-276.

in the name of the tribe is questionable. *See* 28 U.S.C. § 1362.[4]/ Ms. Burley does not address this issue in her brief or in any way demonstrate standing to prosecute this appeal.

In this suit, Ms. Burley, and, presumably, her two daughters and her granddaughter, all of whom were first deemed to be members of this tribe in 1998, AB at 28, seek land for their tribe for gaming purposes. They do so on the theory that the tribe's status as a federally-recognized tribe was terminated in violation of the California Rancheria Act and that its less-than-one-acre tribal property was deeded improperly to a tribal member in 1967. SER at 1-15. The United States admits that the land was transferred to the tribal member but denies that the tribe was ever terminated. The question of whether the tribe was terminated is significant for reasons *other* than this appeal, *i.e.*, for the prospect of gaming. As relief, Ms. Burley seeks (1) a declaration that her tribe's status as a federally-recognized tribe was terminated and subsequently restored within the meaning of

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[4]/ In its entirety, § 1362 provides,

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band *with a governing body duly recognized by the Secretary of the Interior* wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Emphasis added.

the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(B)(iii), and (2) an order directing the United States to take up to 240 acres into trust on behalf of her tribe, either in Calaveras or in San Joaquin County, California. SER at 14-15.

By order issued July 1, 2004, the district court correctly dismissed plaintiff's complaint in its entirety on the grounds that there was no waiver of sovereign immunity to permit plaintiff's claims. ER at tab 48, p.7-15. Alternatively, the district court held that suit was untimely as plaintiff's claim accrued *at the latest* in 1993 and suit was not filed until April 2002 well after the six year statute of limitations, 28 U.S.C. 2401(a), had passed. *Id.* at p. 15-24.

B. Statutory Scheme

Germane to this appeal is the statute of limitations found at 28 U.S.C. § 2401. It is reprinted in the addendum to this brief.

C. Statement of Facts

Several misstatements of fact appear in the opening brief. The disagreement over these facts is immaterial as plaintiff's discussion of thereof is irrelevant to the issues on appeal. Below, the United States addresses those facts that are relevant to the issue before the Court on appeal.

1. The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California, *see* SER 1, is a federally-recognized

tribe, *id.*at 5, ¶ 4. The land known as the Sheep Ranch Rancheria consists of 0.92 acre (less than one acre) and is located in Sheep Ranch, Calaveras County, California. ER at tab 12, p.1; SER 205, ¶ 3. Today, the 0.92-acre rancheria is held in trust by the United States for the heirs of Mabel Hodge Dixie. *Id.*

2. The Bureau of Indian Affairs has never identified the Tribe as a "terminated tribe," *i.e.*, one ineligible to receive services from the federal government because of its status as a terminated tribe nor have any of its members been refused services because of the Tribe's status as a terminated tribe. SER 91.

3. In 1972, the federal government published its first listing of tribal entities in the United States. The publication was a booklet entitled "American Indians and Their Federal Relationship" and was available to the general public. SER 164-201. The Sheep Ranch Rancheria is identified in this booklet as an "Indian organization[] without [a] written governing document[] that [is] served by the Bureau of Indian Affairs." *Id.* at 170, 178.

4. In 1979, the Bureau of Indian Affairs began publishing in the Federal Register, on a periodic basis, the list of tribes deemed to be federally-recognized. *See* 25 C.F.R. § 83.6(b)(1984). The Sheep Ranch Rancheria of Me-Wuk Indians of California, as the tribe formerly was known, SER 1, has been listed on each such

published list since the list first was published in 1979. 44 F.R. 7235, 7236 (Feb. 6, 1979); 45 F.R. 27828, 27830 (Apr. 24, 1980); 46 F.R. 35360, 35362 (July 8, 1981); 47 F.R. 53130, 53133 (Nov. 24, 1982); 48 F.R. 56862, 56864 (Dec. 23, 1983); 50 F.R. 6055, 6057 (Feb. 13, 1985); 51 F.R. 25115, 25117 (July 10, 1986); 53 F.R. 52829, 52831 (Dec. 29, 1988)[5]/; 58 F.R. 54364, 54368 (Oct. 21, 1993)[6]/; 60 F.R. 9250, 9253 (Feb. 16, 1995)[7]/.

5. The Tribe itself maintains that it has been federally recognized since 1994. SER 3 at ¶ 4.

6. At one time, the Tribe was scheduled for termination[8]/ pursuant to the California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 (1958), *as amended*, Pub.L. 88-419, 78 Stat. 390 (1964). AB at 6; SER 4 at ¶ 13. Pursuant to the amended act,

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[5]/ No list was published in 1984 or 1987.

[6]/ No list was published between December 29, 1988, and October 21, 1993. *See* 58 F.R. at 54364.

[7]/ No list was published between October 21, 1993, and February 16, 1995. *See* 60 F.R. at 9250.

[8]/ "Termination" is a term of art in Indian law used to refer to a now-rejected federal policy of severing (or "terminating") federal supervision of and services to certain Indians and tribal entities. Pursuant to such policy, the federal government no longer provided services to terminated tribes and/or individual Indians based upon their status as Indian tribes and/or Indians. *TOMAC v. Norton*, 193 F.Supp. 2d 182, 193 (D.D.C. 2002)(termination refers to those tribes whose federal trust relationship was terminated); *Table Bluff Band of Indians v. Andrus*, 532 F.Supp. 255 (N.D.Cal. 1981).

an election was held at Sheep Ranch Rancheria on the question of whether the Termination Act should apply to Sheep Ranch Rancheria. One adult resident of the rancheria, Mabel Hodge Dixie, was eligible to vote. ER at tabs 6-8, 13. Ms. Dixie voted in favor of termination. ER at tab 10.

7. The Bureau of Indian Affairs ("BIA") then prepared a "Distribution Plan" for the land known as the Sheep Ranch Rancheria, which plan was approved by Ms. Hodge. ER at tabs 12 & 14; SER 4-5 at ¶¶ 11, 14. The Distribution Plan specifically requires the United States to publish a notice in the Federal Register upon termination of the Rancheria and the eligibility of Ms. Dixie to receive federal services based upon her status as an Indian. ER at tab 12, p.3.

8. BIA apparently had information suggesting that Mabel Hodge Dixie was in need of a conservator and anticipated the appointment of a conservator prior to delivery of title to the Sheep Ranch Rancheria. ER at tabs 15-17; SER 5-6 at ¶¶ 13, 18-19, 21. Before a conservator could be appointed, the United States transferred title to the 0.92-acre Sheep Ranch Rancheria to Ms. Dixie. ER at tabs 18-20; SER 6 at ¶ 20. Recognizing its error, the United States immediately had Ms. Dixie quitclaim the property back to the United States. ER at tabs 20-21; SER 6 at ¶ 22. Thereafter, the process of terminating the Sheep Ranch Rancheria came to a halt. No notice of termination was ever published in the Federal Register, as

required by 25 C.F.R. § 242.10 (1965)[9]/ and the distribution plan for Sheep Ranch Rancheria, ER at tab 12, p.3. No record has been located within BIA showing that the Sheep Ranch Rancheria ever transferred out of trust status for any period of time.[10]/ SER 205 at ¶ 4.

9. Ms. Dixie passed away in 1971 and the beneficial interest in the Sheep Ranch Rancheria was probated at that time by the Department of Interior pursuant to 25 U.S.C. § 372 as an asset of Ms. Dixie's estate. ER at tab 22, pp. 1-7; SER 6 at ¶ 24. The land then passed to Ms. Dixie's husband by Indian Custom (Merle Butler) and to her four sons (Yakima, Melvin, Tommy, and Richard Dixie). ER at tab 22, p. 2.

10. In 1990, the Bureau of Indian Affairs sought to amend its land title records with respect to Sheep Ranch Rancheria by filing a petition with Department of Interior's Office of Hearings and Appeals to modify the 1971

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[9]/ With the demise of the government's termination policy, Part 242 was replaced 20 years ago by wholly new and unrelated regulations. Therefore, the 1965 regulations, which were the original termination regulations that pre-dated the termination regulations invalidated in *Kelly v. United States Dept. of Interior*, 339 F.Supp. 1095, 1100-02 (E.D.Cal. 1972), are appended at SER 160-163.

[10]/ The federal government maintains its own title records independent of any title documents recorded with local governments. SER 204-205 at ¶ 2. With respect to Indian lands, the Bureau of Indian Affairs maintains the records of Indian trust lands that identify the name of the beneficiaries on whose behalf the land is held in trust. *See id.* and 25 C.F.R. Part 150.

probate decision by withdrawing the rancheria from Dixie's schedule of assets, which would permit the BIA to hold title in trust for the Tribe. ER at tab 26. The petition for modification was denied. ER at tab 29.

11. In April 2002, the Tribe filed suit against federal defendants, seeking declaratory, injunctive and monetary relief. ER at tab 50, p.14.

SUMMARY OF THE ARGUMENT

Inasmuch as the district court concluded that there was no waiver of sovereign immunity to permit plaintiff's claims to go forward, which conclusion is not challenged in this appeal, the instant appeal should be dismissed. The remaining ground for dismissal, untimeliness, does not raise any substantial issue affecting any rights between the parties, as noted *infra*, for which reason summary affirmance is appropriate. Moreover, the district court correctly decided that this action is time-barred.

Should this Court reach the merits of plaintiff's appeal, the district court correctly found that plaintiff's claims accrued, *at the latest*, in 1993 when the agency affirmed the 1971 probate decision in which the Sheep Ranch Rancheria was inherited by the heirs of Mabel Hodge Dixie. This decision imparted knowledge to tribal members that the Rancheria no longer was tribal land but

individually-held land. Plaintiff's arguments to the contrary are unavailing, especially since plaintiff acknowledges that she knew, within the six-year limitations period for bringing suit, that the property was included in the estate of Ms. Dixie and admitted that she surmised that the property no longer was tribal property.

To escape the consequences of a dismissal on untimeliness grounds, plaintiff raises tolling and estoppel arguments, two doctrines rarely applied against the United States. These issues were not first presented to the district court, for which reason this Court may disregard them. Should this Court reach the merits of plaintiff's equitable arguments, they remain unavailing. Tolling is inapplicable inasmuch as plaintiff knew within the statutory time period that the tribe was landless and then inexplicably delayed four years before filing suit. Similarly, plaintiff is unable to establish any entitlement to estoppel inasmuch as any alleged error by the government did not rise to the level of egregiousness required to estop the government from asserting a limitations defense.

Finally, the untimeliness of plaintiff's suit is jurisdictional in the absence of justification for any delay in filing. Nothing in *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), commands an alternative result. Indeed, this Court in *Nesovic*

v. United States, 71 F.3d 776, 778 (9th Cir. 1995), cited with approval in *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997), held that "if Mr. Nesovic failed without justification to bring his lawsuit within the prescribed period, we are without jurisdiction to hear his claims."

ARGUMENT

I. BECAUSE ONLY ONE OF TWO ALTERNATE GROUNDS FOR DISMISSING THIS SUIT HAS BEEN APPEALED, THIS COURT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S DECISION.

The district court held that it lacked subject matter jurisdiction over appellant's suit for two reasons: (1) Sovereign immunity is not waived and (2) suit is untimely. ER at tab 48. Only the latter determination has been challenged by appellant. Therefore, regardless of the outcome of the instant appeal, the instant suit cannot be revived.

Generally speaking, the Court will not entertain appeals that raise insubstantial or harmless issues. *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982); *Page v. United States*, 356 F.2d 337, 339 and n.1 (9th Cir. 1966). For example, in *Page*, the appellant was convicted on six drug offenses. 356 F.2d at 338. He was sentenced to serve 20 years on each count, to be served *concurrently*. *Id.* Page appealed, and his brief addressed only his conviction on two of the six

offenses. *Id.* This Court granted the government's motion for summary affirmance on the grounds that where the sentence remains unchanged (*i.e.*, 20 years), the appellate court will not examine the validity of any "companion" convictions. *Id.* (string citations omitted). Regardless of the outcome of the appeal, the appellant remained convicted and remained sentenced to serve 20 years.

The same result obtains in the instant case. Whether or not the limitations issue is decided is not going to affect the outcome of this case as the unchallenged alternate ground for dismissal of appellant's complaint necessarily will remain in place.

Plaintiff argues that the district court's decision goes to the merits of the case, thus potentially denying plaintiff the opportunity of refiling suit and establishing jurisdiction on different grounds. Opp. Brf. to Motion to Dismiss or for Sum.Affirm. (hereafter, "Opp. Brf."), filed on or about January 6, 2005, at 2. Plaintiff suggests that suit might be filed in the Court of [Federal] Claims or a tort claim pursued. *Id.* However, there is no averment that any new suit has been filed or a tort claim submitted to the agency, let alone evidence of the same. Moreover, suits in the Claims Court as well as suits under the Federal Tort Claims Act,

28 U.S.C. § 2671 *et seq.* and related statutes, are governed by different limitations statutes than the one addressed below.[11]/ If any such suit is ever filed in the Court of Federal Claims, that court is well qualified to address and decide any timeliness issues raised therein.

Indeed, should plaintiff file new claims arising out of the same factual allegations as the instant suit, plaintiff's suit would remain time-barred, assuming *arguendo* that plaintiff's claims accrued as late as 1998, as she argued in the district court, SER 88.[12]/ The six-year statute of limitations found in § 2501 ran in 2004; the two-year statute of limitations found in § 2401(b) for submitting an administrative tort claim ran in 2000. A review of the docket for the Court of Federal Claims does not reveal any suit filed in the name of the tribe or Silvia Burley or her two daughters, Anjelica Paulk and Rashel Reznor. Moreover, plaintiff fails to aver that an administrative claim has been submitted, which is a predicate to filing a negligence action against the United States. *Brady v. United*

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[11]/ The parties do not dispute that the district court correctly applied the limitations period set out in 28 U.S.C. § 2401. In contrast, suits in the Court of Federal Claims generally are governed by 28 U.S.C. § 2501 while tort actions are governed by 28 U.S.C. § 2401(b).

[12]/ In her appellate brief, plaintiff now argues that her claim accrued in 2001. AB at 16, 17.

States, 211 F.3d 499, 502 (9th Cir. 2000). Finally, inasmuch as plaintiff's arguments for tolling and estoppel are not well taken in the instant appeal, *see infra* at 32-34, they would not save plaintiff from her own negligence in failing to file a timely suit setting forth these additional claims.

For the above reasons, the instant appeal should be dismissed. It fails to raise any substantial issues requiring this Court's attention. Moreover and regardless of the outcome of the appeal, plaintiff's suit cannot be revived nor would any new suits arising out of the same factual allegations be timely assuming *arguendo* appellant were to prevail in this appeal.

II. PLAINTIFF'S CLAIMS ACCRUED *AT THE LATEST* IN 1993 IN THE WAKE OF THE ADMINISTRATIVE DECISION AFFIRMING THE 1971 DECISION THAT DETERMINED THAT SHEEP RANCH RANCHERIA DESCENDED TO THE HEIRS OF MABEL HODGE DIXIE.

A. Standard of Review

Regardless of whether the decision to dismiss on untimeliness grounds is viewed as a dismissal under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction or under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, review by this Court is *de novo*. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir.)(subject matter jurisdiction), *cert.denied*, ___ U.S. ___,

125 S.Ct. 105 (2004); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004)(failure to state a claim).

To the extent that any material factual determinations are disputed on appeal, this Court reviews such factual determinations *de novo* and construes allegations favorably for plaintiff, whether the dismissal is ordered pursuant to Rule 12(b)(1) or 12(b)(6). *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000) (subject matter jurisdiction); *Edwards*, *supra* (failure to state a claim). However, in determining to dismiss, it must be clear that, given the parameters of plaintiff's complaint, plaintiff can prove no set of facts that would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Where plaintiff has attached documents to her complaint, the Court may consider those documents in determining whether to dismiss plaintiff's suit. *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 (9th Cir. 1998).

To the extent that a dismissal of suit against the United States on limitations grounds properly is brought under Rule 12(b)(6) and not Rule 12(b)(1), *see* discussion at 45-51, and where matters outside the pleadings are relied upon in determining the timeliness of the complaint, the motion should be considered as one under the summary judgment standards of Fed.R.Civ.P. 56. Appellate review

of decisions on summary judgment also are *de novo*. *Midwater Trawlers Co-Operative v. Dept. of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

B. Giving Plaintiff Every Generous Benefit of the Doubt, Plaintiff's Suit was Filed at Least Three Years Too Late.

The last time any action occurred with respect to title to the 0.92 acre parcel known as Sheep Ranch Rancheria was the 1993 administrative probate decision that *affirmed* the original probate decision issued in 1971. Both of those decisions held that the small parcel passed to the heirs of Mabel Hodge Dixie. Regardless of whether any action challenging the transfer of title accrued in 1971 or in 1993, the six year statute of limitations found in 28 U.S.C. § 2401(a) had passed by the time suit was filed in 2002. Therefore, the district court properly held that plaintiff's suit is time-barred.

As the district court correctly held, a cause of action typically accrues when "all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action and the plaintiff was or should have been aware of their existence." ER at tab 48, p.16 (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)); *see also Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir.)("statutes of limitations do not commence running until plaintiffs knew or should have known

the facts upon which their claims are based"), *cert. denied*, 498 U.S. 824 (1990). Accrual does not await actual knowledge by the plaintiff of government action. *Shiny Rock Min. Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990). Rather, "a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action." *Id.* (quoting *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir.), *cert.denied*, 479 U.S. 816 (1986)); *see also Hopland Band of Pomo Indians*, 855 F.2d at 1577 ("a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." Emphasis in the original. Citation omitted).

The district court gave plaintiff the benefit of the doubt and assumed without deciding that simple conveyance of title to the Sheep Ranch Rancheria to Mabel Hodge Dixie effected the termination of the Rancheria.[13]/ *See* ER at tab 48, p. 19-

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[13]/ Defendant maintains that termination did not occur *ipso facto* upon the transfer of title, but would have occurred upon publication of formal notice in the Federal Register, as required by 25 C.F.R. § 242.10 (1965), SER 163; *cf.* California Rancheria Act, Pub.L. 85-671, 72 Stat. 619 at § 10(b)(after the assets of a rancheria are distributed, the Indians receiving such assets shall no longer be entitled to federal services to Indians based on their status as Indians).

In addition, the Distribution Plan for the termination of Sheep Ranch Rancheria also required publication of notice in the Federal Register. ER at tab 12, p.3 ("After the assets of the Sheep Ranch Rancheria have been distributed pursuant (continued...)

20. The court then held that plaintiff's claims for the conveyance of the Rancheria as well as for the alleged termination of the tribe accrued *at the very latest* in 1993 when any cloud upon the title of the land was removed by the final probate decision issued in Mabel Dixie's estate. ER at tab 48, pp. 15 n.7 & 21. The district court explained:

> There is no question but that a cloud hung over title to the Rancheria property as a result of the government's conveyance to Mabel Hodge Dixie and subsequent efforts to rescind that conveyance by inducing Mabel Hodge Dixie to execute a quitclaim deed in favor of the United States. * * * The Tribe has a strong argument that, as a result of the government's position [that the quitclaim deed restored the land to tribal trust land status], it was not aware that the government's allegedly illegal conveyance of the property to Mabel Hodge Dixie caused the tribe or its members any injury. If title never in fact passed to Mabel Hodge Dixie, title to the property remained with the United States in trust for the tribe and the Tribe's status was never terminated.

ER at tab 48, pp. 19-20. But, the Court ultimately found that "after issuance of [the 1993 probate] decision the Tribe was aware that the 1967 conveyance to Mabel

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[13]/(...continued)
to this plan and Public Law 85-671 [California Rancheria Act], as amended, *and after a notice to this effect has been published in the Federal Register*, Ms. Dixie shall thereafter not be entitled to any of the services performed by the United States for Indians because of their status as Indians") (emphasis added).

No final notice of distribution was ever published in the Federal Register. Moreover, plaintiff has never adduced any evidence showing that the tribe or its people were ever denied services by the United States based upon the termination of any federal recognition.

Hodge Dixie had caused injury to its interest in the property." *Id.* at p.21. The court also properly applied the six-year period found in 28 U.S.C. § 2401(a), *id.* at 15, and held that plaintiff's claims, thereforewere time-barred, *id.* at 23-24, as the six-year period for filing suit expired in 1999 and plaintiff's suit was not filed until 2002.

Moreover, the United States maintains that plaintiff's claim accrued in 1971 when the property first was probated as part of the estate of Mabel Hodge Dixie. The 1971 probate decision was *affirmed* in all respects by the 1993 probate decision. *Cf.* ER, tab 22 with ER, tab 29. Because there is no evidence suggesting that tribal members had been informed by BIA in the years between the two probate decisions that the land was tribal land rather than individual trust land, the tribe knew in 1971 that it no longer had an interest in the Rancheria and any claim for such injury accrued at that time. Notwithstanding, even an accrual date in 1993 does not save plaintiff from the bar of untimeliness.

In the district court as well as in this appeal, plaintiff argues the following theories to support her claim for a later accrual date: (1) there were no "living [tribal] members" until the tribe's alleged 1998 reorganization who would have been aware of the 1993 probate decision and who would have recognized that the

Rancheria was no longer tribal land, AB at 16, 22-24, SER at 88, and (2) BIA did not "conclusively inform the Tribe" that it was landless until 2001, AB at 26, SER at 88. Neither of these arguments defeats the accrual date of plaintiff's claims as discussed in further detail below.

1. The Tribe is not Extinct, for Which Reason there were Tribal Members Who Could have Pursued a Timely Action

If, as plaintiff argues, there were no living tribal members until 1998, AB at 22-23, this tribe is extinct and should be removed from the list of federally-recognized tribes. But, while BIA is not privy to the precise membership of this tribe, *see 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"), BIA does have some general knowledge of the Indians in the area and is aware of a substantial and viable Indian community in Calaveras County, *see generally* SER 121-123 (describing BIA's knowledge of the Indians of Calaveras County based on nearly 100 years of records). Additionally, if the tribe had no tribal members, it follows that any claim or entitlement to the Rancheria property expired with the tribe. In any event, the so-called lack of tribal members is not grounds for delaying the accrual of a claim for the land. If anything, it would be grounds for extinguishing the claim. To examine this particular argument, we turn first to a

discussion of the person(s) behind the instant lawsuit and their so-called government.

