EXHIBIT 2
(Part 4)

Whatever good reasons the BIA may have had for requiring the Tribe to admit new citizens to participate in its government are not sufficient to overcome the longstanding principles of reserving questions of enrollment to the Tribe.

B. Tribal Government

As with matters of enrollment, each tribe is vested with the authority to determine its own form of government. This authority is a quintessential attribute of tribal sovereignty. Cohen's Handbook of Federal Indian Law, § 4.01[2][a] (2005 Edition).

The Department recommended in a letter to the Tribe, that it "operate as a General Council," which would serve as its governing body. Letter from BIA Central California Superintendent Dale Risling to Yakima K. Dixie, Spokesperson for the Sheep Ranch Rancheria (September 24, 1998). In its letter to the Tribe, the Department advised the Tribe that, "[t]he General Council would then be able to proceed with the conduct of business, in a manner consistent with the authorizing resolution." *Id.* The Department previously considered this form sufficient to fulfill the government-to-government relationship. See award of P.L. 93-638 Contract CTJ51T62801 (February 8, 2000).

The determination of whether to adopt a new constitution, and whether to admit new tribal citizens to participate in that effort, must be made by the Tribe in the exercise of its inherent sovereign authority, and not by the Department.

Conclusion

I have reviewed the documents referenced in this letter, as well as the numerous submissions made by Mr. Dixie and Ms. Burley to my office since the issuance of the IBIA Decision in January 2010.

I conclude that there is no need for the BIA to continue its previous efforts to organize the Tribe's government, because it is organized as a General Council, pursuant to the resolution it adopted at the suggestion of the BIA. Consequently, there is no need for the BIA to continue its previous