Silvia Burley, who was born in 1960, SER 100, admits that she and her daughters became tribal members in 1998 when Yakima Dixie admitted them as members[14]/, *see* AB at 28, SER 130, 105-106. Under Burley's direction, the Tribe took steps towards formal organization, utilizing federal funds. However, and despite acknowledging in this litigation that there are approximately 250 living potential tribal members, SER 1 (the tribe has "a potential membership today of nearly 250 people"), full tribal membership today is restricted to the direct ancestors and descendants of the five individuals listed on the tribe's base roll, *i.e.*, herself, her two daughters, her granddaughter and Yakima Dixie.[15]/ SER 265.

When asked at her deposition what steps were taken to publicize organization of the tribe, Silvia Burley responded, "I don't recall." SER 150-152.

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[14]/ Thus, Burley begs the question of how one can become a member if there are "no living tribal members."

[15]/ The only other person admitted to the tribe is Yakima Dixie. SER 100. Mr. Dixie, who is 65 years old, *id.*, is not believed to have any offspring.

When asked if "the tribe" had a policy to admit non-Indians as members, Burley responded, "I don't know."[16]/ SER 157-158.

Burley has excluded her three siblings as well as the living brother of Yakima Dixie from participation in tribal matters along with any and all collateral relatives, many of whom are believed to live in Calaveras County. SER 122, 131-132. For these and other reasons, BIA now has taken the position that Silvia Burley can no longer be accorded formal recognition as an interim tribal chairperson, but only as an informal point-of-contact for the tribe. For purposes of this litigation, it is evident that Burley lacks knowledge concerning the history of her tribe.

Moreover, to the extent that plaintiff argues that no claim accrued until the tribe organized, plaintiff errs on two grounds: First, the California Valley Miwok Tribe remains an unorganized tribe in the eyes of the United States.[17]/ SER 93,

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[16]/ The tribal enrollment ordinance drafted by Burley permits *full* membership rights, *i.e.,* voting rights, to be bestowed on the direct ancestors and descendants of Burley, her two daughters and her granddaughter. SER 265. If the paternal ancestors of Burley's daughters and granddaughter are non-Indian, the enrollment ordinance nevertheless would permit their enrollment. *Id.*

[17]/ This is not to say that Silvia Burley cannot organize her own association based on her Miwok heritage. It is, however, to say that the United States has plenary authority to determine whether a tribe is organized and has established a tribal

(continued...)

121-124. Second, any claim respecting the loss of tribal land does not await formal reorganization of the tribe. *Hopland Band of Pomo Indians*, 855 F.2d at 1580. As the Federal Circuit explained in *Hopland*,

> The Band's theory of its own disablement through revocation of its charter ignores the reality that it is through the knowledge of individual persons that comprise legal entities such as corporations or tribes that such entities gain the actual knowledge of the events which give rise to their potential causes of action. The termination of the Band's charter or the withdrawal of federal recognition did not affect the ability of the individual members to obtain knowledge and those individual members knew or should have known at least by 1967 all the facts which indicated that the sale of Parcel 1 was improper under the [California Rancheria] Act.

Id.; *see also* cases cited therein. Therefore, as the district court held, it is irrelevant that Silvia Burley was not a tribal member in 1971 or 1993; what is relevant is that those individuals who were members should have been aware that the Rancheria was no longer tribal land and could have brought suit therefor. ER at tab 48, p.22.

Plaintiff's "evidence" of the lack of tribal members stems from a 1989 BIA document entitled "Report of Population by Tribe." AB at 23; ER at tab 24. On this document, the Sheep Ranch Rancheria is shown to have "0" population both on

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[17]/(...continued)
government that is entitled to recognition by the United States for purposes of federal funding, services, etc. *See* U.S. Const. Art. 1, § 8, cl. 3; 25 U.S.C. § 2.

and off the Sheep Ranch Rancheria. *Id.* However, as former BIA official Brian Golding, Sr., explained:

> I am familiar with the "Report of Population by Tribe" dated February 8, 1989. . . . As indicated on this report, the data thereon was derived from 1987/88 Labor Force Report, a document I have not located at this time. Each one of the tribes listed on this "Report of Population by Tribe" is a federally-recognized tribe. That "zero" is reported for Sheep Ranch Rancheria does not mean the Tribe is or was terminated. Instead, this report, which continues to be prepared today, is based on the service population area that was defined at that time in accordance with 25 C.F.R. § 20.1(r)(1989). Population "on" the reservation refers to persons living on trust land; population "off" reservation refers to persons living in "areas or communities adjacent or contiguous to reservations." 25 C.F.R. § 20.1(r)(1989). Consequently, the information contained in this "Report of Population by Tribe" means that ***BIA*** was unaware of tribal members living on the Sheep Ranch Rancheria or adjacent or contiguous thereto as of February 1989. It does not mean that there were no tribal members and is not used for that purpose.

SER 92 at ¶ 6 (emphasis added). The district court agreed that the report failed to establish that there were no tribal or putative tribal members and, instead, merely established that *the government* was unaware of any tribal members actually living on or adjacent to the rancheria. AB at 23; ER at tab 48, p. 22. Plaintiff has never offered any evidence contradicting the government's explanation of this document.

Plaintiff also argues that Yakima Dixie testified in 1993 that he was not a member of a tribe at the hearing on the government's motion to modify the 1971

probate decision in his mother's estate. AB at 20. The precise testimony before the administrative judge, at which Mr. Dixie was not represented by counsel, was as follows:

> Judge: Neither you nor your brother have a *formal* membership in a tribal *unit* do you?
>
> Dixie: No.

ER, tab 28 at 3:17-19 (emphasis added). Inasmuch as the tribe, then as now, is not formally organized, *see supra*, Mr. Dixie likely did not consider himself to have a "formal membership" in a "tribal unit." Moreover, the district court properly found it preposterous of plaintiff to suggest that Mr. Dixie -- the son of the Indian to whom the Rancheria land was given, the person who had been living on the Rancheria, and the person responsible for bringing Silvia Burley and her family into the tribe -- was not a member of the California Valley Miwok Tribe:

> The Court: Yakima Dixie is a member of the Tribe, is he not?
>
> Mr. Steele: Correct. At that time [in 1993] he was not.
>
> The Court: Why do you say that?
>
> Mr. Steele: Because he said so on the record.
>
> The Court: As I understand it, he was a lineal decedent [sic, descendant] of Ms. Dixie; she was a member of the Tribe?

Mr. Steele: Yes.

The Court: You have a hard time saying he's not a member of the Tribe.

Mr. Steele: He said he wasn't a member of the Tribe.

The Court: He said he wasn't, but it seems he's a lineal decedent [sic, descendant] of Ms. Dixie's. That's her son.

Mr. Steele: Not necessarily. I don't think there's any authority that so states.[18/] These people have been running around unrecognized --

The Court: What about the Hopland case? You're not suggesting there were no[] members of the Tribe in existence in '93, are you?

Mr. Steele: Yes, we are. There were no members of the Tribe in '73.

The Court: '93.

Mr. Steele: '93, the same situation existed.

SER 227-228.[19/]

[18/] The two probate decisions held that Yakima Dixie was the son of Mabel Hodge Dixie. ER at tabs 22, 29.

[19/] Plaintiff argues erroneously that, by this colloquy, the district court somehow engaged in a form of bias based on Mr. Dixie's racial status. AB at 24. In the wake of the Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), it cannot reasonably be disputed that an individual's tribal membership is a political preference, is not a racial classification, and is constitutionally sound. *Id.* at 554 n.24 ("The preference [for hiring Indians in the Bureau of Indian Affairs] is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many

(continued...)

The district court did not err in determining that there were, in fact, tribal members in 1993 who could have brought suit for the loss of the tribe's 0.92 acre property. To hold otherwise would establish that there was no tribe, because there would be no members to appreciate the loss of tribal land.

2. Conclusive Proof of Land Status is Not Required for the Claim to Accrue

A claim's accrual is not dependent on conclusive, concrete knowledge of the factual underpinnings of a claim. Therefore, plaintiff errs in arguing that there was no knowledge of the Rancheria's status until Silvia Burley received a letter from BIA in 2001 confirming that the California Valley Miwok Tribe was landless. AB at 17 (heading); ER at tab 39. What is significant is when the injury was or should have been appreciated and when the plaintiff has enough information to successfully bring a claim. *Shiny Rock*, 906 F.2d at 1364. As the district court held, tribal members were aware, with the issuance of the 1993 probate decision, that the 0.92-acre Sheep Ranch Rancheria no longer was tribal land. ER at tab 48, p. 21.

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[12]/(...continued)
individuals who are racially to be classified as 'Indians.' In this sense the preference is political rather than racial in nature").

Moreover, Silvia Burley herself admits she knew in September 1998 that the Rancheria was not tribal property, SER 145-146, and she retained counsel to pursue the land status issue, SER 149. At that time, she became aware that Mabel Dixie's probate had been reopened and that the Rancheria was property included in the probate. This is precisely the knowledge that the district court held was significant: knowledge that the property was included in the estate of a private individual and probated. Burley, who is a college graduate, SER 128, 143, reasonably and logically determined at that time that the property must not be tribal property if it was being probated and retained counsel to pursue the issue. Therefore, the plaintiff had actual knowledge of the relevant facts *within* the statutory time period and could have instituted a timely action.

3. Other Issues Raised by Plaintiff were not Presented to the District Court and May be Disregarded on Appeal

Plaintiff also argues that her claims have not accrued because (1) BIA itself was unclear on the status of the Rancheria property following the 1993 decision, (2) there is no evidence in the record as to who received or had knowledge of the 1993 probate decision, and (3) Yakima Dixie was confused about the land's status. Not only are these arguments irrelevant, they were not raised below for which reason this Court can disregard them.

It is well established that issues not presented to the district court may be disregarded by this Court. *O'Rourke v. Seaboard Surety Company*, 887 F.2d 955, 957 (9th Cir. 1989). As the Court stated in *O'Rourke*,

> The rule in this circuit is that appellate courts will not consider arguments that are not 'properly raise[d] in the trial courts. [Citation omitted.] There is no bright-line rule to determine whether a matter has been properly raised. [Citations omitted.] A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it.

Id. Notwithstanding the Court's discretion to disregard these newly raised issues, they are addressed below.

Plaintiff argues, without support[20]/, that BIA was unclear after the 1993 probate judge's decision whether the land would be held in trust for the heirs of Mabel Dixie or in fee by the heirs of Mabel Dixie. AB at 20. This argument is irrelevant to the question of whether the tribe was landless and when tribal members reasonably should have known of the tribe's landlessness.

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[20]/ Plaintiff cites testimony from the BIA Realty Officer, Carmen Facio, that BIA's land titles officer told her that she had obtained "clarification" of the 1993 probate decision from the probate judge. AB at 20. This testimony is hearsay and is inadequate to establish whether Ms. Facio or BIA's land titles officer or anyone else at BIA had any difficulty "comprehend[ing] the administrative law judge's order." *Id.*

Plaintiff also argues that there is no evidence that Yakimia Dixie received the 1993 probate decision. AB at 18. Had this argument been raised below, the certificate of service accompanying the order would have been produced. Plaintiff cannot now raise a factual dispute on appeal that was not raised below. *O'Rourke, supra*. Plaintiff also argues that tribal members could not be on notice that the tribe was landless when the Land Title Records Office ("LTR") had not entered a clerical correction of its records in the wake of the 1993 probate decision. AB at 18. Plaintiff, however, failed to establish that any tribal members were aware of any misinformation at the LTR Office.

Finally, plaintiff argues that another tribal member, Mabel Dixie's son, Yakima Dixie, was confused about the land's status and therefore the land claim could not accrue. AB at 20. Plaintiff claims that because Mr. Dixie referred to the rancheria as "tribal property," he somehow was confused about the land's true status. Again, plaintiff errs. Mr. Dixie is not a party to this suit and any statement attributable to him about the "tribal property" is ambiguous at best.[21]/

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[21]/ He may have referred to the property as "tribal property" to reflect his contention that he is the rightful chairperson of the tribe and that he maintains the rightful tribal headquarters on his land, which he considers to be tribal land. He could have meant "tribal property" as the historic site of the tribe. It is entirely unclear what Mr. Dixie may have intended when he referred to the rancheria as

(continued...)

For all of the foregoing reasons, the district court properly determined that plaintiff's claims accrued *at the latest* by 1993. We turn now to a discussion of the inapplicability of the doctrines of equitable tolling or estoppel.

III. BECAUSE TOLLING AND ESTOPPEL WERE NOT RAISED IN THE DISTRICT COURT, THIS COURT NEED NOT ADDRESS EITHER OF THESE ISSUES ON APPEAL.

For the first time in the opening brief, plaintiff belatedly argues that the statute of limitations should be tolled or the United States estopped from asserting a limitations defense.

This Court ordinarily declines to consider issues that were not first raised in the district court. *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001), *cert.denied*, 538 U.S. 949 (2003); *Great Southwest Life Insurance Co. v. Frazier*, 860 F.2d 896, 904 (9th Cir. 1988). Issues raising estoppel and tolling are not exempt from this general rule. *Jiminez*, *supra* (equitable estoppel); *United States v. Monreal*, 301 F.3d 1127, 1131 (9th Cir. 2002)(equitable tolling, raised for the first time on appeal, is waived), *cert.denied*, 537 U.S. 1178 (2003).

Under narrow circumstances, the Court may exercise its discretion to review such issues when the issue is purely one of law that will result in no prejudice to the

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[21]/(...continued)
"tribal property."

opposing party, *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003), *cert.denied*, ___ U.S. ___, 124 S.Ct. 1602 (2004), or where manifest injustice may result, *Monreal, supra.* Additionally, the Court may consider a new issue on appeal where there are "exceptional circumstances" for the failure to raise the issue in the district court or where a change in the law gives rise to the issue during the pendency of the appeal. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). However, none of these exceptions to the Court's general rule are present in this appeal, for which reason tolling and estoppel are waived.

First, the determination of whether estoppel or tolling should apply are necessarily dependent on a development of a factual basis showing *why* estoppel or tolling would be appropriate. Therefore, these issues are not issues of pure law to be decided at the first instance on appeal. Indeed, plaintiff argues in support of its tolling argument that the United States actively concealed that the Tribe had been terminated and its land held in trust for individuals rather than for the tribe. Not only was there no concealment, the United States' position is that the Tribe has never been terminated.

Second, manifest injustice will not result. This case remains at an end regardless of the outcome of this appeal because the district court also held that

there was no waiver of sovereign immunity to permit this case to go forward, an issue that plaintiff declined to pursue in this appeal. Moreover, plaintiff has argued that at some future time suit may be filed in the Court of Federal Claims or to pursue a negligence claim against the United States. Opp.Brf. at 2. Plaintiff presumably will then raise equitable tolling and estoppel, if necessary to avoid a limitations bar applicable to such suits. For these reasons, there would be no miscarriage of justice if this Court declines to consider plaintiff's tolling and estoppel arguments.

Finally, it cannot be disputed, nor does plaintiff argue, that "exceptional" circumstances or a change in the law demand this Court's attention to these new issues.

For each of the foregoing reasons, the Court should decline to consider the issues of equitable tolling and equitable estoppel.

IV. EVEN WERE THE COURT TO CONSIDER WHETHER THE STATUTE OF LIMITATIONS SHOULD BE TOLLED OR WHETHER THE UNITED STATES SHOULD BE ESTOPPED FROM ASSERTING A TIMELINESS DEFENSE, NEITHER DOCTRINE APPLIES.

Plaintiff cannot meet its burden of showing that the limitations statute should be equitably tolled or that the United States should be estopped from asserting it.

These doctrines are sparingly applied, *Irwin*, 498 U.S. at 96, and the facts herein do not justify their application.

The burden rests at all times with the plaintiff to establish that tolling or estoppel is appropriate. *United States v. Marolf*, 173 F.3d 1213, 1218 n.3 (9th Cir. 1999)(tolling); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997) (estoppel). It is a burden that plaintiff cannot meet.

A. Equitable Tolling is Inappropriate Because Notice of the Manner in Which Title to the Rancheria land was Held was Available

While equitable tolling primarily examines plaintiff's reasons for filing an untimely suit, it is not a tool for excusing plaintiff's own negligence and it is sparingly applied. *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998). In the instant case, plaintiff knew, within the limitations period, that the Sheep Ranch Rancheria was no longer tribal land because it was going through probate. SER 145-146. Armed with this knowledge, plaintiff inexplicably delayed four years before filing suit. This negligence is inexcusable, garden variety negligence to which the equitable doctrine of tolling does not apply.

Equitable tolling provides that a statute of limitations will not commence to run "where a plaintiff has been injured by *fraud* and remains in ignorance of it without any fault or want of diligence or care on his part. . .until the fraud is

discovered." *Federal Election Commission v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996)(quoting *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)), *cert.denied*, 522 U.S. 1015 (1997)(emphasis added). Therefore, to establish tolling, the plaintiff must prove "fraudulent concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and due diligence by the plaintiff until discovery of those facts." *Id.* at 240-41; *see also Marolf, supra* (tolling can also apply where "defendant misleads the plaintiff into allowing the statutory period to expire. . .or extraordinary circumstances beyond the plaintiff's control make it impossible for him to file suit on time. Citations omitted).

Plaintiff cannot meet her burden. First of all, there is *no* evidence offered of fraud either with respect to the alleged termination or the distribution of the land. As to termination, plaintiff merely argues conclusorily that "[t]his Tribe was terminated" and "the government did not notify the Tribe that it had been terminated." AB at 25. Nothing in either of these statements satisfies the elements of tolling.[22]/

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[22]/ The Tribe has never been terminated and has consistently been identified as a federally recognized tribe in every publication of recognized tribes. *See, e.g.*, SER 170, 178; 44 F. R. 7235, 7236 (Feb. 6, 1979); 45 F.R. 27828, 27830 (Apr. 24,
(continued...)

As to the land issue, plaintiff claims that, through some administrative oversight, BIA land records apparently were not amended in the wake of the 1993 decision of the probate judge to reflect that the lands comprising Sheep Ranch Rancheria were held in trust for the heirs of Mabel Hodge Dixie. *See* ER at tabs 37, 38. However, there is no evidence that this clerical oversight caused plaintiff to delay filing suit. In fact, it was plaintiff who requested that the error be corrected, which BIA did. *Id.* In this request, plaintiff states,

> I am requesting that the Bureau of Indian Affairs Informational Title Report/Title Status Report. . .be up dated to show the correct Status of the .92 acre[] in Sheep Ranch is Individually owned land based on the William E. Hammett (Administrative Law Judge) decision of April 14, 1993.

ER at tab 37. By this request to BIA to correct the title records, plaintiff demonstrates that she had a clear and correct understanding of the status of title to Sheep Ranch Rancheria.

More importantly, Silvia Burley confirms this knowledge. At her deposition, she testified as follows:

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[22]/(...continued)
1980); 46 F.R. 35360, 35362 (July 8, 1981); 47 F.R. 53130, 53133 (Nov. 24, 1982); 48 F.R. 56862, 56864 (Dec. 23, 1983); 50 F.R. 6055, 6057 (Feb. 13, 1985); 51 F.R. 25115, 25117 (July 10, 1986); 53 F.R. 52829, 52831 (Dec. 29, 1988); 58 F.R. 54364, 54368 (Oct. 21, 1993); 60 F.R. 9250, 9253 (Feb. 16, 1995).

Q Was there a point in time when you thought the California Valley Miwok Tribe actually had trust land?

Counsel Objection, calls for a legal conclusion

A That would have to be referred to the attorneys.

Q No, you still have to answer the question.

A I don't understand, because when I came into the tribe, when Yakima was elected chairperson they opened up for probate, *I didn't figure that the tribe had land at that time.* Why would they have a probate if the tribe had land?

Q Okay. When was that?

A I think the probate got opened up again in 1998, maybe September, I'm not sure. I wasn't chairperson.

Q Could it have been earlier than that, like around 1990, '91?

Counsel Objection.

A I don't know.

SER 145-146 (emphasis added). Pursuant to this testimony, plaintiff knew when she became a member in September 1998 and within the limitations period that the rancheria land was not held in trust for the Tribe. Therefore, plaintiff is unable to show that she failed to discover the operative facts underlying this cause of action within the limitations period as required to establish a basis for tolling the statute.

Additionally, there is no evidence of diligence by plaintiff to determine the status of the land. Although Ms. Burley avers that "multiple inquiries" were made to BIA about "its land status," ER at tab 45, ¶ 7, there is no detail concerning these inquiries, *e.g.*, to whom they were directed, when they were made, what questions specifically were asked, etc. Importantly, this evidence, which is objectionable hearsay, is contradicted by plaintiff's own deposition testimony that she knew in 1998 that the property was in probate and knew that it could not be tribal property.[23]/ Indeed, she retained counsel in 1998 to look into land issues. SER 149.

Finally, plaintiff claims that "confirmation of landlessness," *i.e.*, lack of tribal trust lands, was required from BIA and BIA did not provide such confirmation until 2001. Such confirmation is not a basis for tolling and plaintiff cites no authority for such a proposition. In 1998, plaintiff knew of the 1993

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[23]/ Plaintiff claims that unnamed persons from the Tribe spoke with unnamed BIA staff who informed the unnamed persons from the Tribe that the Sheep Ranch Rancheria was held in trust for the tribe. ER at tab 45, ¶¶ 7-8. Inasmuch as the declarant does not represent that she was a party to these communications, the United States objects on hearsay grounds. In contrast, the declarant, Silvia Burley, claims in ¶ 9 of her declaration that "I met with Assistant Secretary of Indian Affairs Kevin Gover in an attempt to address the land issue." ER at tab 45. Therefore, the witness is capable of stating when she has been personally involved in a particular meeting or conversation.

Moreover, it cannot be determined whether plaintiff sought information about the status of the land from appropriate persons within BIA.

probate decision and knew therefrom that the land was held in trust for individuals and not for the tribe.

For the foregoing reasons, plaintiff cannot meet the showing required for the application of equitable tolling.

B. Plaintiff Cannot Establish Grounds to Estop the Government from Asserting the Statute of Limitations

In contrast to equitable tolling, equitable estoppel focuses on the defendant's *intent* in determining whether to permit the defense of limitations to be raised. In the instant case, plaintiff seeks to estop the United States from asserting that her claim for land and her claim that her tribe was terminated are both time-barred. She fails at this effort primarily because she knew the facts within the limitations period and offers no evidence that she was dissuaded from pursuing her claims because of agency action or inaction.

Plaintiff is required to meet the traditional elements of estoppel:

> (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct will be acted on or must so act that the party invoking estoppel has a right to believe it is so intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or she must detrimentally rely on the former's conduct.

Lehman, 154 F.3d at 1016. Additionally, where equitable estoppel is sought against the United States, the plaintiff must also establish "that the agency engaged

in 'affirmative conduct going beyond mere negligence' and that 'the public's interest will not suffer undue damage' as a result of the application of this doctrine." *Id.* at 1016-17 (quoting *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)).

First of all, plaintiff makes no effort to establish any traditional elements of estoppel for her claim respecting the alleged termination of her tribe, for which reason the United States does not here address them. Indeed, plaintiff cannot establish any of the elements of estoppel except the first: Following the administrative law judge's ruling in 1993, there was no further ambiguity regarding the status of the Sheep Ranch Rancheria. That is, the BIA was then unequivocally aware that the land was held in trust for the heirs of Mabel Hodge Dixie. The agency knew the relevant facts pertaining to the land.

Plaintiff has not proven and cannot prove the remaining traditional elements of estoppel: Plaintiff offers only hearsay evidence alleging that unidentified persons at two BIA offices allegedly told "the Tribe" that the rancheria was tribal trust land. ER at tab 45, ¶¶ 7-8. Paragraphs 7 and 8 state in their entirety:

> 7. Beginning in late 1998, the Tribe made multiple inquiries to the BIA about its land status. The BIA repeatedly ignored these inquiries, or told the tribe that the Sheep Ranch Rancheria was tribal land.
>
> 8. That the Tribe and its representatives and on at least one occasion a potential Tribal Developer met with staff from the BIA's Sacramento Area

> and Central California Offices and in 1999, and 2000 and were told that the Sheep Ranch Rancheria was land held in trust for the Tribe.

The United States objects to the proffer of the above hearsay evidence. The declarant does not state that she was a party to any of these conversations with BIA officials. Moreover, even assuming *arguendo* that the evidence is competent, it is very vague and conclusory and provides no indication that the agency intended that this information be acted on in any way. That is, unless BIA was informed of the purpose for which the information was to be put to use, BIA cannot have intended any particular reliance on it.

Next, Silvia Burley was not ignorant of the true facts: She admits that she knew that the land could not be tribal land when it went to Indian probate in, she believes, September 1998. SER 145 -146. This information would have been gleaned from contact with the agency as trust property is probated by the Department of the Interior . *See* 25 U.S.C. § 372. Therefore, the third element of estoppel is not met.

Finally, there is no evidence to show that plaintiff specifically relied on BIA information in refraining from filing a timely suit. Rather, it is just as conceivable that plaintiff deliberately delayed pursuing any action, recognizing that 0.92 acre of land might be insufficient acreage on which to establish a tribal home and/or the

land was held in trust for at least one tribal member, Yakima Dixie, who maintained his home there.

With respect to the two elements of estoppel that must be addressed in claims against the United States, plaintiff again falls short. First, it is undisputed that the United States transferred title to the .92 acre Sheep Ranch Rancheria to Mabel Hodge Dixie (a Miwok Indian) before a conservator could be appointed for her. It was an error that BIA attempted to undo by having Ms. Dixie, a few months thereafter, execute a quitclaim deed to deed the land back to the United States. This error was *not* further compounded by formal termination. Plaintiff offers no evidence showing that termination ever took place, *e.g.*, any denial of services to tribal members on the grounds that the tribe was terminated, but argues that termination occurred by operation of law when title to the land transferred to Ms. Dixie. The evidence of any termination is, however, to the contrary: The Tribe has always been included on every list of federally-recognized tribes. *See* n.22 *supra*.

Plaintiff also claims that the land has not been "distributed," *i.e.*, fee title given to the heirs of Mabel Hodge Dixie. AB at 28. Plaintiff has no standing to raise this claim. Even if she did, the land has been distributed in the sense that the

records of the BIA reflect that the land is held in trust for the heirs of Mabel Hodge Dixie.

The government has not engaged in any affirmative misconduct. The 0.92 acre parcel mistakenly was transferred to Mabel Hodge Dixie in April 1967 before a conservator was appointed for her. That the BIA attempted to undo the error in September 1967 without the appointment of a conservator, again, was well-intentioned. In any event, these garden variety errors do not rise to the level of egregiousness required for estoppel to lie against the United States nearly 35 years later. The land *did* remain and has remained in trust since then, first for Ms. Dixie and now for her heirs. It is only newly admitted members, who now purport to govern the tribe, AB at 29, who seek to prosecute a claim for the 0.92 acre parcel.

Finally, plaintiff does not appear to address the effect, if any, on the public's interest. The public's interest *is* unduly damaged by permitting a stale claim to be brought alive 35 years later by persons who did not become members of the tribe until 1998.

The plaintiff fails to establish any grounds for estopping the United States from asserting an untimeliness defense.

V. BECAUSE PLAINTIFF FAILED TO ESTABLISH ANY JUSTIFICATION FOR FILING AN UNTIMELY SUIT, THE DISTRICT COURT CORRECTLY HELD THAT DISMISSAL ON LIMITATIONS GROUNDS WAS JURISDICTIONAL.

Plaintiff failed to establish any justification for her failure to pursue this litigation during the limitations period. For this reason and pursuant to this court's decision in *Nesovic*, 71 F.3d at 778, the district court properly held that dismissal on limitations grounds was jurisdictional.

We begin our analysis with the well-known maxim that the United States of America, its agencies and its employees, may not be sued in the absence of a waiver of sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, (1994); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *United States v. Testan*, 424 U.S. 392, 399 (1976). The terms of the sovereign's consent define a court's jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941). Therefore, the United States, as sovereign, is immune from suit except to the extent that it consents to be sued. *Id.*

The terms of the consent to suit against the United States frequently include such conditions as a mandatory administrative claim preceding suit, *Brady*, 211 F.3d at 502 (Federal Tort Claims Act), the plaintiff's agreement to relinquish the right to a jury trial, *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981)(Age

Discrimination in Employment Act), and the plaintiff's relinquishment of the right to claim damages, *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998)(Administrative Procedures Act). Importantly, for our discussion here, the statute of limitations also is an undisputed term of the United States' consent to suit. *Irwin*, 498 U.S. at 94 (the limitations period found in "2000e-16 is a condition to the waiver of sovereign immunity and thus must be strictly construed"); *United States v. Dalm*, 494 U.S. 596, 608 (1990) ("A statute of limitations requiring that a suit against the United States be brought within a certain time period is one of those terms [of the United States' consent to suit]").

Where suit is brought against the United States, as here, the United States' waiver of sovereign immunity is one of the cornerstones informing the court's jurisdiction.[24]/ *F.D.I.C.*, 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature"); *United States v. Mottaz*, 476 U.S. 834, 841(1986)("When the United States consents to be sued, *the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction*")(emphasis added); *Block v. North Dakota*,

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[24]/ Other cornerstones include the jurisdictional statute that grants jurisdiction over the subject matter of the suit, *e.g.*, whether the subject matter may be heard in the district courts, court of federal claims, etc., *see, e.g.*, 28 U.S.C. §§ 1346, 1491, and venue statutes.

461 U.S. 273, 278 (1983)(same); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003)("Jurisdiction over any suit against the [United States] Government requires a clear statement from the United States waiving sovereign immunity. . .together with a claim falling within the terms of the waiver").

Nothing in *Irwin* alters the conclusion that limitations periods are part of the condition of the waiver of sovereign immunity and therefore jurisdictional. Indeed, *Irwin* specifically states that "the time limits imposed by Congress in a suit against the Government *involve a waiver of sovereign immunity,*" 498 U.S. at 96 (emphasis added), and concludes that "making the rule of equitable tolling applicable to suits against the Government. . .amounts to little, if any, *broadening* of the congressional waiver [of sovereign immunity]," *id.* at 95 (emphasis added). Hence, the Supreme Court in *Irwin* continued to view the applicable limitations period as a term of the government's waiver of sovereign immunity that are subject to the *sparingly-used* exceptions of tolling, waiver and estoppel.

Indeed, *Irwin* stands for the proposition that there is a rebuttable presumption that equitable tolling applies to waivers of the United States' immunity. *Irwin*,

498 U.S. at 95-96 (the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States"); *see also Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 542-43 (2002); *see also id.* at 553 n.11 (Stevens, J., dissenting)(citing *Irwin* for the same proposition). Subsequent pronouncements of the Supreme Court emphasize that *Irwin* was not a departure from earlier rulings in which the Court had stated that the statute of limitations is a condition on the United States' waiver of sovereign immunity and, therefore, is jurisdictional. *See id.* at 542-43.

Bearing in mind the foregoing line of cases, this Court correctly observed that,

> "[t]he applicable statute of limitations [in § 2401(a)] is a term of consent. The failure to sue the United States within the period of limitations is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action."

Nesovic, 71 F.3d at 777-78 (quoting *Sisseton-Wahpeton Sioux Tribe*, 895 F.2d at 592). Indeed, the Court in *Nesovic* did not disregard the Supreme Court's ruling in *Irwin*. The Court observed, "because Mr. Nesovic's lawsuit is a civil action against the United States, and because it was not filed within six years after his right of action, if any, 'first accrue[d],' it is barred *unless* he can find a recognized reason to avoid this result." *Id.* at 778 (citing *Irwin*)(emphasis in the original). In *Nesovic*,

the plaintiff argued *inter alia* that the limitations period of 28 U.S.C. § 2401(a) should be equitably tolled, an argument this Court rejected on its merits. *Id.* at 779. Thus, the Court ultimately concluded that, in the absence of any justification for tolling the statute, the limitations period jurisdictionally barred plaintiff's suit. *Id.* at 778 ("if [plaintiff] failed without justification to bring his lawsuit within the prescribed period, we are *without jurisdiction* to hear his claims").[25]/

Two years after *Nesovic*, this Court in *Cedars-Sinai* confirmed that *Nesovic* was correctly decided. 125 F.3d at 770. Importantly, this Court recognized and held that "limitations periods for suing the federal government are not *strictly* jurisdictional." *Id.* (emphasis added). Although the Court did hold that "[b]ecause the statute of limitations codified at 28 U.S.C. § 2401(a) makes no mention of jurisdiction but erects only a procedural bar. . .§ 2401(a)'s six-year statute of limitations is not jurisdictional. . . ," *id.*, this holding conflicts with other statements in this decision ("limitations periods for suing the federal government are not strictly jurisdictional") as well as with its approval of *Nesovic*. More importantly, *Cedars-Sinai* is at odds with Supreme Court pronouncements in *Irwin* and *Raygor*,

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[25]/ As seen in *Sisseton-Wahpeton Sioux Tribe*, tolling has been considered in cases against the United States prior to the Supreme Court's decision in *Irwin*, 895 F.2d at 595-97, and, in the absence of justification for tolling the statute, a dismissal for untimeliness is jurisdictional, *id.* at 592.

all of which hold that limitations statutes applicable to suits against the United States remain jurisdictional.

Thus, in *Cedars-Sinai*, 125 F.3d at 770, this Court -- relying on *Irwin* and Circuit precedent interpreting *Irwin* -- indicated that the statute of limitations defense is not jurisdictional and can be waived by the United States. However that decision is read, the Supreme Court subsequently has made clear (1) that *Irwin* stands for the proposition that there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States' immunity, *see Raygor*, 534 U.S. at 542-43; *see also id.* at 553 n.11 (Stevens, J., dissenting) (citing *Irwin* for the same proposition); and (2) that *Irwin* was not a departure from earlier rulings in which the Court had stated that the statute of limitations is a condition on the United States' waiver of sovereign immunity and, therefore, is jurisdictional, *see Raygor*, 534 U.S. at 542-43 (citing with approval *Block* and *Mottaz*); *see also Henderson v. United States*, 517 U.S. 654, 656 (1996) (majority opinion) (statute of limitations is condition on waiver of sovereign immunity and therefore jurisdictional) and *id.* at 677-78 & n.3 (Thomas, J., dissenting) (stating that the Court has "long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the

district court's jurisdiction to hear a claim against the United States," and citing cases).

The Court in *Irwin* believed that tolling would be *sparingly* applied in suits against the United States, for which reason there would be little, if any, *broadening* of the waiver of sovereign immunity. The limitations period, therefore, remains a term of the consent of the United States to suit. Where, as here and in *Nesovic*, the plaintiff fails to establish any justification (*i.e.*, tolling, waiver or estoppel) for extending the limitations period, the immunity of the United States is not waived and the court "is deprived of jurisdiction to entertain the action." *Nesovic, supra.* Therefore, because the court below properly held that the statute was not tolled, the court also properly dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the district court's decision is entitled to affirmance.

Dated: March 4, 2005

Respectfully submitted,

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United States Attorney

By: _____
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the court is advised that this case is not believed to be related to any other case now pending before the Court.

BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 11,992 words.

McGREGOR W. SCOTT
United States Attorney

By: _____
DEBORA G. LUTHER
Assistant U. S. Attorney

Dated: March 4, 2005

APPENDIX

CHAPTER 159—INTERPLEADER

Sec.
2361. Process and procedure.

§ 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

(June 25, 1948, c. 646, 62 Stat. 970; May 24, 1949, c. 139, § 117, 63 Stat. 105.)

CHAPTER 161—UNITED STATES AS PARTY GENERALLY

Sec.
2401. Time for commencing action against United States.
2402. Jury trial in actions against United States.
2403. Intervention by United States or a State; constitutional question.
2404. Death of defendant in damage action.
2405. Garnishment.
2406. Credits in actions by United States; prior disallowance.
2407. Delinquents for public money; judgment at return term; continuance.
2408. Security not required of United States.
2409. Partition actions involving United States.
2409a. Real property quiet title actions.
2410. Actions affecting property on which United States has lien.
2411. Interest.
2412. Costs and fees.
2413. Executions in favor of United States.
2414. Payment of judgments and compromise settlements.
2415. Time for commencing actions brought by the United States.
2416. Time for commencing actions brought by the United States—Exclusions.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(June 25, 1948, c. 646, 62 Stat. 971; Apr. 25, 1949, c. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub.L. 86–238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.L. 89–506, § 7, 80 Stat. 307; Nov. 1, 1978, Pub.L. 95–563, § 14(b), 92 Stat. 2389.)

HISTORICAL AND STATUTORY NOTES

Senate Revision Amendment

Subsection (b) amended in the Senate to insert the 1 year limitation on the bringing of tort actions and to include the limitation upon the time in which tort claims not exceeding $1000 must be presented to the appropriate Federal agencies for administrative disposition. 80th Congress Senate Report No. 1559, Amendment No. 48.

1949 Acts. House Report No. 276, see 1949 U.S. Code Cong. Service, p. 1226.

1959 Acts. Senate Report No. 797, see 1959 U.S. Code Cong. and Adm. News, p. 2272.

1966 Acts. Senate Report No. 1327, see 1966 U.S. Code Cong. and Adm. News, p. 2515.

1978 Acts. Senate Report No. 95–1118, see 1978 U.S. Code Cong. and Adm. News, p. 5235.

References in Text

The Contract Disputes Act of 1978, referred to in subsec. (a), is Pub.L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (section 601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

Effective and Applicability Provisions

1978 Acts. Amendment by Pub.L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978 and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub.L. 95–563, set out as a note under section 601 of Title 41, Public Contracts.

1966 Acts. Amendment by Pub.L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers; that on March 4, 2005, she served two copies of **APPELLEE'S BRIEF** by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and its contents in the United States Mail at Sacramento, California.

Addressee(s):

George L. Steele, Esq.
Law Offices of George L. Steele
790 E. Colorado Boulevard, Suite 900
Pasadena, CA 91101

CAROL BROWN

DOCUMENT NO. 51

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA 10601 Escondido Place Stockton, CA 95212, Plaintiff, vs. UNITED STATES OF AMERICA 950 Pennsylvania Avenue, NW Washington, DC 20530 UNITED STATES DEPARTMENT OF THE INTERIOR GALE A. NORTON, Secretary of the Interior, 18th Street & C Street, NW Washington, DC 20240 UNITED STATES DEPARTMENT OF THE INTERIOR MICHAEL D. OLSEN, Acting Assistant Secretary -- Indian Affairs 18th Street & C Street, NW Washington, DC 20240 Defendants.	Case No.:

COMPLAINT FOR DECLARATORY RELIEF

This is an action for declaratory relief against the United States and officials within the United States Department of the Interior, acting in their official capacity, to prohibit the United States from interfering with internal tribal matters.

The California Valley Miwok Tribe ("Plaintiff" or "Tribe") by and through its undersigned attorneys, upon personal knowledge as to itself, its own acts and its allegations of the contents of documents referred to herein, and upon information and belief as to all other matters, for its Complaint herein allege as follows:

INTRODUCTION

The Tribe, on their own behalf, brings this action to address the Bureau of Indian Affairs' ("BIA") unlawful attempts to interfere with the Tribe's internal affairs.

The Tribe's lands were distributed pursuant to the California Rancheria Act in 1967. The Tribe is now landless, and the Tribe's status between 1967 and 1994 is a matter of dispute. In approximately 1998, the Tribe attempted to organize its government pursuant to the BIA's direction. The Tribe requested BIA assistance in conducting a secretarial election pursuant to the Indian Reorganization Act. When the BIA ignored the Tribe's request, the Tribe moved forward to organize on its own. The Tribe exercised its inherent authority to adopt its own governing documents and to organize its government. Since at least June 25, 1999, the BIA recognized the government, its documents and its chairperson, Silvia Burley, in its course of dealing with the Tribe, to include providing funding to the Tribe pursuant to Public Law 93-638. Now, the BIA is attempting to reverse the position it had taken from 1999 to 2004 with respect to the recognition of the Tribe's government.

The BIA's actions are unlawful, intrude upon the Tribe's sovereign authority, and violate the clear congressional intent of the 2004 amendment to the Indian Reorganization Act relating to inherent tribal sovereignty and the legitimacy of tribal documents approved after 1935. Accordingly, the Tribe seeks declaratory relief affirming that 1) the Tribe possesses the inherent authority to adopt governing documents outside of the Indian Reorganization Act pursuant to 25 U.S.C. § 476(h); 2) pursuant to 25 U.S.C. § 476, the documents that the Tribe has adopted are valid governing documents; and 3) the Tribe has lawfully organized pursuant to their inherent sovereign authority.

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1361 and 1362, and 5 U.S.C. § 701, et seq. Plaintiff is an Indian tribe recognized by the Secretary of the Interior. The matter in controversy arises under the Constitution, laws, or treaties of the United States. Plaintiff has been adversely affected and aggrieved by the unlawful actions of agencies of the United States.

2. A real and actual controversy now exists between Plaintiff and Defendants relating to Tribal sovereignty for which Plaintiff desires a declaration of rights.

3. A declaratory judgment is necessary in that Plaintiff contends that it has the inherent sovereign power to adopt governing documents under procedures other than those specified in 25 U.S.C. § 476(a)-(g), pursuant to 25 U.S.C. § 476(h). Defendants dispute this contention.

RELIEF SOUGHT

4. Plaintiff seeks declaratory relief against Defendants pursuant to 5 U.S.C. §§ 701, et seq., 28 U.S.C. §§ 2201 and 2202, and FRCP 57.

VENUE

5. Venue is properly laid in this district pursuant to 28 U.S.C. § 1391(e), in that Defendant is located in this judicial district.

PARTIES

6. Plaintiff is a federally recognized Tribe in that its name was published in the federal register pursuant to Section 104 of the Act of November 2, 1994, Pub. L. 103-454; 108 Stat. 4791, 4791.

7. The United States of America is a governmental entity organized under the provisions of the Constitution of the United States.

8. Defendant, United States Department of the Interior ("DOI"), is an administrative agency of the United States of America, which has overall responsibility for administering the relationship between the United States and American Indian tribes and is primarily responsible for fulfilling the trust responsibility owed by the United States to American Indian tribes.

9. Defendant, Gale A. Norton, is the Secretary of DOI and the Chief Executive Officer of the DOI and has ultimate responsibility for administering the DOI. Defendant Norton is sued herein in her official capacity.

10. Defendant Michael D. Olsen is the Acting Assistant Secretary – Indian Affairs. In such capacity, Defendant Olsen is the administrative head of the Bureau of Indian Affairs

("BIA"), a bureau within DOI. The BIA is the bureau within DOI that is primarily responsible for fulfilling DOI's administrative responsibilities for managing the federal relationship with American Indian tribes and the trust responsibility of the United States to American Indian Tribes. Defendant Olsen is sued herein in his official capacity.

GENERAL ALLEGATIONS

11. On or about September 24, 1998, the Superintendent of the BIA Central California Agency sent a letter to Yakima Dixie as Tribal Chairman, following a meeting between the Tribe, Mr. Raymond Fry and Mr. Brian Golding. In that letter the BIA recognized that Yakima Dixie, Melvin Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristan Wallace "possess the right to participate in the initial organization of the Tribe." The letter goes on to recommend a General Council form of Government.

12. On or about April 20, 1999, Yakima Dixie called a meeting for the purpose of resigning as Chairperson for the Tribe.

13. On or about April 20, 1999, Yakima Dixie presented his resignation as tribal chairperson to the Tribal Council. Yakima Dixie participated in the unanimous vote of the tribal council to accept his resignation.

14. On or about May 8, 1999, the Tribe held a general election. Yakima Dixie participated in the unanimous vote to elect Silvia Burley as Chairperson, himself as Vice Chairperson, and to ratify the Tribe's constitution. Yakima Dixie then participated in several more Tribal Council meetings and signed several documents as the Vice-Chairman of the California Valley Miwok Tribe.

15. In a June 25, 1999 letter, the Superintendent of the BIA Central California Agency recognized Silvia Burley as Tribal Chairperson.

16. On or about July 30, 1999, the Secretary of the Interior and the Sheep Ranch Band of Me-Wuk Indians of California entered into a Self-Determination Contract to provide funding to the Tribe for tribal government activities.

17. On October 9, 1999, the Sheep Ranch Band of Me-Wuk Indians adopted an Interim Operating Authority and Rights Resolution, R-2-10/09/99.

18. On or about September 30, 1999, the Tribe became a "contracting Tribe" pursuant to the Indian Self Determination Act, Public Law 93-638 ("638). Public Law 638 provides for federal funding to organized tribes to support and assist tribes in the development of tribal government, tribal programs, and tribal economic development.

19. In a February 4, 2000 letter from the Superintendent BIA Central California Agency Office to Vice-Chairperson Yakima Dixie, the BIA makes several critical findings:

(1) Prior to August 1998, Mr. Dixie was recognized as the spokesperson for the Tribe.

(2) On August 5, 1998, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristan Wallace were accepted as members of the Tribe enjoying all benefits, privileges, rights and responsibilities of Tribal membership, including right to participate in organizing the Tribe.

(3) That as of that date, only those members over the age of 18 (Mr. Dixie, Ms. Burley and Ms. Reznor) were entitled to participate in the organization of the Tribe.

(4) That on or about November 5, 1998, Resolution #GC-98-01 was adopted by the Tribe which established a Tribal General Council.

(5) That issues involving the leadership of the Tribe are internal matters to be resolved by the Tribe.

20. On or about February 9, 2000, the Tribal Council notified Yakima Dixie that he had 30 days to initiate review of claims regarding his resignation. Mr. Dixie did not respond by the expiration of the 30 day period.

21. On March 6, 2000, the Tribe ratified its Constitution.

22. In a March 7, 2000 letter from the Superintendent of the Central California Agency to Silvia Burley, Chairperson, the BIA makes the following critical findings:

(1) That the General Council of the Tribe consisted of Mr. Dixie, Ms. Burley and Ms. Reznor.

(2) That all members of the Tribe possess full rights of membership.

(3) That the leadership dispute between Mr. Dixie and Ms. Burley was an internal tribal matter.

(4) That the appropriate forum for resolving a tribal leadership dispute is the Tribal General Council.

(5) That the rights of others to participate in the governance of the Tribes are to be determined by the appropriate Tribal Forum.

(6) That the BIA acknowledged that as a matter of Federal law and policy, there is no basis for agency involvement in a leadership dispute.

23. In a March 9, 2000 letter from Superintendent, BIA Central California Agency to Silvia Burley, Chairperson, the BIA confirmed receipt of the attached Tribal Council Resolution requesting a review of the Tribe's Constitution and a Secretarial Election under the Indian Reorganization Act.

24. The Indian Reorganization Act, 25 U.S.C. § 476, sets forth the procedure for the review and approval of a tribe's constitution and the conduct of a Secretarial Election. The Act requires that the Secretarial Election be conducted within 180 days after a tribe's request, no later than September 7, 2000.

25. On March 16, 2000, the Tribal Council passed Resolution R-2-3-16-2000, which resolved that pursuant to Resolution R-2-10/9/99 (Interim Operations Authorities and Rights), Yakima Dixie waived his right to contest his resignation by failing to respond to the Tribal Council within the prescribed 30-day period.

26. On or about March 16, 2000, the Tribal Council informed Yakima Dixie of the Tribal Council's final determination of his claims.

27. In a July 12, 2000 letter from the Superintendent of the Central California Agency office to Silvia Burly, Chairperson, the BIA confirmed their recognition of Silvia Burley as Chairperson of the Tribe, with the Vice-Chairperson position being vacant and Rashel Reznor as Secretary/Treasurer of the Tribe.

28. In a July 26, 2000 letter from the Superintendent of the Central California Agency to the Secretary of Indian Affairs, the BIA confirmed that Silvia Burley was Chairperson of the Tribe and that she was an elected official of the Tribe. Attached hereto as **Exhibit "1,"** and incorporated herein by this reference, is a true and correct copy of the July 20, 2000 letter.

29. In a June 7, 2001 letter from the Deputy Commissioner of Indian Affairs to Silvia Burley, Chairperson, the BIA approved the Tribe's name change from "Sheep Ranch Rancheria of Mi-Wuk Indians" to "California Valley Miwok Tribe." The letter confirmed that that Tribe has a tribal council which can and does conduct business on behalf of the Tribe through resolutions.

30. In a June 7, 2001 letter from Chairperson Burley to the BIA Central California Agency office, the Tribe withdrew its request for a Secretarial Election, approximately 15 months after the Tribes' initial request.

31. On or about July 18, 2001, Yakima Dixie filed a civil suit against the Tribe in federal district court challenging the Tribe's membership and leadership.

32. In an October 31, 2001 letter from Dale Risling, Superintendent of the Central California Agency, to Silvia Burley, the BIA confirmed receipt of the September, 2001 version of the Tribe's constitution, which amended the constitution ratified on March 6, 2000, which the BIA confirmed receipt of on March 9, 2000. Mr. Risling stated the following:

> "The Agency will continue to recognize the Tribe as an unorganized Tribe and its elected officials as an interim Tribal Council until the Tribe takes the necessary steps to complete the Secretarial election process. Agency staff is available to provide technical assistance in this matter upon receipt of the Tribe's written request. We are returning the original document to the Tribe without any action."

33. On or about January 24, 2002, the federal district court dismissed Yakima Dixie's lawsuit for lack of jurisdiction by virtue of tribal sovereignty and failure to exhaust administrative remedies. No. CIV S-01-1389 LKK/DAD. The Court took judicial notice of evidence that Silvia Burley and Rashel Reznor were recognized by the BIA as the sole members of the governing body of the Tribe.

34. In an April 9, 2002 letter from Dale Risling, Superintendent of the Central California Agency of the BIA, to Silvia Burley, Chairperson, the BIA stated that the provision of the Tribe's 638 Contract regarding the development of a tribal constitution subject to IRA would be deleted until a Federal Solicitors opinion supporting the requirement was rendered. To date, no such opinion has been provided.

35. On or about October 30, 2003, Yakima Dixie notified the Tribe of his filing of an Administrative Appeal in violation of 25 C.F.R. Part 2, to the Deputy Assistant Secretary – Indian Affairs at the U.S. Department of the Interior. In this Appeal, Mr. Dixie raised the same issues as were originally raised to the BIA at the December 28, 1999 meeting, and in his legal action filed on January 18, 2001 and dismissed by the Court on January 24, 2002.

36. On or about November 24, 2003, the BIA released a recognition letter acknowledging that the BIA maintains a government to government relationship with the Tribe through the tribal council chaired by Silvia Burley. Attached hereto as **Exhibit "2,"** and incorporated herein by this reference, is a true and correct copy of the November 24, 2003 recognition letter.

37. In a January 5, 2004 letter from the Superintendent Central California Agency to Silvia Burley, Chairperson, the BIA granted the Tribe "Mature Contract Status" under the FY-04 Mature Status-Consolidated Tribal Government Program. A "Mature Contract" is a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization. 25 U.S.C. § 450b.

38. On or about February 4, 2004, the Tribe passed Resolution R-1-02-04-2004 assuming jurisdiction and establishing an administrative forum to address Yakima Dixie's appeal.

39. On or about February 5, 2004, the Tribe notified the BIA that they had assumed jurisdiction over Yakima Dixie's claims.

40. On February 10, 2004, Mr. Dale Risling, Superintendent, BIA Central California Agency, testified under oath that Silvia Burly is the recognized Chairperson of the California Valley Miwok Tribe.

41. On February 10, 2004, Mr. Raymond Fry, Tribal Operations Officer, BIA Central California Agency Office testified under oath that the BIA recognizes Silvia Burley as Tribal Chairperson.

42. In a February 11, 2004 letter from the Chairperson of the California Valley Miwok Tribe to the Superintendent of the BIA Central California Agency, the Tribe, relying on Mr. Fry's testimony, provided a copy of its Tribal Constitution to the BIA for it records, and not for review.

43. On March 2, 2004, the Native American Technical Corrections Act of 2004 ("NATCA") became law. The Act amends Section 16 of IRA by stating that Tribes have the inherent sovereign power to adopt governing document outside the scope of IRA, and that nothing in IRA invalidates any constitution or governing document adopted by a Tribe after June 18, 1934. 25 U.S.C. § 476(h).

44. On March 22, 2004, the Tribe's Administrative Hearing Officer, acting pursuant to Tribal Council Resolution R-1-02-04-2004, forwarded a notification of an Administrative Hearing in Yakima K. Dixie v. California Valley Miwok Tribe, Case No. CVMT-AH-2004-001 to Silvia Burley and Yakima Dixie relating to the issue raised by Yakima Dixie regarding the Tribal Chairmanship.

45. On or about March 26, 2004, Dale Risling, Sr., Superintendent of the Central California Agency, prepared a letter addressed to Ms. Silvia Burley, Chairperson, California

Valley Miwok Tribe. The letter stated that despite the fact that they Tribe has a constitution, that the BIA considers the Tribe to be "unorganized." The letter further stated that "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." Attached hereto as **Exhibit "3,"** and incorporated herein by this reference, is a true and correct copy of the March 26, 2004 letter.

46. On February 11, 2005, Michael D. Olsen, Acting Assistant Secretary – Indian Affairs, sent a letter addressed to Yakima Dixie, of the "Sheep Ranch Rancheria of MiWok Indians of California." In this letter, the Assistant Secretary dismissed Yakima Dixie's appeal as untimely. The Assistant Secretary went on to state that:

(1) the BIA had rejected the Tribe's constitution;

(2) the BIA did not recognize Silvia Burley as tribal chairperson, but as a "person of authority within the California Valley Miwok Tribe."

(3) the BIA would not recognize anyone as the tribal chairperson until the tribe has organized as described in the letter of March 26, 2004.

(4) the BIA did not recognize the tribal hearing process as a legitimate tribal forum. Attached hereto as **Exhibit "4,"** and incorporated herein by this reference is a true and correct copy of the February 11, 2005 letter.

47. Plaintiff has exhausted any and all available administrative remedies in that no administrative appeal is available to remedy the actions of the Assistant Secretary of Indian Affairs.

First Claim For Relief

(Violation of the 2004 Native American Technical Corrections Act

[25 U.S.C. § 476(h)])

48. Plaintiff incorporates paragraphs 1 – 47 as if fully incorporated herein.

49. The Native American Technical Corrections Act of 2004 ("NATCA") clarified the inherent sovereign power of Indian tribes by amending the Indian Reorganization Act ("Act") with the following addition:

> (h) Tribal Sovereignty. Notwithstanding any other provision of this Act—
> (1) each Indian Tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
> (2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1). 25 U.S.C. § 476(h).

Defendants violated NATCA as follows:

a) By declining to recognize the Tribe's constitution, adopted by the Tribe in September, 2001.

b) By declining to recognize the Tribe's resolution establishing a Tribal Forum, Tribal Council Resolution, R-1-02-04-2004, adopted by the Tribe on February 4, 2004.

50. As a direct and proximate result of these violations of NATCA, Defendants have infringed upon the Tribe's sovereign authority, impaired the Tribe's ability to govern itself, and severely damaged the Tribe's ability to conduct business with state and local governments as a sovereign entity.

51. The Tribe prays for relief as further provided below.

Second Claim For Relief

(Administrative Procedure Act [5 U.S.C. §§ 701-706])

52. Plaintiff incorporates paragraphs 1 – 51 as if fully incorporated herein.

53. The actions of the Defendant in declining to recognize the validity and effect of the Tribe's governing documents violates 25 U.S.C. § 476(h) in that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

54. The actions of the Defendant in declining to recognize the tribal hearing process lawfully adopted through the Tribe's governing documents as a legitimate tribal forum violates 25 U.S.C. § 476(h) in that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

55. The actions of the Defendant in declining to recognize the tribal hearing process as a legitimate tribal forum constitutes a showing of bad faith or improper behavior by Defendants.

56. The actions of the Defendant in declining to recognize the tribal hearing process as a legitimate tribal forum went beyond Defendants' delegated authority and therefore constitute ultra vires acts.

57. The actions of the Defendant in declining to recognize Silvia Burley as tribal chairperson after her election pursuant to the Tribe's constitution is a departure from prior precedent that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

58. The actions of the Defendant in declining to recognize Silvia Burley as tribal chairperson after her election pursuant to the Tribe's constitution constitutes a showing of bad faith or improper behavior by Defendants.

59. The actions of the Defendant in declining to recognize Silvia Burley as tribal chairperson after her election pursuant to the Tribe's constitution went beyond Defendant's delegated authority, and therefore, constitute ultra vires acts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

1. Plaintiff requests that this Court issue declaratory relief pursuant to 28 U.S.C. § 2201 that the Tribe retains inherent sovereign power to adopt governing documents under procedures other than those specified in 25 U.S.C. §476(a-g);

2. Plaintiff requests that this Court issue declaratory relief pursuant to 28 U.S.C. § 2201 that the Constitution of the California Valley Miwok Tribe, adopted by the Tribe in September, 2001, is a valid governing document for the Tribe;

3. Plaintiff requests that this Court issue declaratory relief pursuant to 28 U.S.C. § 2201 that Tribal Council Resolution R-2-3-16-2000, adopted by the Tribe on March 16, 2000, is a valid governing document for the Tribe;

4. Plaintiff requests that this Court issue declaratory relief pursuant to 28 U.S.C. § 2201 that Tribal Council Resolution R-1-02-04-2004, adopted by the Tribe on February 4, 2004, is a valid governing document for the Tribe;

5. Plaintiff requests that this Court issue declaratory relief pursuant to 28 U.S.C. § 2201 that the Tribe has lawfully organized pursuant to 25 U.S.C. § 476.

6. Plaintiff requests that this Court issue declaratory relief pursuant to 28 U.S.C. § 2201 that the February 11, 2005 letter from the Acting Assistant Secretary – Indian Affairs is invalid;

7. That Plaintiff be awarded its costs, expenses and attorney fees incurred herein; and

8. For such other and further relief as the Court deems just and proper.

Dated: April 12, 2005

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DOCUMENT NO. 52

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH RANCHERIA OF ME-WUK INDIANS OF CALIFORNIA, Plaintiff, v. UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GAIL NORTON, Secretary of Interior, DAVID W. ANDERSON, Assistant Secretary - Indian Affairs, Defendants.	CASE NO. CIV.1:04CV1794 RWR

DECLARATION OF CAROL ROGERS-DAVIS

IN SUPPORT OF DEFENDANTS'

MOTION TO TRANSFER

I, CAROL B. ROGERS-DAVIS, declare:

1. I am a Tribal Operations Specialist at the Central California Agency of the Bureau of Indian Affairs ("BIA"), who temporarily is serving as the Acting Tribal Operations Officer at the present time. I have been employed with the Central California Agency continuously since 1976, and I have been in the Branch of Tribal Operations since 1991. The Central California Agency provides BIA services to tribes located in the Central California area, including the California Valley Miwok Tribe. My duties include providing information and assistance to tribes in such areas as forming tribal governments; conducting tribal elections; drafting of tribal constitutions, ordinances, resolutions and other governing documents; preparing tribal membership rolls; assisting with various grants available from the Bureau of Indian Affairs, including Aid to Tribal Governments grants; etc. I have personal knowledge of all facts set forth in this declaration.

2. Tribal Operations, which is part of Tribal Services, provides assistance to individual Indians and federally-recognized tribes in Northern and Central California: We provide genealogy services and, at the request of the tribes, we assist in conducting tribal elections, drafting governing documents, establishing or changing the structure of tribal governments, resolving intratribal disputes, etc. We also maintain historical records that pertain to the tribes that our office serves.

3. The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians (hereafter "the Tribe"), is one of the tribes within the geographic area served by the Central California Agency. According to the records of this office, the United States purchased a parcel of land in Calaveras County, California, for the Indians in that area. This land, consisting of 0.92 acre, became known as the Sheep Ranch Rancheria and is located in Sheep Ranch, California. Since its purchase by the United States, the Rancheria has always been held in trust status for Indians,

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CVMT-2011-000760

first as tribal land and, currently, as individual trust lands for the heirs of Mabel Hodge Dixie. According to the probate records for Ms. Dixie's estate, her heirs were her husband and her four sons, Yakima Dixie, Melvin Dixie, Richard Dixie, and Tommy Dixie.

4. In 1998 or 1999, it is the understanding of this office that Silvia Burley contacted Yakima Dixie about formally organizing the Tribe with a tribal government, governing documents, a membership roll, etc. At that time, BIA recognized Yakima Dixie as the representative of the Tribe. It is BIA's understanding that an interim tribal government was formed with Mr. Dixie as the chairperson and Ms. Burley as vice chairperson.

5. In 1998, the Tribe submitted its first application to BIA for financial assistance under the "Aid to Tribal Governments" program. These funds are available to tribes as "start up" money for, *e.g.*, organizing an unorganized tribe (*i.e.*, a tribe that exists as a community of Indians but without a formal government structure or governing documents). The funds are available to be used to contact the tribal community to engage the individual members in the organization process, to define the tribal government structure, draft governing documents, identify short- and long-term tribal goals, etc. These are not the only uses to which the funds may be put, but BIA anticipated that the Tribe would use the funds for these purposes at the outset because, according to BIA records, there was no formal organized structure to the Tribe. Since its first grant for FY 1999, the Tribe has received annual amounts ranging from $166,160 to its current annual contract of $374,753. Attached hereto as Exhibit 1 is a true and correct copy of the Tribe's initial grant.

6. In 1999, BIA was notified that a tribal election had been held and Ms. Burley had been elected as the new tribal chairperson. BIA accepted this notice and began to communicate with Ms. Burley on tribal matters as the "tribal chairperson." Apparently, Yakima Dixie did not, and still

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CVMT-2011-000761

does not, agree with this change, insisting, *e.g.*, that he and not Ms. Burley has always been the chairperson of the tribe.

7. In February 2004, my office received a tribal Constitution purportedly adopted by the California Valley Miwok Tribe in 2001. Exhibit 2 hereto. We reviewed it and found it to be alarming for a number of reasons, including the establishment of an ancestral or base roll of the tribe consisting only of five living persons: Yakima Dixie, born in 1940; Silvia Burley, born in 1960; Rashel Reznor, born in 1979; Anjelica Paulk, born in 1983; and Tristian Wallace, born in 1996. BIA already is aware that John and Tillie Jeff, the common ancestors of Yakima Dixie and Silvia Burley, have been acknowledged as ancestral members appropriate for inclusion on the tribal base roll. In addition, BIA is unaware of any efforts that may have been made to include the tribal community in the Tribe's organization process, including Ms. Burley's own three siblings who are believed to live in the West Point area (which is in Calaveras County, CA) and Mr. Dixie's one living sibling.

8. In addition to the Constitution, BIA also reviewed a document purporting to be a tribal enrollment ordinance for the California Valley Miwok Tribe. A true and correct copy of this document is attached hereto as Exhibit 3. According to this document, only direct lineal descendants and lineal ancestors of Silvia Burley and Yakima Dixie may be full voting members of the Tribe. Since it is BIA's understanding that Mr. Dixie has no children, this office is troubled by the apparent creation of this Tribe solely for Ms. Burley's family. While other persons may, subject to strict criteria, be adopted into the Tribe, the enrollment ordinance provides that they cannot have voting rights, which means that the Tribe remains subject to the control of Ms. Burley and her family.

9. Based on what BIA has seen in the purported constitution and enrollment ordinance submitted to BIA, this office determined that it was inappropriate to continue to acknowledge

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Ms. Burley as a tribal chairperson who leads an organized tribe or to acknowledge a governing council for the Tribe. This office notified Ms. Burley of its decisions and concerns by certified letter dated March 26, 2004, which is attached as Exhibit 4. When this letter was returned, undelivered, to this office by the Postal Service, the letter was re-sent on or about May 13, 2004. At Exhibit 5 is a true and correct copy of the May 13th letter that accompanied the second mailing of the March 26th letter.

10. To the best of my knowledge, Ms. Burley has not appealed any matter contained in the BIA's letter of March 26, 2004.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of November 2004 in Sacramento, California.

CAROL B. ROGERS-DAVIS

Nov-10-04 05:34pm From-U.S. ATTORNEY'S OFFICE 916 554 2900 T-617 P.006 F-710

CVMT-2011-000763

DOCUMENT NO. 53

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly, SHEEP RANCH OF THE MI-WUK INDIANS OF CALIFORNIA,	
Plaintiff,	**Judge James Robertson**
	No. I:05CV00739
v.	
UNITED STATES OF AMERICA, et al.,	
Defendants.	

DEFENDANTS' MOTION TO TRANSFER VENUE AND TO SUSPEND OBLIGATION TO ANSWER IN THE DISTRICT OF COLUMBIA

Pursuant to 28 U.S.C. § 1404(a), the defendants move to transfer this case to the United States District Court for the Eastern District of California. There is no appreciable connection between this case and the District of Columbia and, for the reasons stated in the attached Memorandum of Law in Support of Motion to Transfer Venue, the matter should be transferred to the Eastern District of California.

The defendants further move the Court to suspend their obligation to answer the plaintiff's Complaint until ten days following judicial resolution of the venue issue or at a time to to be determined by the transferee court.

A memorandum of law in support of this motion is attached.

Dated this 13th day of June, 2005.

Respectfully submitted,

KELLY A. JOHNSON
Acting Assistant Attorney General

Electronically signed
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Attachment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly, SHEEP RANCH OF THE MI-WUK INDIANS OF CALIFORNIA,	
Plaintiff,	**Judge James Robertson**
	No. I:05CV00739
v.	
UNITED STATES OF AMERICA, et al.,	
Defendants.	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER VENUE AND TO SUSPEND OBLIGATION TO ANSWER IN THE DISTRICT OF COLUMBIA

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ATTORNEYS FOR DEFENDANTS

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ATTACHMENT C: Sheep Ranch Rancheria of Miwok Indian Tribe of California v. Burley, CIV S-01-1389 LKK (E.D.Cal.)

ATTACHMENT D: Declaration of Fred Doka (previously submitted in California Valley Miwok Tribe v. United States, Civ. No. 04CV01794)

ATTACHMENT E: Dixie v. State of California, No. 04A504205 (Super. Ct. Sacramento Cty.)

ATTACHMENT F: Declaration of Debora G. Luther (previously submitted in California Valley Miwok Tribe v. United States, Civ. No. 04CV01794)

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ATTACHMENT L: Wyandotte Nation v. Nation Indian Gaming Commission, et al.,Civil Action No. 04-1727 (RMU), slip op. dated May 2, 2005.

ATTACHMENT M: Letter of February 4, 2000 from BIA Central California Agency to Vice Chairperson, Yakima Dixie

ATTACHMENT N: Letter of June 7, 2001 from Sylvia Burley to BIA Central California Agency

ATTACHMENT O: Letter of October 31, 2001 from BIA Central California Agency to Sylvia Burley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly, SHEEP RANCH OF THE MI-WUK INDIANS OF CALIFORNIA,	)	
Plaintiff,	)	**Judge James Robertson**
	)	**No. I:05CV00739**
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER VENUE AND TO SUSPEND OBLIGATION TO ANSWER IN THE DISTRICT OF COLUMBIA

Pursuant to 28 U.S.C. § 1404, defendants move to transfer venue of this case.

Defendants also seek the issuance of an order suspending their obligation to answer in the District of Columbia. In the attached Memorandum in Support of this motion, defendants demonstrate that this Circuit's requirements for granting a motion to transfer venue clearly have been met.

The federal district court for the Eastern District of California (the potential transferee court) should entertain this action because the plaintiff is located in California, virtually all of the witnesses, including Federal officials, are located in California, virtually all relevant events occurred in California, and there is no material connection between this lawsuit and the District of Columbia. Indeed, the plaintiff has previously filed a suit against the same Federal defendants in Federal district court for the Eastern District of California. California Valley Miwok Tribe v.

United States, CIV S-02-0912 FCD (E.D.Cal.), appended hereto as Attachment A.[1]

We turn now to the pertinent facts of this case.

STATEMENT OF FACTS

1. The California Valley Miwok Tribe (hereafter, "the Tribe") is a federally-recognized tribe. 68 Fed.Reg. 68180-01 (Dec. 5, 2003). The Tribe originated in the foothills of the Sierra Nevada Mountains in Calaveras County, California, particularly at and around Indian trust lands located near the towns of Sheep Ranch and West Point. At one time, BIA held 0.92 acre in trust for the Tribe, which was located in the town of Sheep Ranch.[2] Declaration of Carol Rogers-Davis, appended hereto as Attachment B. At all times relevant to this litigation, the Tribe has had four adult members identified.

2. Around 1998, Ms. Sylvia Burley, a current representative of the Tribe, returned to Calaveras County after a few years' absence. She contacted Yakima Dixie, the son and heir of Mabel Hodge Dixie, who was then acknowledged by the Bureau of Indian Affairs as the Tribe's representative, and sole active member, and requested admission to the Tribe. After gaining membership for herself, her two daughters, and her granddaughter, Ms. Burley and Mr. Dixie began making plans to formally organize the Sheep Ranch Rancheria of Miwok Indians. To that end, Ms. Burley and Mr. Dixie established an interim tribal government, and denominated Mr.

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[1]Plaintiff appealed the district court's decision to dismiss the suit to the Court of Appeals for the Ninth Circuit. The appeal is still pending.

[2] In the 1960's, beneficial title to the .92 acre Sheep Ranch Rancheria transferred from the Tribe to the sole resident of the Rancheria, Mabel Hodge Dixie. The plaintiff challenged that transfer, among other things, in California Valley Miwok Tribe v. United States, CIV S-02-0912 FCD (E.D.Cal.July 1, 2004), appended hereto as Attachment A. The court dismissed the action on jurisdictional grounds. The Tribe appealed this ruling to the Ninth Circuit; this appeal is pending. California Valley Miwok Tribe `v. United States, No. 04-16676 (9th Cir.).

Dixie as the chairperson and Ms. Burley as the vice-chairperson. The Tribe applied for financial assistance from the BIA for the purpose of organizing the Tribe, and the Tribe has received annual grants ranging from $166,160 to $374,753 since 1998. *See* Exhibit 1 to Attachment B (initial FY 1999 "Aid to Tribal Government" grant).

3. In organizing the Tribe, it has been BIA's expectations *inter alia* that the Tribe would identify and contact the Indian community in and around the Sheep Ranch Rancheria, where the siblings and other extended family of Silvia Burley and Yakima Dixie reside or resided, to involve them in the process of selecting a formal government structure, drafting governing documents, organize the Tribe, and defining short- and long-term tribal goals. Attachment B and Exhibit 1 thereto.

4. In 1999, BIA was informed by Ms. Burley that a tribal election had been held and she had become the chairperson. Attachment B. Ms. Burley claimed Mr. Dixie resigned as Chairman. The BIA accepted this change and commenced recognizing Ms. Burley as the "tribal chairperson." *Id.* Mr. Dixie did not agree with or accept the changes that had occurred with the tribal government, and he filed suit against the Tribe in 2001. Sheep Ranch Rancheria of Miwok Indian Tribe of California v. Burley, CIV S-01-1389 LKK (E.D.Cal.). That suit was dismissed voluntarily by plaintiff in 2002 after the court dismissed the suit for failure to exhaust his administrative remedies, but gave plaintiff leave to amend. Attachment C, hereto.

5. In a February 4, 2000 letter from the Superintendent BIA Central California Agency Office to Vice-Chairperson Yakima Dixie, the BIA states as follows:

(1) Prior to August 1998, Mr. Dixie was recognized as the "Spokesperson for the Tribe,"

(2) On August 5, 1998, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristan Wallace were accepted as enrolled members of the Tribe "enjoying all benefits, privileges, rights and responsibilities of Tribal membership, [including] the right to participate in the initial organization of the Tribe, provided that those persons are eighteen years or older;"

(3) That on September 8, 1998 and October 15, 1998, BIA Central California Agency staff met with Mr. Dixie, Ms. Burley and Ms. Reznor to "discuss the group's interest in formally organizing the Tribe;"

(4) In organizing an "undeterminated" tribe, the "initial issue" is "specifying those persons entitled to participate;"

(5) That as of that date, only those members over the age of 18 (Mr. Dixie, Ms. Burley and Ms. Reznor) were "entitled to participate in the organization of the Tribe;"

(6) That on or about November 5, 1998, Resolution #GC-98-01 was adopted by the Tribe which established a Tribal General Council to "serve as the governing body of the Tribe;" and

(7) "The general position of the Agency is that the appointment of tribal leadership and the conduct of Tribal elections are internal matters," but noted an exception arises when a tribal member files an appeal to BIA on such matters. See Attachment M, appended hereto.

6. On or about February 9, 2000, the Tribal Council notified Yakima Dixie that he had 30 days to initiate review of claims regarding his resignation. Mr. Dixie did not respond by

the expiration of the 30 day period. See Complaint, ¶ 20.

7. On March 6, 2000, the Tribe ratified its Constitution. See Complaint, ¶ 21.

8. On March 16, 2000, the Tribal Council passed Resolution R-2-3-16-2000, which resolved that pursuant to Resolution R-2-10/9/99 (Interim Operations Authorities and Rights), Yakima Dixie waived his right to contest his resignation by failing to respond to the Tribal Council within the prescribed 30-day period. See Complaint, ¶ 25.

9. On or about March 16, 2000, the Tribal Council informed Yakima Dixie of the Tribal Council's final determination of his claims. See Complaint, ¶ 26.

10. In a July 26, 2000 letter from the Superintendent of the Central California Agency to the Secretary of Indian Affairs, the BIA recognized that Silvia Burley was Chairperson of the Tribe and that she was an elected official of the Tribe. See Complaint, attached Exhibit 1.

11. In a June 7, 2001 letter from Chairperson Burley to the BIA Central California Agency office, the Tribe withdrew its request for a Secretarial Election, approximately 15 months after the Tribe's initial request. See Attachment N, appended hereto.

12. In an October 31, 2001 letter from Dale Risling, Superintendent of the Central California Agency, to Silvia Burley, the BIA confirmed receipt of the September, 2001 version of the Tribe's constitution, and stated, in pertinent part, as follows:

> "The Agency will continue to recognized the Tribe as an unorganized Tribe and its elected officials as an interim Tribal Council until the Tribe takes the necessary steps to complete the Secretarial election process. Agency staff is available to provide technical assistance in this matter upon receipt of the Tribe's written request. We are returning the original document to the Tribe without any action."

See Attachment O, appended hereto.

13. On or about November 24, 2003, the BIA released a recognition letter acknowledging that the BIA maintains a government to government relationship with the Tribe through the tribal council chaired by Silvia Burley. See Complaint, attached Exhibit 2.

14. In January 2004, Silvia Burley sent the BIA a copy of a tribal constitution. Attachment B and Exhibit 2 thereto. The constitution identified the Tribe's base roll, *i.e.,* which ordinarily lists the Tribe's ancestors, as Yakima Dixie (born in 1940), Silvia Burley (born in 1960), Rashel Reznor (born in 1979), Anjelica Paulk (born in 1983) and Tristian Wallace (born in 1996).[3] *Id.* at Exhibit 2. Moreover, the membership criteria, found in the enrollment ordinance also provided by Silvia Burley, specifies that only the direct lineal ancestors and descendants of those persons on the base roll were eligible for full tribal membership.[4] *Id.* at Exhibit 3.

15. The BIA rejected the Tribe's proposed constitution because the larger tribal community had not been involved in its adoption. Rather, only Ms. Burley and her two daughters were involved. Following its evaluation of the tribal constitution submitted by Ms. Burley, BIA determined that it was necessary to clarify its prior recognition of Ms. Burley and her daughters as an interim tribal government. The BIA made clear it could recognize her only as a tribal spokesperson or representative with whom BIA communicates on federal-tribal

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[3] The constitution defines "base roll" to be the list of current tribal members. Exhibit 2 to Rogers-Davis Decl. (Attachment B).

[4] The enrollment ordinance does contain a provision for "adopting" other individuals as tribal members but under fairly strict circumstances. Exhibit 2 to Attachment B. Additionally, these "adoptees" would be non-voting tribal members, *id.*, and thus subject to whatever rights, including divestment thereof, that the voting members (the Burley family) might choose to bestow. *Id.*

matters because the Tribe was not organized. Exhibit 4 to Attachment B. This decision was communicated to Ms. Burley by letter dated March 26, 2004, from Dale Risling, Superintendent of the Central California Agency of the Bureau of Indian Affairs, located in Sacramento, California. *Id.* Given the base roll and membership criteria set out in the tribal constitution, BIA determined that Ms. Burley and her daughters created a tribe consisting only of their immediate family and Yakima Dixie.[5] *Id.* BIA is unaware of any efforts by Ms. Burley to identify and/or contact and/or involve her extended family or the extended family of Yakima Dixie. *Id.* In addition, BIA has records relating to a number of other Indian families who lived or are living in Calaveras County and who are believed to be part of the Indian community of Sheep Ranch, California. *Id.*

16. Despite providing administrative appeal rights in the March 26th letter, (Exhibit 4 to Attachment B), and advising of the importance of the letter, (Exhibit 5 to Attachment B), no administrative appeal was ever submitted by the Tribe or Ms. Burley. That is, the Tribe has not appealed the decision to reject the Tribe's proposed constitution and Ms. Burley has not appealed the decision to recognize her as a tribal "spokesperson" or representative of an "unorganized" tribe. See Declaration of Fred Doka, attached hereto as Attachment D.

17. On or about October 30, 2003, BIA received an administrative appeal from Yakima Dixie challenging the BIA's continued recognition of Silvia Burley as tribal chairperson. Compl. at ¶30. That administrative appeal remains pending at the present time. *Id.* at ¶ 37.

18. On February 11, 2005, Michael D. Olsen, Acting Principal Deputy Assistant Secretary – Indian Affairs, sent a letter addressed to Yakima Dixie, of the "Sheep Ranch

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[5] It is BIA's understanding that Yakima Dixie, who is 64 years old, is childless. Attachment B.

Rancheria of MiWok Indians of California." In this letter, the Acting Principal Deputy Assistant Secretary dismissed Yakima Dixie's appeal on three grounds: first, it was rendered moot by the Department's March 26, 2004 decision not to recognize Ms. Burley as "tribal chairman;" second, it was procedurally defective; and third, Mr. Dixie's appeal was untimely. The Assistant Secretary went on to state that:

(1) the BIA had rejected the Tribe's "proposed constitution" on March 26, 2004 because it did not involve the larger membership;

(2) the BIA did not "recognize Sylvia Burley as tribal Chairman," but did recognize her as "a person of authority within the California Valley Miwok Tribe;"

(3) "Until such time as the Tribe has organized, the Federal government can recognize no one, including yourself, as the tribal chairman;" – that is, organized "along the lines outlined in the March 26, 2004 letter;" and

(4) the "BIA does not recognize [the Tribe's hearing officer] Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum." This is because the Tribe does not have a "recognized tribal government." Complaint, attached Exhibit 4.

19. The Tribe filed this action on April 12, 2005 seeking declaratory relief that, certain tribal governing documents are valid, that the Tribe has lawfully organized pursuant to 25 U.S.C. § 476 and that the letter of February 5, 2005 from the Acting Principal Deputy Assistant Secretary – Indian Affairs to Yakima Dixie is invalid – principally, because it states that the Tribe is "unorganized" and Sylvia Burley is recognized as the tribal "spokesperson" only.

SUMMARY OF ARGUMENT

This case meets the requirements of 28 U.S.C. § 1404(a) for a transfer of this case to the Eastern District of California because: this suit could have been brought in the Eastern District of California, just as a prior suit against the United States was brought there in 2002; it is a "localized controversy" that should be resolved locally, thereby serving the interest of justice; and the interests of the parties and the witnesses would be served by a transfer because virtually all of them are located in California.

In addition, the defendants request that their obligation to answer the Complaint be suspended until ten days after the Court's ruling on the transfer motion, or, at a time to be fixed by the transferee court .

ARGUMENT

TRANSFER OF THIS CASE TO THE EASTERN DISTRICT OF CALIFORNIA IS APPROPRIATE UNDER THE CHANGE OF VENUE STANDARD OF 28 U.S.C. § 1404.

Section 1404(a) of 28 U.S.C. provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

This section is intended to facilitate transfer of actions to a more appropriate federal forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981); Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). In general, a district court acting pursuant to 28 U.S.C. § 1404(a) may transfer an action to another federal forum if two requirements are met. First, as a threshold matter, the proposed transferee district must be one in which the action might have been brought originally. See DeLoach v. Philip Morris Companies, Inc., 132 F. Supp. 2d 22, 24 (D.D.C.

2000). Second, the court must then decide, in the exercise of its discretion, whether the transfer is warranted. In making the latter determination – whether transfer is warranted – the statute requires the Court to examine three elements : (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interest of justice. The Court has broad discretion to order transfer under this standard. In re Scott, 709 F.2d 717, 720 (D.C. Cir. 1983). See also Norwood v. Kirkpatrick, 349 U.S. 29 (1955). An analysis of the Section 1404(a) factors demonstrates that transfer to the Eastern District of California is appropriate.

A. This Case Could Have Been Brought In the Eastern District of California.

A "threshold consideration" in determining the appropriateness of transfer under § 1404(a) is whether the action "might have been brought" in the transferee district. Nichols v. U.S. Bureau of Prisons, 895 F. Supp. 6, 8 (D.D.C. 1995); see also Van Dusen, 376 U.S. at 616 (transfer power is expressly limited by the clause restricting transfer to those districts in which the action "might have been brought"). This determination encompasses the forum choices of both plaintiff and defendant, the location in which the claim arose, the convenience of witnesses, the convenience of the parties and ease of access to sources of proof. Trout Unlimited v. United States Department of Agriculture, 944 F. Supp. 13, 16 (D.D.C. 1996). While a plaintiff's choice of forum is entitled to substantial deference, "numerous cases in this Circuit recognize that such a choice receives considerably less deference where the plaintiffs neither reside in, nor have any substantial connection to that forum." Deloach, 132 F. Supp. 2d at 24; see also Trout Unlimited, 944 F. Supp. at 17 (showing that defendants must make to overcome plaintiff's choice of forum "is lessened when the plaintiff's choice of forum has no factual nexus to the case." (Internal quotation omitted)).

In this case, the only connection between plaintiff's action and the District of Columbia is the February 11, 2005 letter to Yakima Dixie from Michael D. Olsen, the Acting Principal Deputy Assistant Secretary – Indian Affairs who works at the Department of the Interior's headquarters office which is located here. The involvement of Federal officials located in Washington, DC is not determinative for venue purposes. Wyandotte Nation v. National Indian Gaming Commission, et al., Civ. No. 04-1727 (RMU), slip. op. at 8-9, dated May 2, 2005 (Attachment L); Shawnee Tribe v. United States, 298 F.Supp. 2nd 21, 25-26 (D.D.C. 2002). In contrast, this action has substantial connections to the Eastern District of California. The plaintiff primarily objects to decisions of Federal officials in California. Its objection to the decision of Michael Olsen is limited to one issue – the tribal forum. In contrast, the plaintiff objects to two issues decided in California – rejection of the Tribe's proposed constitution and the failure to recognize Sylvia Burley as the Tribal "Chairperson." Virtually all relevant events occurred in California. Moreover, the plaintiff Tribe is located in California, as are its headquarters and members, including those who oppose Ms. Burley. Simply put, there is no substantial connection between the plaintiff's claims and the District of Columbia.

B. Transfer to the Eastern District of California is in the Interests of Justice.

The United States Supreme Court has stated: "There is a local interest in having localized controversies decided at home." American Dredging Co. v. Miller, 510 U.S. 443, 448 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509); Trout Unlimited, 944 F. Supp. at 16. In Trout Unlimited, the court declared that "[c]ontroversies should be resolved in the locale where they arise . . . " 944 F. Supp. at 17. "Justice requires that such localized controversies be decided at home." Citizen Advocates for Responsible Expansion, Inc. (I-Care) v. Dole, 561 F. Supp. 1238,

1240 (D.D.C. 1983). See to the same effect: Shawnee Tribe v. United States, 298 F.Supp. 21, 26 (D.D.C. 2002) (local interest in deciding a local controversy considered to be "most persuasive factor" for granting transfer); Armco Steele Co. v. CXS Corp., 790 F. Supp. 311, 324 (D.D.C. 1991); Harris v. Republic Airlines, 699 F. Supp. 961, 963 (D.D.C. 1998).

For example, this Court has often recognized that the interests of justice are promoted by transferring cases (related to Indian gaming controversies) back to the federal district court in the state in which the controversy is located. Towns of Ledyard, North Stonington and Preston, Connecticut v. United States, Civ. No. 95-0880 (TAF) (D.D.C.) slip op. dated May 31, 1995, at 4-6; (Attachment G) at 5-6; Apache Tribe of the Mescalero Reservation v. Reno and Babbitt, Civil Action No. 96-115 (RMU) (D.D.C.), (February 5, 1996), (Attachment H). Cheyenne-Arapaho Tribe of Oklahoma v. Reno, Civil Action No. 98-CV-065 (RMU) (D.D.C.), (Attachment I). This Court ably articulated the considerations in favor of transfer in a case involving the Santee Sioux Tribe of Nebraska:

> ". . . [t]he federal courts do not allow cameras or tape recorders in courtrooms, there is intense local interest in this controversy, and there is a significant benefit to allowing those whose lives will be most immediately affected by the outcome of litigation, as well as the local media, to physically attend the proceedings which will determine that outcome. There is no substitute for personally observing, watching and evaluating the judge who presides, hearing the quality of the arguments, and getting a first-hand impression of whether the proceeding is being handled with the appropriate fairness and seriousness. Furthermore, the members of this District Court have repeatedly honored this principle by transferring cases involving Indian gaming controversies back to the state in which the controversy and the gaming were located. See Towns of Ledyard, N. Stonington, and Preston, Conn. v. United States, Civ. No. 95-0880, slip op. at 4-5 (D.D.C. May 31, 1995); Apache Tribe of the Mescalero Reservation v. Reno, Civ. No. 96-115, slip op. (D.D.C. Feb. 5, 1996); Cheyenne-Arapaho Tribe of Okla. v. Reno, Civ No. 98-065, slip op. (D.D.C. Sept. 8, 1998); and Citizen Advocates for Responsible Expansion, Inc. v.

Dole, 561 F.Supp. 1238, 1240 (D.D.C. 1983). [Emphasis added].

Santee Sioux Tribe of Nebraska v. National Indian Gaming Commission, Civil Action No. 99-528 (GK) slip op. at 8-9 (Attachment J). See also Lac Courtes Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, Civil Action No. 01-1042 (HHK/DAR) slip op. at 1, 6-7 (Attachment K). On balance, the interests of justice would best be served by transferring this matter to the Eastern District Court of California. Although this case does not concern Indian gaming, we believe that the considerations set forth in the first two sentences of the quoted portion of the Santee Sioux opinion favor transfer.

Plaintiff's Complaint demonstrates that this is primarily a "localized controversy" that should be decided in the Eastern District of California.

The Tribe is located in California. The members of the Tribe reside in California. With the exception of Mr. Olsen, the Federal officials are located in California. Furthermore, the fact the challenged February, 2005 determination was issued in Washington, D.C. does not mean this is where plaintiff's claim "arose." Wyandotte Nation v. National Indians Gaming Commission, et al.; Civ. No. 04-1727 (RMU), slip. op. dated May 2, 2005, at 9-10 (Attachment L); Shawnee Tribe v. United States, 298 F.Supp. 2d 21, 25-26 (D.D.C. 2002).

In sum, the foregoing considerations favor transfer of this case.

C. The Transfer to the Eastern District of California Will Serve the Convenience of the Parties and the Witnesses.

The purpose of § 1404(a) is "to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense . . .'" Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (citing Continental Grain v. Barge, FBL-585, 364 U.S. 19, 26-27 (1960)). Transfer of this case will serve the convenience of the parties and

the witnesses; therefore, the second and third elements of the determination as to whether the transfer is warranted are satisfied. The United States is fully prepared to litigate this case in the Eastern District of California. The BIA Office that has been involved with this matter on an ongoing basis is located in Sacramento, California. Plaintiff's tribal office is located in Stockton; the Tribe's members reside in California. The principal BIA witnesses are located in Sacramento. The Plaintiff's principal witness would presumably be Sylvia Burley.

Since this appears to be a suit under the Administrative Procedure Act, 5 U.S.C. § 551, et seq., defendant anticipates this controversy will be decided by dispositive motion. The Eastern District of California is the most appropriate forum for the filing of the administrative record and the most convenient forum for the parties. Finally, we stress that the Tribe has previously sued the United States in the federal district court for the Eastern District of California. See California Valley Miwok Tribe v. United States, No. CIV S-02-09012 FCD/GGH (E.D. Calif.).[g] The foregoing considerations heavily favor proceedings in the Eastern District of California. Oil, Chemical & Atomic Workers Local Union No. 6-418 v. N.L.R.B., 694 F.2d 1289, 1300 (D.C. Cir. 1982) (citing Liquor Salesmen's Union Local 2 v. N.L.R.B., 664 F.2d 1200, 1205 (D.C. Cir. 1981)).

D. Transfer of This Action At this Stage of the Litigation is Appropriate.

This litigation is at its earliest stage.

The United States contends, that this case is at the juncture where it is appropriate for the Court to address the issue of transfer. See Shawnee Tribe, supra, 298 F. Supp. 2d at 21, 22-23;

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[g] The Tribe appealed the Court's ruling to the Ninth Circuit Court of Appeals; this appeal is pending. California Valley Miwok Tribe v. United States, No.04-16676 (9th Cir.).

Trout Unlimited, supra, 944 F. Supp. at 19 (granting of transfer motion where present forum has not dealt with any issues in, or with the merits, of this case; also, there would be no delay in the need for the transferee court having to familiarize itself with this case).

CONCLUSION

For the foregoing reasons, the defendants' motion to transfer and to suspend answering the Complaint in the District of Columbia should be granted.[7]

In concert with defendants' motion to transfer venue of the case, defendants also move the Court to suspend their obligation to answer the Complaint until ten days following judicial resolution of the motion to transfer, or, at a time to be determined by the transferee court.

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[7] A proposed Order is attached.

Dated this 13th day of June, 2005.

Respectfully submitted,

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Electronically signed
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Attachments

DOCUMENT NO. 54

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA	)	
Plaintiff,	)	
vs.	)	**No. 1:05CV00739**
	)	**Judge James Robertson**
UNITED STATES OF AMERICA GALE A. NORTON, Secretary of the Interior,	)	
and	)	
MICHAEL D. OLSEN, Acting Assistant Secretary – Indian Affairs	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants hereby move to dismiss this suit for lack of subject matter jurisdiction pursuant to FRCP 12 (b)(1), or, in the alternative, for failure to state a claim upon which relief may be granted pursuant to FRCP 12(b)(6).

A Memorandum in Support of this motion is attached.

Dated this 5th day of August, 2005.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA **Plaintiff,** vs. **UNITED STATES OF AMERICA** **GALE A. NORTON, Secretary of the Interior,** **and** **MICHAEL D. OLSEN, Acting Assistant Secretary – Indian Affairs** **Defendants.**	**No. 1:05CV00739** **Judge James Robertson**

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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ATTACHMENT B Complaint for Injunctive and Declaratory Relief (April 29, 2002), California Valley Miwok Tribe v. United States, No. CIV. S-02-0912-FCD GGH (E.D. Cal.).

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ATTACHMENT E Supplemental Declaration of Fred Doka, Jr. (July 29, 2005), California Valley Miwok Tribe v. United States, No. 05-CV-00739 (JR) (D.D.C.)

ATTACHMENT F Letter dated June 10, 2003, to Honorable Ben Nighthorse Campbell, Chairman, Committee on Indian Affairs from David L. Bernhardt, Director of Congressional and Legislative Affairs and Counselor to the Secretary, Department of Interior and letter dated October 23, 2003, to Honorable Richard Pombo, Chairman, Committee on Resources, from David L. Bernhardt, Director of Congressional and Legislative Affairs and Counselor to the Secretary, Department of Interior

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA	)	
Plaintiff,	)	
vs.	)	**No. 1:05CV00739**
	)	**Judge James Robertson**
UNITED STATES OF AMERICA GALE A. NORTON, Secretary of the Interior,	)	
and	)	
MICHAEL D. OLSEN, Acting Assistant Secretary – Indian Affairs[1]	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff California Valley Miwok Tribe[2] challenges the government's "decision" (allegedly contained in the February 11, 2005 letter from Michael Olsen, Acting Principal Deputy Assistant Secretary - Indian Affairs to Mr. Yakima Dixie, [3]) not to recognize: (1) the Tribe's

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[1] This is not Mr. Olsen's correct title.

[2] At the present time, the California Valley Miwok Tribe (hereafter, "Tribe") lacks "a governing body duly recognized by the Secretary of the Interior" as required by 28 U.S.C. § 1362. As explained infra while the Tribe seeks to appeal the Secretary's decision that the Tribe does not have a recognized governing body, that decision became final over a year ago.

[3] See Paragraph No. 6 of Prayer for Relief and Plaintiff's Opposition to Defendants' Motion to Transfer Venue and Suspend Obligation to Answer in District of Columbia, filed on

constitution adopted by the Tribe in September, 2001 as a legitimate governing document, Comp. at ¶¶ 21, 30, 32, 42, 43, and 45; (2) Ms. Sylvia Burley as the Tribal Chairperson, *id.* at ¶¶ 14, 15, 19, 22, 23, 27, 28, 29, 36, 37, 40, 41, and 45; and (3) the tribal forum created by Tribal Council Resolution No. R-1-02-04-2004, *id.* at ¶¶ 38, 45, and 46. In short, Plaintiff seeks 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[4] - - that is, not supported by a majority if the "whole tribal community." See Exhibit No. 3 attached to the Complaint (Letter of March 26, 2004 from the Superintendent of the BIA's Central California Agency to Sylvia Burley[5]).

Plaintiff has asserted that the February 11, 2005 Olsen letter to Mr. Yakima Dixie is the

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July 11, 2005. Plaintiff's Opposition states that this action was filed " . . . seeking declaratory relief from the February 11, 2005 letter of Michael D. Olsen in view of 25 U.S.C. [sec] 476(h)." Pl. Opp. at 2). Plaintiff adds that the Olsen letter is"[t]he only event giving rise to the instant case . . ." [Emphasis supplied] (Pl. Opp. at 3). (Excerpt of Pl. Opp attached as Attachment A).

[4] Plaintiff's Complaint asks this Court to declare the following: 1) that the Plaintiff retains "inherent sovereign power to adopt governing documents under procedures other than those specified in 25 U.S.C. § 476 (a-g);" 2) that the constitution adopted by the Tribe in 2001 is a valid governing document for the Tribe; 3) that Tribal Council Resolution R-2-3-16-2000 adopted by the Tribe on March 16, 2000 which resolved that Yakima Dixie waived his right to contest his resignation is a valid governing document; 4) that Tribal Council Resolution R-1-02-04-2004 adopted by the Tribe on February, 2004 to provide a tribal forum for Yakima Dixie's appeal is a valid governing document; 5) that the Tribe "has lawfully organized pursuant to 25 U.S.C. § 476;" and 6) that the February 11, 2005 letter from Defendant Michael D. Olsen in his capacity as Acting Assistant Secretary – Indian Affairs to Yakima Dixie is invalid. Plaintiff has brought two previous cases alleging similar facts. The first was dismissed for lack of jurisdiction and is currently pending before the Court of Appeals for the Ninth Circuit. C.A. No. 04-16676. The second was voluntarily dismissed before this court. CIV. 1:04CV1794 RWR.

[5] In this letter, BIA concluded that the Plaintiff tribe was not "organized" and therefore, BIA could neither recognize the Tribe's constitution a a valid document nor recognize Sylvia Burley as the Tribal Chairperson. The letter specifically informed Ms. Burley that she could file an administrative appeal from this decision under 25 C.F.R. Part 2 (2004).

"only event giving rise to the instant case..." (Pl. Opposition to Defendants' Motion to Transfer Venue and Suspend Obligation to Answer in the District of Columbia, filed July 11, 2003 at 3). This assertion is consistent with Paragraph 6 of the Prayer for Relief requesting that the Olsen letter be declared "invalid," but not requesting that the March 26, 2004 letter be declared invalid.

Mr. Olsen, however, did not render the particular decisions plaintiff attempts to challenge in this action.[6/7] More notably, the Olsen letter refers to the March 26, 2004 letter as "BIA's decision" and discusses the contents of the March 26th letter.

All three of Plaintiff's claims arise from the BIA's March 26, 2004 decision letter. If there is only one event giving rise to this lawsuit, then it is the issuance of this decision letter from which all claims flow. This conclusion is based upon the March 26, 2004 decision that the finding that the Plaintiff tribe is not "organized". Based upon this finding, the BIA refused to recognize the tribal constitution and to recognize Ms. Burley as Tribal Chairperson. The BIA's refusal to recognize the tribal forum created by Tribal Resolution R-1-02-04-2004 also necessarily flows from its March 26, 2004 decision that the Tribe is not "organized" and, therefore, can adopt no governing documents until it becomes "organized." It also flows from Defendants alleged failure to recognize the tribal constitution because, as Plaintiff alleges in its

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[6/] Mr. Olsen rendered other decisions in his letter: He determined that: (1) an appeal submitted by Yakima Dixie was moot; (2) that Mr. Dixie raised new issues that had not been previously raised at a lower level of his administrative appeal; and (3) that Mr. Dixie's appeal was untimely. None of these decisions is at issue this lawsuit.

[7/] As Mr. Olsen repeatedly observes in his letter of February 11th, the decisions Plaintiff seeks to challenge in this litigation were made in March 2004 and conveyed at that time directly to Silvia Burley. Despite providing appeal rights, no administrative challenge has ever been made to these decisions. Thus, they became final several months prior to Mr. Olsen's February 11th letter.

"First Claim for Relief" (¶¶ 49(a) and (b) of Complaint), the 2004 tribal resolution creating the tribal forum and the tribal constitution are both tribal governing documents. Accordingly, it follows that the refusal to recognize the tribal constitution implicitly encompasses any and all tribal governing documents.

Plaintiff predicates its claims on the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, and the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476 (h), (the Native American Technical Corrections Act). Defendants hereby move to dismiss this action for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1) or, alternatively, for failure to state a claim upon which relief may be granted pursuant to FRCP 12(b)(6). Subject matter jurisdiction is absent because the resolution of internal tribal disputes are not within the court's limited jurisdiction.

Alternatively, Plaintiff fails to state a claim under the APA because the decisions which are challenged in this suit were made in March, 2004, and have never been administratively appealed, as authorized by Section 2.6(a) of 25 C.F.R. Part 2 (See ATTACHMENTS D and E). As to its claims under the IRA, Plaintiff cannot show that Defendants' March 26, 2004, decision violated the IRA. Plaintiff's argument relating to the IRA is also without merit. Section 103 of the Native American Technical Corrections Act of 2004 which added subsection (h) to Section 16 of the IRA (25 U.S.C. § 476 (h)), simply confirmed the right of Indian tribes to adopt their own governing documents outside the provisions of that IRA. The added subsection did not do away with the substantive and procedural requirements of IRA and the Secretary's regulations when a tribe sought to reorganize pursuant to it and in return to obtain the Secretary's approval of its governing document pursuant to the act.

Sylvia Burley (born in 1960) and her two daughters have changed the name of the Sheep Ranch Rancheria of Me-Wuk Indians, and seek legitimacy as a tribe consisting only of them and their descendants. In its prior suit against the government in the Eastern District of California (California Valley Miwok Tribe v. United Statse, et al., No. CIV. 5-02-0912 FCD GGH), the Tribe alleged in the Complaint: "Plaintiff claims it is an Indian tribe with a potential membership of 250 people . . ." (Copy of Complaint appended as ATTACHMENT B). These 250 people, in our opinion, constitute the "whole" (or a least) "greater" tribal community discussed in the March 26th letter, which is not reflected in the present membership of the Tribe.

SUMMARY OF ARGUMENT

This case should be dismissed for lack of subject matter jurisdiction because it involves, in essence, an internal tribal dispute. In the alternative, it should be dismissed for failure to state a claim upon which relief may be granted under the Administrative Procedure Act because Plaintiff failed to exhaust its administrative remedies and because the supposed violation of the Indian Reorganization Act is not supported by the facts alleged.

FACTUAL BACKGROUND

In 1998, the BIA Central California Agency recognized the right of certain individuals to " 'participate in the initial organization of the Tribe.'"[8] (¶ No. 11 of General Allegations of the Complaint). Following the Tribe's general election in May of 1999, the BIA's Central California Agency recognized Sylvia Burley as Tribal Chairperson in June, 1999. (Paragraph Nos. 14 and 15 of General Allegations of Complaint).

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[8] Organizing the tribe entails identifying the greater tribal membership, drafting governing documents, and seeing that those documents are adopted by the membership.

In October, 1999, the Tribal Council adopted a resolution on "Interim Operations Authorities and Rights." (¶ No. 25 of the General Allegations). In July of 2000 and 2001, the BIA's Central California Agency confirmed its recognition of Sylvia Burley as Tribal Chairperson. (¶¶ Nos. 27 and 28 of General Allegations).

In a June 7, 2001 letter, Ms. Burley withdrew the Tribe's initial request for the review of the Tribal constitution and the scheduling of a Secretarial Election to approve this constitution. (¶ No. 30 of the General Allegations).

In an October 31, 2001, letter to Sylvia Burley, the Superintendent of the BIA's Central California Agency stated, in pertinent part, as follows:

> The Agency will continue to recognize the Tribe as an unorganized Tribe and its selected officials as an Interim Tribal Council until the Tribe takes steps to complete the Secretarial election process. Agency staff is available to provide technical assistance in this matter upon receipt of the Tribe's written request. We are returning the original document [the September, 2001 tribal constitution] without any action.

[Emphasis added.] (¶¶ Nos. 32 and 21). In 2001, Yakima Dixie filed suit filed in federal district court for the Eastern District of California, " . . . challenging the Tribe's membership and leadership;" the suit was dismissed in 2002, in part, for failure to exhaust administrative remedies. (¶¶ Nos. 31 and 33 of Complaint; Attachment C to Memorandum in Support of Defendants' Motion to Transfer Venue and Suspend Obligation to Answer in District of Columbia). (Copy of Attachment C appended hereto as Attachment C.) Around October of 2003, Mr. Dixie filed an "Administrative Appeal" to the Deputy Assistant Secretary - Indian Affairs raising the same issues that were raised in the Eastern District of California suit. (¶ No. 35).

On February 11, 2004, the Tribe transmitted a copy of its September 2001 constitution to the Superintendent of the BIA's Central California Agency for BIA's " . . . records, and not for review." (¶ No. 42). In a March 26, 2004 letter to Sylvia Burley, the Superintendent states, in pertinent part, as follows:

> Although the Tribe has not requested any assistance or comments from this office in response to your document, we provide the following observations. As you know, the BIA's Central California Agency (CCA) has a responsibility to develop and maintain a government-to-government relationship with each of the 54 federally recognized tribes situated within the CCA's jurisdiction. This relationship includes, among other things, the responsibility of working with the person or persons from each tribe who either are rightfully elected to a position of authority within the tribe or who otherwise occupy a position of authority within an unorganized tribe. However, the BIA does not view your tribe to be an 'organized' Indian Tribe and this view is borne out by the document you have presented as the tribe's constitution but additionally, by our relations over the last several decades with members of the tribal community in and around Sheep Ranch Rancheria .
>
> * * *
>
> When a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. We have not seen evidence of such general involvement was attempted or has occurred within the purported organization of your tribe. For example, we have not been made aware of any efforts to reach out to the Indian communities in and around the Sheep Ranch Rancheria, or to persons who maintained any cultural contact with the Sheep Ranch. 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 have resided at Sheep Ranch Rancheria at various times in the past 75 years and persons who have inherited an interest in the Rancheria. We are also not aware of any efforts to involve Indians (such as Lena Shelton) and their descendants who once lived adjacent to Sheep Ranch Rancheria or to investigate the possibility of involving a neighboring group. We are aware that the Indians of the Sheep Ranch Rancheria were in fact, part of a larger group of Indians residing less than 20 miles away at West Point. * * * The BIA remains available, upon your request, to assist you in identifying the members of the local Indian community, to assist in disseminating

> both individual and public notices, facilitating public meetings, and otherwise providing logistical support.
>
> 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. We are very concerned about the designated 'base roll' for the tribe as identified in the submitted tribal constitution ***
>
> * * * *
>
> We must continue to emphasize the importance of the participation of a greater tribal community. We reiterate our continued availability and willingness to assist you in this process and that via PL 93-638 contracts intended to facilitate the organization or reorganization of the tribal community, we have already extended assistance. we urge you to continue the work you have begun towards formal organization of the California Valley Miwok Tribe. * * *
>
> * * * *
>
> Should you wish to appeal any portion of this letter, you are advised you may doso by complying with the following:
>
> * * * *
>
> If no timely appeal is filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

(emphasis added.) See Exhibit 3 attached to Complaint. In her effort to organize the tribe, therefore, Ms. Burley had failed to identify the greater tribal membership and obtain its support for her proposed constitution, which she acknowledged/asserted to exist in her prior complaint in the Eastern District of California (see supra, p. 5).

Defendant Olsen addressed the issue of the tribe's forum in a February 11, 2005 letter to Yakima Dixie which states, in pertinent part as follows:

> Your appeal of the BIA's recognition of Ms. Burley as Tribal Chairman has been rendered moot by the BIA's decision of March 26, 2004, . . . rejecting the Tribe's proposed Constitution. In that letter, the BIA made clear that the

Federal government did not recognize Ms. Burley as the tribal Chairman. * * *

* * * *

In light of the BIA's letter of March 26, 2004, that the Tribe is not an organized tribe, however, the BIA does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time. I understand that a Mr. Troy M. Woodward has held himself out as an Administrative Hearing Officer for the Tribe and purported to conduct a hearing to resolve your complaint against Ms. Burley. Please be advised that the BIA does not recognize Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum. * * *

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

A. Rule 12(b)(1) Motions

In ruling on a FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court is not limited to the allegations of the Complaint, but can consider matters outside the Complaint. Marsh v. Johnson, 263 F. Supp. 2d 49, 54 (D.D. C. 2003). Indeed, the factual allegations in the Complaint receive "closer scrutiny" than they do in the case of a FRCP 12(b)(6) motion. The principal rationale for this "closer scrutiny" is because "subject matter jurisdiction focuses on the court's power to hear the claim." (Id.) Bobreski v. U.S. Environmental Protection Agency, 284 F. Supp. 2d 67, 72 (D.D.C. 2003). Another rationale for this "closer scrutiny" is that a 12(b)(1) motion " . . . focuses on the Court's power to hear the claim."(Id.). The Plaintiff has a burden of establishing by a preponderance of the evidence that the court has jurisdiction to adjudicate these three claims. U.S. v. ex rel. Rockefeller v. Westinghouse Electric Co., 274 F. Supp. 2d 10, 14 (D.D. C. 2003), aff'd sub nom. Rockefeller ex rel. U.S. v. Washington TRU Solutions, LLC, 2004 WL 180264 (D.C. Cir. 2004).

B. The Court Lacks Jurisdiction to Adjudicate an Internal Tribal Dispute.

At heart this case is about an internal tribal dispute between Yakima Dixie and Sylvia Burley over leadership and tribal organizational issues. Ms. Burley's submission of a constitution to the BIA in March 2004 was part of that dispute and the BIA's March 26, 2004 letter was the BIA's response to it. Plaintiff's claims, therefore, will necessarily require this court to settle that internal tribal dispute. The Plaintiff's prayer for relief is most telling. It requests the court to declare, amoung other things, that Ms. Burley's constitution is a valid governing document, that Ms. Burley is the tribal chairperson, and that the resolution establishing the tribal forum is a legitimate governing document. This court, however, lacks jurisdiction to resolve Plaintiff's claims and grant its requested relief.

As a general rule, federal district courts lack jurisdiction over internal tribal leadership disputes, membership issues, and organizational issues. In re Sac & Fox Tribe, 340 F.3d 749, 763 (8th Cir. 2003) (leadership); Smith v. Babbitt, 100 F.3d 556, 558-559 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997) (membership); Ordinance 59 Ass'n v. United States Dep't of the Interior, 163 F.3d 1150, 1159-1160 (10th Cir. 1998) (membership); Potts v. Bruce, 533 F.2d 527, 529-530 (10th Cir. 1976) (organizational issues), cert. denied, 429 U.S. 1002 (1976); Motah v. United States, 402 F.2d 1, 2 (10th Cir. 1968) (organizational issues). But see Seminole Nation of Oklahoma v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002).

There is a limited exception to this general rule when a federal statutory responsibility is implicated. In Seminole Nation of Oklahoma v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002) this court adjudicated a challenge by the Seminole Nation to the Secretary's refusal to recognize the tribal government and its principal chief because the Nation was excluding its Freedmen members from voting. But Seminole is distinguishable from the case at hand because in

Seminole the Secretary had a statutory responsibility to ensure the integrity of the tribal election process. In this case, the Defendants have no comparable statutory responsibility under Section 476(h) which would require the Secretary to review a tribal constitution, as opposed to review at the Secretary's discretion.

This case squarely involves an internal tribal dispute over leadership and organizational issues. First, Yakima Dixie and Sylvia Burley dispute who should lead the Tribe, as evidenced by Michael Olsen's February 11, 2005 letter about Mr. Dixie's challenge of Ms. Burley's leadership position. Second, Yakima Dixie and Sylvia Burley are presently working with the BIA along parallel lines to organize the tribe. Were the Court to adjudicate the Plaintiff's claims, it would necessarily decide these issues for the tribe. Under the authority cited above, the court does not have jurisdiction to do so. The case should be dismissed under FRCP 12(b)(1).

C. The Government Has Not Waived its Sovereign Immunity

The United States, its agencies and its employees may not be sued in the abscence of a waiver of sovereign immunity. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988); United States v. Testan, 424 U.S. 392, 399 (1976). The terms of the sovereign's consent define a court's jurisdiction. United States v. Sherwood, 312 U.S. 584, 586-87 (1941). Therefore, the United States, as a sovereign, is immune from suit except to the extent that it consents to be sued. Id.

Where suit is brought against the United States, as here, the United States' waiver of sovereign immunity is one of the cornerstones informing the court's jurisdiction. F.D.I.C., 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature"); United States v. Mottaz, 476 U.S. 834, 841 (1986)("When the United States consents to be sued the terms of its waiver of

sovereign immunty define the extent of the court's jurisdiction")(emphasis added); Block v. North Dakota, 461 U.S. 273, 278 (1983)(same); *see also* United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003)("Jurisdiction over any suit against the [United States] Government requires a clear statement from the United States waiving sovereign immunity. . . together with a claim falling within the terms of the waiver"). The burden of establishing waiver of sovereign immunity rests at all times with the party asserting a claim against the United States, its agencies and/or its employees. Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987) (plaintiff "bears the burden of demonstrating an unequivocal waiver of immunity"), cert. denied, 487 U.S. 1204 (1988).

Here, Plaintiff has not identified any waiver of sovereign immunity which would allow it to bring suit on the claims at issue. Without such a waiver, this count has no subject matter jurisdiction over Plaintiffs cliams.

II. ALL OF PLAINTIFF'S CLAIMS SHOULD BE DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. Rule 12(b)(6) Motions.

In ruling upon a FRCP 12(b)(6) motion, the court must accept the allegations of the complaint as true, but need not accept any of plaintiff's legal conclusions as true. Briton v. Palestinian Interim Self - Government Authority, 310 F. Supp. 2d 172, 177 (D.D.C. 2004); Coleman v. Elec . Power Co., 310 F. Supp. 2d 154, 157 (D.D.C. 2004), aff'd, No. 04-7043, 2004 WL 2348144 (D.C. Cir. Oct. 19, 2004). In the same vein, the court need not accept plaintiff's legal inferences or conclusory allegations unsupported by facts set forth in the complaint. Hopkins v. Women's Div., Gen. Bd. of Global Ministries, 238 F. Supp. 2d 174, 177-178 (D.D.C.

2002). Also, the court need not accept legal conclusions cast in the form of factual allegations. In re Lorazepam & Clorasepate Antitrust Litigation, 295 F. Supp. 2d 30, 34 (D.D.C. 2003).

The court may take judicial notice of matters of a general public nature such as court records. Primorac v. CIA, 277 F. Supp. 2d 117, 119 (D.D.C.), aff'd, No. 03-5271, 2004 WL 869631 (D.C. Cir.2004).[9] In ruling on a 12(b)(6) motion, the court may consider public records and matters of which a court may take judicial notice. Jackson v. City of Columbus, 194 F. 3d. 737, 741 (6th Cir. 1999) overruled on other grounds sub nom., Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002). Matters of "public record" include pleadings, orders and other papers filed with the court or records of administrative bodies. Barapind v. Reno, 72 F. Supp. 2d 1132, 1141 (E.D. Cal. 1999), aff'd, 225 F.3d. 1100 (9th Cir. 2000).

B. The Failure to Exhaust Administrative Remedies is Properly Pled Under a 12(b)(6) Motion.

The Second Claim for Relief in the Complaint alleges that all of Plaintiff's three claims implicate the APA. See ¶¶ Nos. 53, 54, and 57. Plaintiff, however, has failed to exhaust administrative remedies and, therefore, the Complaint should be dismissed under FRCP 12(b)(6).

The BIA's decision of March 26, 2004, which gave rise to all of Plaintiff's claims, was appealable to the Regional (formerly Area) Director of BIA's Pacific Regional Office. Under 25 C.F.R. Part 2 (2004). Plaintiff does not allege that it filed such an administrative appeal. Indeed, no such appeal has ever been filed. See ATTACHMENTS A and B hereto.

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[9] But see Herron v. Veneman, 305 F. Supp. 2d 64, 69 (D.D.C. 2004) which held the court could not consider factual allegations in briefs or the memoranda of law, particularly when they contradict the complaint. This case can be distinguished because it concerns the government's failure to use the proper format for its motion for summary judgment. Rather than prepare a Statement of Uncontroverted Facts with supporting documents, the government attached excerpts from its prior pleadings in Veneman.

This Circuit has held that even in the case of "non-jurisdictional" exhaustion, the failure to exhaust administrative remedies is properly pled under a 12(b)(6) motion. See Johnson v. District of Columbia, 368 F. Supp. 2d 30, 36 (D.D.C. 2005):

> In cases involving the application of the non-jurisdictional exhaustion requirement imposed by the Freedom of Information Act ("FOIA"), the D.C. Circuit has treated exhaustion as a condition precedent to filing suit in federal court. See Hidalgo v. F.B.I., 344 F.3d 1256, 1259-60 (D.C.Cir.2003); see also Wilbur v. C.I.A., 355 F.3d 675, 677 (D.C.Cir.2004). A plaintiff's failure to demonstrate that he or she has satisfied this condition, then, is tantamount to a failure to sufficiently plead a necessary element of a federal cause of action. Thus, when a federal court finds that the plaintiff failed to exhaust his or her administrative remedies, and the exhaustion requirement is prudential rather than jurisdictional, the appropriate disposition is to dismiss the plaintiff's unexhausted claims under Federal Rule of Civil Procedure 12(b)(6). In such a case, the plaintiff has in fact "failed to state a claim on which relief may be granted" with respect to the unexhausted claim or claims by failing to demonstrate that a necessary precondition to judicial review of those claims has been satisfied. In evaluating the defendants' exhaustion argument on the present motion, then, the Court will proceed under the legal standard applicable to Rule 12(b)(6) motions to dismiss.

Id.

C. Exhaustion of Administrative Remedies in General.

"Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." Oglesby v. United States Dep't of the Army, 920 F.2d 57, 61 (D.C. Cir. 1990) (citations omitted). Until a party has exhausted all administrative remedies required by a statute or an agency rule, it may not obtain judicial review of the challenged agency action. Darby v. Cisneros, 509 U.S. 137, 146-147 (1993). See also James v. United States Department of Health and Human Resources, 824 F.2d 1132, 1136-1137 (D.C. Cir. 1987) (held that suit filed by dissident tribal faction of an unrecognized Indian tribe seeking federal recognition of the Tribe by the Department of the Interior was properly dismissed

for failure to exhaust its administrative remedies). However, BIA's regulations, 25 C.F.R. Part 2 (2004) do not require exhaustion; thus, the type of exhaustion at issue is "non-jurisdictional" exhaustion (where exhaustion is provided for, but not mandated).

Although the BIA's regulations give rise only to the "non-jurisdictional" type of exhaustion, we submit that the exhaustion of remedies is a "condition precedent" to filing suit. Hidalgo v. Federal Bureau of Investigation, 344 F.3d 1256, 1258-59 (D.C. Cir. 2005). (dismissed for failing to pursue administrative appeal process); Johnson v. District of Columbia, 368 F. Supp. 2d 30, 32, 36-37 (D.D.C. 2005) (dismissed for failing to pursue administrative appeal process). Given the circumstances of this case, and based upon the strength of these two decisions alone, we submit that the Court should, as a "prudential" matter, dismiss the Complaint because of the Plaintiff's failure to exhaust its administrative remedies. We reiterate that Plaintiff does not even allege that it exhausted its administrative remedies, and, in fact, has never attempted to exhaust its administrative remedies.

If the Court should reject this contention, then, in the alternative, Defendants submit that the application of the two-part analysis in Advocado Plus, with respect to the "non-jurisdictional" form of exhaustion, to the facts of this case yields an outcome which clearly warrants dismissal of the Complaint. See discussion under subheading D below.

D. The Circuit Standards for Ruling Upon a "Non-Jurisdictional" Failure to Exhaust Administrative Remedies.

1. The Exhaustion of Remedies Includes Two Distinct Legal Concepts.

In Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004), supra, the United States Court of Appeals for this Circuit held that the defense of failure to exhaust

administrative remedies involves "two distinct legal concepts" the first of which is called **"non-jurisdictional exhaustion."** (emphasis in original) (370 F. 3d at 1247). The first concept is "a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court." Id. "**Non - jurisdictional exhaustion**" serves three functions: " 'giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, and compiling a record inadequate for judicial review.'" Id.

The "second form of exhaustion arises when Congress requires resort to the administrative process as a predicate to the judicial review." (Id.) This form of exhaustion – "**jurisdictional exhaustion**" is "rooted, not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts. [Citation omitted.]." (Id.) If a federal statute "mandates exhaustion", then a federal court has no jurisdiction over the case in question "prior to exhaustion." (370 F. 3d at 1248). Here, the Defendants are relying upon the "**non - jurisdictional**" form of exhaustion of remedies; under this form of exhaustion, the court has the discretion to require a plaintiff to exhaust its administrative remedies. (370 F. 3d at 1250-51).

2. Required Two-Part Analysis

In making its determination as to whether to so require a plaintiff, the court must conduct a two - part analysis: (1) determine whether requiring exhaustion would "serve the policies underlying the doctrine;" and if it would serve these policies, then (2) balance the "interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion," (citing McCarthy v. Madigan, 503 U.S. 140, 147 (1992)). McCarthy holds that there are three "sets of circumstances" to be taken into account in

doing this balancing process. (Id. at 146-48). These are: (1) whether requiring exhaustion would prejudice a subsequent court action because of unreasonable or indefinite time frames for action by the administrative appellate entity; (2) whether the agency can grant effective relief; and (3) whether the administrative appellate body has been shown to be "biased" or has made a "prejudgment of the issue" before it.

In James, the Court of Appeals stated that exhaustion has four purposes:

> First, it carries out the congressional purpose in granting authority to the agency by discouraging the frequent and deliberate flouting of administrative processes that could encourage people to ignore its procedures. Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial fact-finding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.

James, 842 F.2d at 1137-38. In this case, requiring exhaustion would serve the purposes of the doctrine.

3. Part I of the Avocado Plus Analysis: Whether Requiring Exhaustion of Remedies Here Would Serve the Purposes of the Exhaustion Doctrine.

a. The Plaintiff has Ignored the Department's Administrative Process.

Congress granted broad authority over Indian affairs to the Secretary in 25 U.S.C. §§ 2 and 9, and 43 U.S.C. § 1457. Pursuant to that authority, the Secretary has adopted rules and regulations, including those governing agency appeals decisions - 25 C.F.R. Part 2. Section 2.6 of 25 C.F.R. Part 2 authorizes the exhaustion of administrative before seeking judicial review under the APA. In his March 26th decision, the Superintendent informed the Plaintiff of its right

to appeal the his decision to the Regional Director of BIA's Pacific Region. From there, 25 C.F.R. Part 2 provides that an appeal may be taken to the Interior Board of Indian Appeals. During the pendency of an appeal, the Superintendent's decision is stayed. Rather than pursue its administrative appeal rights under 25 C.F.R. Part 2 with respect to Defendants' alleged failure to recognize the tribal constitution, Ms. Burley as the purported Tribal Chairperson, and the Plaintiff ignored the administrative appeal process and waited over a year from the date the agency decision was issued and then filed this Complaint to obtain judicial review of the decision. Here, the Plaintiff is "deliberately flouting" the Defendants' administrative process.

b. The Doctrine of Exhaustion Protects the Agency's Autonomy.

Requiring exhaustion in this case would protect the Department of the Interior's autonomy in managing Indian affairs. As noted above, Congress has delegated to the Department broad authority over Indian affairs. The Department has extensive expertise over Indian matters. See e.g., Shenandoah v. United States, 159 F.3d 708, 712 (2d Cir. 1998); James, 824 F.2d at 1138; Goodface v. Grassrope, 708 F.2d 335, 352 (8th Cir. 1983). Exhaustion here would allow the agency to apply this expertise and its discretion, correct any error it may have made in the first instance prior to being subject to any judicial action. By going directly to district court, Plaintiff has deprived the Department of this opportunity.

c. Requiring Exhaustion Would Aid Judicial Review.

Requiring exhaustion here would aid judicial review by allowing a factual record to be developed prior to review. In this litigation, because the Plaintiff did not exhaust its administrative remedies, the only factual record for the court to review is Superintendent Risling's March 26, 2004 letter to Ms. Burley. Had Plaintiff exhausted its administrative

remedies, the Court would have before it Plaintiff's appeal to the Regional Director, the Regional Director's decision, any appeal the Plaintiff might have taken from that decision to the BIA, and the decision of that appeal. Without exhaustion, the record before the Court is limited.

d. Requiring Exhaustion Would Promote Judicial Economy.

Finally, requiring exhaustion would promote judicial economy by allowing this court to benefit from the development of the factual record as part of the administrative process. Because Plaintiff failed to exhaust its administrative remedies, this Court does not have the benefit of being able to review a factual record that should have been developed at the agency level and may need to be constructed here.__

Accordingly, Plaintiff should be required to exhaust its administrative remedies before seeking alleged judicial review. As demonstrated below, Plaintiff has not and indeed cannot allege, any facts to demonstrate that it exhausted its administrative remedies with respect to its claim concerning its constitution and Ms. Burley's status as Chairperson warranting dismissal of Plaintiff's Complaint.

e. The Plaintiff Failed to Exhaust Its Administrative Remedies.

On March 26, 2004, the Superintendent of the Central California Agency of the BIA wrote in reply to Ms. Burley declining recognition of the tribe as an 'organized' tribe and offering guidance as to the proper procedures to become organized. (Plaintiff's Exhibit 3) The BIA understood that she had submitted the Tribe's constitution "in an attempt to demonstrate that it [Plaintiff] is an 'organized' tribe." The purpose of the letter was to inform Ms. Burley that she had failed to make such a demonstration, explain the tribe's status as an unorganized tribe, and to offer guidance as to how the Tribe could become organized. The letter made two points, which

the Plaintiff's Complaint challenges: first, the Tribe's constitution did not qualify as a valid governing document because the broader tribal community was not involved in its adoption; second, Ms. Burley was not a government official of the Tribe, but was a "person of authority" with whom the BIA would deal. (Complaint ¶¶ 49(a), 53, 57, 58, 59). Plaintiff was informed of its right to appeal the decision to the Regional Director, and was provided a copy of the relevant regulations. The letter provided instruction on how to file an appeal and informed the Plaintiff that, if needed, it could receive assistance preparing its appeal from the Superintendent's office. Finally, the letter explained that if no timely appeal was filed, the decision would become "final" for the Department. (Emphasis added.)

The Plaintiff fails to allege anywhere in its Complaint that it appealed the March 26, 2004 decision. Because Plaintiff failed to avail itself of its administrative appeal rights within the time provided, all three of Plaintiff's claims, or in the alternative, the claims relating to the failure to recognize the tribal constitution and Ms. Burley as tribal Chairperson should, for the reasons set forth earlier, be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). See e.g. Johnson v. District of Columbia, 368 F. Supp. 2d at 36-37; Hildalgo v. Federal Bureau of Investigation, 344 F.3d at 1257-1258.

4. Part II of the Advocado Plus Analysis: Whether Balancing the Interests of the Plaintiff and the Institutional Interests of the U.S. Department of the Interior Weighs in Favor of Requiring Exhaustion of Remedies, Here.

As noted, there are three "sets of circumstances" (three elements of the balancing test) that the Court must take into account when it rules upon a "non-jurisdictional" exhaustion Rule 12 (b)(6) motion. The first element is whether requiring exhaustion would prejudice a later court action because of lack of reasonable or definite timeframes for action by the appellate

administrative body. Plaintiff has not alleged that it would be prejudiced if it brought a later court suit. The second element is whether the administrative agency can afford the requested relief. Certainly, the Plaintiff here does not contend that Interior is not empowered to grant the requested relief. Finally, Plaintiff has not asserted that the administrative appellate entity to which Plaintiff could have appealed the March 26, 2004, BIA decision with respect to the claims concerning the failures to recognize the tribal constitution or Ms. Burley as Tribal Chairperson the Regional Director of BIA's Pacific Region, was "biased" or had made a "prejudgment" on the issues raised by these claims.

In sum, the application of the "balancing" test required as the second part of this Court's analysis of Defendants' FRCP 12(b)(6) motion weighs in favor of the institutional interests of the Department of the Interior, and therefore, a dismissal for failure to exhaust administrative remedies is clearly warranted.

III. PLAINTIFF'S CLAIMS FOR FAILURE TO RECOGNIZE THE TRIBE'S CONSTITUTION AND TO RECOGNIZE THE TRIBE'S FORUM ARE NOT CLAIMS UPON WHICH RELIEF MAY BE GRANTED AND SHOULD BE DISMISSED.

Plaintiff alleges that the government's failures to recognize the tribal constitution and tribal forum constitute violations of Section 476(h) of the Indian Reorganization Act. See First Claim for Relief, ¶ 49 of Complaint. In the March 26, 2004 letter, Superintendent of the BIA's Central California Agency rejected the constitution submitted by Ms. Burley because she had not involved the greater tribal community, but rather had involved only herself and her two daughters. (Exhibit 3 attached to Complaint). Given the March 26, 2004 decision of the Superintendent that the Tribe was not "organized," Michael Olsen, in turn, reasonably concluded

(in his February 11, 2005 letter) that the BIA does not "recognize any tribal government" of the Plaintiff Tribe and, therefore, does not recognize the "tribal dispute resolution process at this time" as a "legitimate tribal forum." (Exhibit 4 attached to Complaint). As noted, all of the Plaintiffs' claims arose from the March 26, 2004 letter.

As stated earlier, a court may dismiss a complaint under Rule 12(b)(6) when the Complaint fails "to state a claim upon which relief can be granted." A complaint may also be dismissed under Rule 12(b)(6) if relief cannot be granted on some set of facts consistent with the allegations in the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). There is no duty on the part of the Department to recognize a governing document without a showing that the will of the membership supports. It has long been recognized that tribal authority derives from the will of the members:

> In point of form it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe.

Felix Cohen's Handbook of Indian Law, 122 (1942). Indeed, the IRA requires that a majority of the tribe adopt the Tribe's governing document. Plaintiff's reliance on the 2004 addition of subsection (h) to Section 16 of the IRA is misplaced and without merit. As already noted, the plain language of subsection (h) (25 U.S.C. § 476(h)) is simply Congressional confirmation of the right of Indian tribes to adopt their own governing documents outside the provisions of that IRA. The subsection does not impose a duty on the part of the Department to recognize or approve governing documents adopted outside the provisions of the IRA, which imposes significant minimum participation requirements on the recognition of valid elections to adopt

tribal constitutions as a prerequisite for Secretary's approval . See 25 U.S.C. § 478(a). But in this case, Plaintiff failed to allege that a majority of the Tribe did so. Instead, the Plaintiff would have this Court find that the Department was arbitrary and capricious or otherwise violated the IRA in failing to recognize the governing document of the Tribe, a document that was supported by a small group – maybe three or four in number – and not by the majority of the members of the "greater tribal community." (Exhibit No. 3 attached to Complaint). Without an allegation that a majority of the members of the greater tribal community approved or adopted the constitution, the Complaint does not support the relief Plaintiff seeks with respect to Defendants' alleged failures to recognize the Tribe's constitution and tribal forum. Accordingly, the Plaintiff's claims should be dismissed for failure to state a claim under Rule 12(b)(6).

A. Section 476(h) of the IRA Does Not Contain an Unequivocal Waiver of Sovereign Immunity.

In its First Claim for Relief, Plaintiff asserts that the Defendants' failure to recognize its claims alleging the tribal constitution and failure to recognize the tribal forum involve the violation of Section 476(h) of the IRA (First Claim for Relief, paras. 48-51). Section 476(h), however, does not contain a private right of action such that Plaintiff can properly allege that Defendants violated the statute. While the APA can provide the waiver of sovereign immunity to allege violations of statutes not containing private rights of action, Plaintiff has not invoked the APA in its First Claim for Relief.[10] For example, Williams v. United States, eta al, No. Civ. S-01-2040 WBS JFM, Order of August 28, 2003 (E.D. Cal) (Copy attached as Attachment G), individual tribal members based their suit, in part, on alleged violations of Section 476(f) and (g)

[10] Plaintiff, has, however invoked the APA in its Second Count, but not in Count I.

of the IRA. The court held that nothing in these statutes reflected the existence of an "unequivocal waiver of sovereign immunity." (Order at 6-7). Accordingly, because Section 476(h) does not embody an unequivocal waiver of sovereign immunity, the First Claim for Relief of Plaintiff's Complaint should be dismissed under 12(b)(6).

B. Section 476(h) of the IRA Does Not Require the Department To Recognize a Tribe As "Organized," Absent Adoption of the Governing Documents By a Majority of the Members of the Greater Tribal Community.

Under the IRA, of which section 476(h) is a part, a tribe becomes organized upon the adoption of governing documents by a majority vote of the adult tribal members. *See* 25 U.S.C. § 476(a)(1) and 478a; 25 C.F.R. § 81.7. Sections 476(a) and (c) lay out fairly detailed procedures and timetables binding on the Secretary in conducting constitutional elections when a tribe seeks to adopt or amend governing documents to be approved by the Secretary. The Plaintiff here asserts its organization is mandated under Section 476(h). This section provides:

> Notwithstanding any other provision of this Act--
>
> (1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
>
> (2) nothing in the Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph 1.

25 U.S.C. § 476 (h). Certainly, Section 476 is silent as to whether the Secretary has the authority to find that a tribe is not "organized," and, therefore, to refuse to recognize a tribal forum, and to refuse to recognize of a tribal constitution (or a tribal resolution) which does not reflect the will of the membership of the greater tribal community – that is, a constitution adopted by the majority of the members of that community. When the language of a statute is not clear, a court

may resort to the legislative history thereof. E.g., Rotec Industries, Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1252 (Fed. Cir. 2000). Where statutory language is subject to more than one interpretation, as is true of Section 476(h), the court may examine the legislative history. United States v. Braxtonbrown-Smith, 278 F.3d 1348, 1352 (D.C. Cir.), cert. denied, 536 U.S. 932 (2002). The very limited legislative history on this section provides that this section:

> clarifies that Indian tribes that accepted the Indian Reorganization Act (IRA), 25 U.S.C. 476 are not required to adopt constitutions pursuant to the IRA and remain free to organize their governing bodies pursuant to organizational governing documents that they determine.

Senate Report 108-49 (May 15, 2003).

We submit that the legislative history of Section 476(h) should be viewed as encompassing Interior's comments on Section 103 of the S. 523[11]. Interior noted that it was unclear what Section 103 added to existing law. Interior stated that the IRA and Oklahoma Indian Welfare Act of 1936 form the statutory "basis for tribal reorganization."[12] These statutes:

> "...guarantee notice, a defined process and minimum participation before a tribe's constitution is adopted. That process and minimum participation provides the Secretary with assurance that those with whom she deals in accordance with the Tribe's constitution represent the majority of tribal members."

(emphasis added.)

The 2003 interpretation of the IRA by Interior quoted above has effectively been held to be reasonable. Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 107 F. 3d 667, 670 (8th Cir. 1997). In Shakopee, the Secretary disapproved the results of the Secretarial

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[11] The language of Section 476(h) is essentially identical to that of Section 103 of S. 523.

[12] See Interior's comments of June 10, 2003 and October 24, 2003 on Section 103 of S. 523 to the House and Senate Committee with jurisdiction over S.523.
Copy attached as Attachment E.

election approving certain amendments to the community's tribal constitution. The Secretary interpreted the IRA as allowing him to reject such election results:

> ...when, as here, the Secretary is unable to determine whether an election has resulted in ratification by a majority of the voting members of the tribe as required by 25 U.S.C. 476(a)(1). We believe that this interpretation is reasonable.

(107 F.3d at 670.)

Although the Tribe initially requested on March 9, 2000, that the Secretary review the draft constitution and hold a Secretarial election under the IRA to approve the draft tribal constitution, (¶ 23 of Complaint), on June 7, 2001, the Tribe withdrew that request. (¶¶ 23 and 30). While we read Section 476(h) as having freed tribes from the procedural requirements of Section 476 (a) and (c), where the Secretary, at the tribe's request, calls and conducts the election, Section 476(h) does not negate the Secretary's authority to find that a tribe is "unorganized" and to refuse to recognize the tribe's constitution, because it does not reflect approval by the majority of the membership of the greater tribal community. The problem for the Plaintiff is that it has yet to identify its membership. Therefore, Mr. Burley's constitution cannot possibly have the requisite support of the membership in order for the BIA to accept it as a legitimate governing document. Section 476(h) cannot be fairly interpreted as requiring the Department to recognize a purported governing document whether it be a tribal constitution or the tribal resolution establishing a forum under such circumstances, as Plaintiff would have this court do. Such a reading of the statute would be contrary to the very nature of the federal-tribal relationship, as well as the canons of statutory construction.

C. **The Federal-Tribal Relationship**.

The will of the tribal membership is fundamental to the relationship between the federal

government and a tribe. Ransom v. Babbitt, 69 F. Supp. 2d 141, 153 (D.D.C. 1999). Congress delegated to the Secretary of the Interior broad authority over "public business relating to . . . Indians." 43 U.S.C. § 1457. In discharging this responsibility, the Secretary has an obligation to ensure that the government with which she deals actually represents the members of the tribe. The Supreme Court articulated that the Department has a responsibility to conduct business only with the lawfully constituted governing bodies, specifically those that represent the tribe. As articulated by the Court:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.

Seminole Nation v. United States, 316 U.S. 286, 295-96 (1942).

Consistent with the Supreme Court's decision in Seminole, the Secretary has a responsibility to determine that he or she is dealing with a government that is representative of the tribe as a whole. This duty to deal only with representative governments has made the majority the yardstick against which legitimacy of tribal governments are measured. See Shakopee, 107 F.3d at 670 (IRA allows Secretary to reject results of election when the Secretary cannot determine whether the results were ratified by a majority of qualified voters); Ransom, 69 F. Supp. 2d at 153 ("By not determining for themselves whether or not the Constitution was valid, [the BIA was] derelict in [its] 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.") This is especially true when the Secretary is faced with two competing factions as is the case here. See Milam v. U.S. Department of the Interior, 10 ILR 3013, 3017, No. 82-3099 (D.D.C. 1982), ("The longstanding controversy that has divided the Indian tribes [sic] into competing factions has cast into doubt the representativeness of the General Council and its officers, and has threatened the integrity of the trust funds over which the BIA has ultimate authority and responsibility.") (citations omitted). The key, therefore, to determining whether a group claiming to be leaders or a document held out as a governing document should be accepted by the Department as such, therefore, is to determine whether the group or the document reflects the will of the membership. Ransom, 69 F. Supp. 2d at 153; Morris v. Watt, 640 F.2d 404 (D.C.Cir. 1981); cf. Goodface, 708 F.2d at 339 (district court must defer to tribal process to resolve election dispute); see also Potts, 533 F.2d at 528 (claims by Business Committee member against BIA dismissed because BIA's actions were supported by a majority of the tribe). The federal-tribal relationship, thus, is founded on the premise that the tribal governing documents and government reflect the will of the tribal membership.

D. Defendants' Position Is Consistent With the Canons of Statutory Construction

In addition to the federal-tribal relationship, canons of statutory construction also support the conclusion that governing documents must be supported by the will of the tribal membership. First, courts presume that Congress knows the law when it passes a statute. Garrett v. United States, 471 U.S. 773, 793-94 (1985); Albernaz v. United States, 450 U.S. 333, 341-42 (1981). Because Congress is presumed to have known the law regarding the federal-tribal relationship

when it passed Section 476(h), Section 476(h) implicitly contains a reflection of that relationship by requiring that a majority of the tribal members support the tribe's governing document.

Second, it is a cardinal rule of statutory construction that a statute is to be read as a whole. Washington State Dep't of Social and Health Services v. Keffler, 537 U.S. 371, 384 n. 7 (2003). This means that sections of the same act are to be read together so as to be consistent. See, e.g., King v. Shaefer, 940 F.2d 1182, 1185 (8th Cir. 1991) *cited in* Keffler, *id.* In order to read Sections 476(a) and 476(h) consistently, Section 476(a)'s requirement of majority support must also apply equally to Section 476(h). Finally, it is a canon of construction that when a specific section and a general section conflict, the specific section controls. Cohn v. Federal Bureau of Prisons, 302 F. Supp. 2d 267, 273 (S.D.N.Y. 2004); Rodriguez v. West, 189 F.3d 1351, 1353 (Fed. Cir. 1999), cert. denied, 529 U.S. 1004 (2000). In this case, because Section 476(a) is more specific than Section 476(h), the Section 476(a) provision requiring majority support controls. Under these rules of construction, the requirement of majority approval contained in Section 476(a), therefore, also applies to Section 476(h).

In sum, in order for the Department to accept a governing document under the IRA, the document must reflect the will of the tribal membership. This is based on the nature of the federal-tribal relationship, as well as the IRA itself. Governing documents, whether adopted under Section 476(a) or recognized under Section 476(h), must, therefore, be adopted by a majority of the tribal members. This well-reasoned interpretation of the Department of the Interior (which is charged with administering the IRA) can properly be utilized by a court for guidance. Olmstead v. L.C. en rel. Zimring, 527 U.S. 581, 597-598 (1991). The Court must uphold the agency's interpretation so long as it is reasonable. Safe Food & Fertilizer v. EPA, 350

F. 3d 1263,1268, 358 U.S. App. D.C. 416 (D.C. Cir. 2003.)

E. Plaintiff Fails to State a Claim Because It Fails To Allege That A Majority Adopted Its Constitution or the Tribal Resolution Establishing a Forum.

Plaintiff asserts that Defendants violated Section 476 (and in turn the APA) by refusing to accept its constitution as a legitimate governing document, and by refusing to recognize its resolution establishing a tribal forum. (Complaint Para. 49 (a) & (b), and 53-59). But nowhere in its Complaint does the Plaintiff assert that the constitution, or the Resolution were adopted by, or even enjoyed the support of, the majority of the tribe. Indeed, this lack of support is exactly why, in March 2004, the Bureau of Indian Affairs ("BIA") refused to recognize the constitution and Ms. Burley as the Chairman. Plaintiff, in its litigation in the Eastern District of California, has asserted it has a potential membership of 250. Yet, it has asserted no evidence of the participation of the 250 in the current tribal membership.

In a letter from Superintendent Dale Risling of the BIA to Ms. Burley, dated March 26, 2004, (Plaintiff's Exhibit 3), the BIA explained that it could not accept the Plaintiff's constitution because it did not reflect the will of the majority of the tribal membership:

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

Id. (Emphasis added). Defendants found, therefore, that the constitution, reflected only the will of Ms. Burley and her two daughters; it did not reflect the will of the membership as a whole. Accordingly, the BIA's decision not to accept it as an organizational document was consistent with case law and the standards of the IRA.

The Plaintiff asserts also that the Defendants' failure to recognize the Tribe's Resolution establishing a tribal forum violates the IRA. Defendant Olsen addressed the issue of the Tribe's forum in a February 11, 2005, letter to Mr. Yakima Dixie, a member of the Tribe who opposes Ms. Burley's control of the Tribe. In his letter, Defendant Olsen concluded that the Tribe did not have a forum that the BIA could recognize because it is not an "organized" Tribe. He wrote:

> In light of the BIA's letter of March 26, 2004, that the Tribe is not an organized tribe, however, the BIA does not recognize any tribal government, and therefore, cannot defer to any tribal dispute resolution process at this time. I understand that a Mr. Troy M. Woodward has held himself out as an Administrative Hearing Officer for the Tribe and purported to conduct a hearing to resolve your complaint against Ms. Burley. Please be advised that the BIA does not recognize Mr. Woodward as a tribal official or his hearing process as a legitimate tribal forum.

(emphasis added) (Plaintiff's Exhibit 4). Plaintiff's claim that Defendants violated the IRA by failing to recognize this forum should be dismissed for the same reason that the tribal constitution claim must fail – until the Tribe as a whole becomes "organized" and adopts its governing documents, there is no forum for the Department to recognize. Both the tribal constitution and tribal forum claims flowed from the March 26, 2004, decision letter. Thus, the conclusions contained in and/or flowing from the March 26th decision letter are neither arbitrary nor capricious. In addition, these conclusions do not constitute an abuse of discretion.

As demonstrated above, nothing in Section 476(h) or its legislative history imposes a duty on the Department to recognize the organization of a tribe, unless it is supported by the will of the greater tribal community. Plaintiff has failed to allege any facts to demonstrate that its constitution ever received the support of the majority of the greater Tribal community. To the contrary, Superintendent Risling's March 26, 2004, letter makes clear that the Department declined to accept the Tribe's constitution as a legitimate governing document precisely because

it did not reflect the will of the greater tribal membership. This, in turn, caused the Department to determine that Ms. Burley could not be recognized as a tribal chairperson and that the Tribe's forum could not be recognized as a legitimate forum. Accordingly, Plaintiff's claims under the IRA should be dismissed for failure to state a claim under Rule 12(b)(6) because the Defendants did not violate the IRA in refusing to recognize the tribal constitution, or tribal forum.

CONCLUSION

For the foregoing reasons, the Defendants request that this case be dismissed for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1). In the alternative, the Defendant request that this case be dismissed for failure to state a claim upon which relief may be granted pursuant to FRCP 12(b)(6)[13].

Dated this 5th day of August, 2005.

Respectfully submitted,

Electronically signed
JAMES M. UPTON
Trial Attorney
General Litigation Section
Environmental & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20044

Telephone: (202) 305-0482
Fax: (202) 305-0506

Attorneys for Defendants

Attachments

[13] A proposed Order is attached.

DOCUMENT NO. 55

U.S. Department of Justice

Environment and Natural Resources Division

JMU:ayr
90-2-4-11585

General Litigation Section
P.O. Box 663
Ben Franklin Station
Washington, DC 20044-0663

Telephone (202) 305-0437
Facsimile (843)448-3022

August 12, 2005

George L. Steele, Esq.
790 E. Colorado Blvd.
Suite 900
Pasadena, California 91101

TELEFAX AND U.S. MAIL

Re: California Valley Miwok Tribe, formerly Sheep Ranch of Mee-Wuk Indians of California v. the United States of America, Gail A. Norton, Secretary of the Interior, and Michael D. Olsen, Acting Assistant Secretary - Indian Affairs. Case No. **1:05CV00739 (D.D.C.)**

Dear Mr. Steele:

This letter is to inform you that the Superintendent of the BIA Central California Agency, Troy Burdick, has today authorized me to inform you that the BIA Central California Agency has agreed to revoke the July 19, 2005, suspension of the current P.L.93-638 contract between BIA and the California Valley Miwok Tribe.

Sincerely,

James M. Upton
Attorney

cc: Sonya A. Smith-Valentine, Esq.
Phillip E. Thompson, Esq.

DOCUMENT NO. 56

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

1. CONTRACT ID CODE | PAGE 1 OF 1 PAGES

2. AMENDMENT/MODIFICATION NO. Fifteen (15)
3. EFFECTIVE DATE 08-19-05
4. REQUISITION/PURCHASE REQ. NO.
5. PROJECT NO. (If applicable)

6. ISSUED BY CODE

Bureau of Indian Affairs
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, California 95814

7. ADMINISTERED BY (If other than Item 6) CODE

SAME AS BLOCK #6

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)

CALIFORNIA VALLEY MIWOK TRIBE
10601 ESCONDIDO PLACE
STOCKTON, CALIFORNIA 95212

(X) 9A. AMENDMENT OF SOLICITATION NO.

9B. DATED (SEE ITEM 11)

X CTJ51T62802

10B. DATED (SEE ITEM 11 01/01/02

CODE FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ___ is extended, ___ is not extended
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:
(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF FOFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment your desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

N/A

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM

CHECK ONE

A. THIS CHANGE ORDER ID ISSUED PURSUANT TO: (Specify authority) THE CHNAGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc) SET FORTH IN ITEM 14, PURSUANT TO THE ATUHORITY OF FAR 43.103(b).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

X D. OTHER (Specify type of modification and authority) Public Law 638

E. IMPORTANT: Contractor X is not __ is required to sign this document and return N/A copy to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Modification No. Fifteen (15) to Contract No. CTJ51T62802 (FY 05/06 Mature Status – Aid to Tribal Government Program) is issued to make the following change(s):

The contract is hereby reinstated only for the purposes of fulfilling the Scope of Work and approved Standards for the Aid to Tribal Government Program as outlined in the original contract signed on 4-10-02.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)

16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
Janice Whipple-DePina, Awarding Official
BIA-2001-LT-000024

15B. CONTRACTOR/OFFEROR
BY _____ (Signature of person authorized to sign)

15C. DATE SIGNED 04/01/04

16B. UNITED STATES OF AMERICA
BY _____ (Signature of Contracting Officer)

16C. DATE SIGNED 8/19/05

NSN 7540-01-152-8070
Previous edition unuseable

STANDARD FORM 30 (REV. 10-83)
Prescribe by GSA FAR (48 CFR) § 53.243

DOCUMENT NO. 57

CALIFORNIA VALLEY MIWOK TRIBE
10601 Escondido Pl. Stockton CA 95212 Bus: (209) 931-4567 Fax: (209) 931-4333
http://www.californiavalleymiwoktribe-nsn.gov

2005-09-30

ENROLLMENT COMMITTEE – OFFICIAL NOTICE

August 30, 2005

Yakima Kenneth Dixie
P.O. Box 41
Sheep Ranch, California 95250

Subject: Official Notice – Disenrollment of Yakima Kenneth Dixie

Mr. Dixie,

This official letter is to inform you that you have been **disenrolled**, in accordance with the Miwok Customs and Traditions and with the California Valley Miwok Tribe's Enrollment Ordinance. An official notice was mailed to you on Wednesday, August 10th, 2005 in which you had 15 days to request a hearing on the proposed disenrollment, as provided in Chapter 8, Section 08.020 Disenrollment Proceedure.

Therefore, your failure to respond to, and /or send any corresponding evidence to the contrary of information on file with the Tribal Government made available to the Enrollment Committee has left the committee with no other alternative than to make this a final determination

As of this date, be it known that you (Yakima Kenneth Dixie) are now **disenrolled** as a member of the California Valley Miwok Tribe.

Certified By

Anjelica Paulk

Anjelica Paulk
Enrollment Committee Officer

Certified by
Anjelica Paulk
Enrollment Committee Officer
California Valley Miwok Tribe
Date AUG 30 2005

DOCUMENT NO. 58

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA,	
Plaintiff,	
v.	**No. 1:05CV00739**
	Judge James Robertson
UNITED STATES OF AMERICA, GALE A. NORTON, Secretary of the Interior,	
and	
JAMES E. CASON, Associate Deputy Secretary of the Interior,[1]	
Defendants.	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES M. UPTON
Trial Attorney
Natural Resources Section
Environmental & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 2004

ATTORNEYS FOR DEFENDANTS

[1] David W. Anderson, formerly the Assistant Secretary - Indian Affairs, is no longer with the Department of the Interior. The position of Assistant Secretary - Indian Affairs is vacant. The duties of the Assistant Secretary have been delegated by the Secretary of the Interior to the Associate Deputy Secretary by Secretarial Order 3259, dated February 8, 2005, as amended on August 11, 2005. James E. Cason, Associate Deputy Secretary is substituted for Mr. Anderson pursuant to Fed. R. Civ. P. 25(d).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA VALLEY MIWOK TRIBE, formerly SHEEP RANCH OF ME-WUK INDIANS OF CALIFORNIA,	
Plaintiff,	
v.	**No. 1:05CV00739**
	Judge James Robertson
UNITED STATES OF AMERICA, GALE A. NORTON, Secretary of the Interior,	
and	
JAMES E. CASON, Associate Deputy Secretary of the Interior,	
Defendants.	

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The Tribe's preliminary injunction motion is yet another reflection of the underlying internal tribal dispute over leadership, membership and organizational issues which constitutes the very essence of this lawsuit. The Tribe's motion really amounts to the latest episode in an ongoing, seemingly interminable, saga of internal tribal turmoil. **Defendants strongly oppose this latest maneuver to avoid confronting the jurisdictional deficiencies in the Tribe's case, and request that this Court first consider Defendants' pending Motion to Dismiss before ruling on the Tribe's motion for preliminary injunction.**

Plaintiff California Valley Miwok Tribe now challenges the decision of Raymond Fry, Tribal Operations Officer, Bureau of Indian Affairs' Central California Agency, contained in the

October 26, 2005 letter from Mr. Fry to Ms. Silvia Burley, refusing to take action on Tribal Resolution No. R-1-09-26-2005. See Attachment A hereto. This resolution authorized the reprogramming of "Tribal Priority Allocation" (TPA) funds in the amount of $3,000 for each of three years (fiscal years 2006, 2007, and 2008) for the purpose of transferring these funds "into a special Bureau [BIA Central California Agency] account for the express purpose of expanding the Realty and Environmental Services [offices of the Agency] in the area of fee-to-trust acquisitions by funding the California Fee-to-Trust Program."[2] The Tribe sent the Resolution to the Central California Agency for the purpose of having BIA approve it.

As noted, this present challenge (as is true of the Tribe's challenge to the March 26, 2004 decision of the Superintendent of BIA's Central California Agency (see Complaint filed April 12, 2005; Memorandum in Support of Defendants' Motion to Dismiss, filed August 5, 2005 at 1-5)), clearly reflects the underlying internal tribal dispute over leadership and organizational issues which constitutes the very core of this suit. Plaintiff's motion unavoidably implicates the Defendants' Motion to Dismiss, which, if granted, would dictate denial of the Plaintiff's motion. Accordingly, Defendants suggest that the Court first rule on their Motion to Dismiss on which briefing has been completed. In the alternative, Defendants request the Court to deny the Tribe's motion for a preliminary injunction and then rule on the government's Motion to Dismiss.

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[2] Under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, Act of January 4, 1975, 88 Stat. 2203, commonly referred to simply as "638" (25 U.S.C. § 450 *et seq.*), tribes can contract with the BIA to perform services that the BIA would otherwise perform pursuant to the Tribe's Tribal Priority Allocation (TPA). The funds in this case were provided to the Tribe by the BIA pursuant to a "638" contract to enable the Tribe to implement the Aid to Tribal Government Program and, thus, were Federal government, not tribal monies.

FACTUAL BACKGROUND[3]

In his February 11, 2005, letter, Michael D. Olsen, the Acting Principal Deputy Assistant Secretary- Indian Affairs, stressed: "The first step in organizing the Tribe is identifying putative tribal members. If you need guidance or assistance, Ray Fry... of the Central California Agency of the BIA can advise you how to go about doing this." This admonition prompted both tribal factions to set up meetings to discuss the organization of the Tribe. See Attachment B hereto (Third Declaration of Raymond Fry, dated January 3, 2006, ¶12).

Beginning in March, 2005, the Central California Agency's acting and permanent Superintendents and Mr. Fry held a series of meetings, attended by Mr. Yakima Dixie, (hereditary chief of the Tribe, first Tribal Chairperson, and spokesperson for "putative tribal members," -- see Motion of Yakima Dixie to Intervene at 2), his tribal consultants, attorneys and prospective tribal members and, on the other hand, representatives of Ms. Silvia Burley. See Attachment B (Id., ¶¶ 13-17).

The principal subjects of discussion at the foregoing meetings were: (1) identification of putative members of the Tribe; (2) organizational approaches/methods that should be considered for use; (3) the concerns of the Yakima Dixie faction about the use of P.L. No. 93-638 contract funds under Ms. Burley's leadership; (4) the use of non-gaming revenues by the Burley faction; and (5) the lack of Ms. Burley's personal involvement in any of these meetings. Id., ¶16.

Tribal Resolution No. R-1-09-26-2005, (dated September 26, 2005), authorized a reprogramming of "638" funds in the amount of $3,000 for each of Fiscal years 2006, 2007 and 2008 for the purpose of joining the fee-to-trust consortium comprised of numerous federally

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[3] The "Factual Background" of this litigation contained in the Memorandum in Support of the Defendants' Motion to Dismiss at 5-9 covers the period from 1998 up through February 11, 2005, and is incorporated herein by reference.

recognized tribes in California. The purpose of the BIA's Pacific Region Fee-to-Trust Program is to facilitate putting tribal fee lands into trust. Id., ¶¶ 20, 21. The Department of the Interior is now reviewing the authority for, and appropriateness of, this program. Id., ¶22.

On September 2, 2005, Mr. Yakima Dixie moved to intervene in this case. Just before that, on August 30, 2005, Ms. Silvia Burley, the leader of the other faction of the Tribe, notified Mr. Dixie that he had been officially disenrolled from the Tribe. Id., ¶11. See also Plaintiff's Opposition to Yakima Dixie's Motion to Intervene, at 7-9.

In a letter of October 26, 2005, addressed to Ms. Silvia Burley, from Raymond Fry, Tribal Operations Officer for the BIA's Central California Agency, Mr. Fry stated that he was returning Tribal Resolution No. R-1-09-26-2005, authorizing a reprogramming of Tribal Priority Allocation (TPA) funds [that is, "638" contract monies provided to the Tribe by BIA to enable the Tribe to implement the Aid to Tribal Government Program and thus government, not tribal, monies], in the amount of $3,000 annually (for Fiscal Years 2006, 2007, and 2008) for use in the BIA's Fee-to-Trust Program without taking any action thereon. See Attachment B (Declaration of Raymond Fry), ¶¶ 23, 24. The stated rationale for the refusal to take action was that " . . . the BIA does not recognize any governing body for the Tribe, nor do we currently have a government-to-government relationship with the California Valley Miwok Tribe . . ." Although Mr. Fry had sent a draft of the letter to Scott Keep, Assistant Solicitor, Tribal Government and Alaska, in the main Office of the Solicitor in Washington, D.C., neither Mr. Fry nor any other official of the BIA's Central California Agency requested Mr. Keep's approval of the draft before it was sent to Ms. Burley. See Attachment D hereto (Declaration of Scott Keep, ¶ 8).

The quoted language was derived from Mr. Fry's reliance on the decision contained in the March 26, 2004, letter from Superintendent Dale Risling to M. Silvia Burley. See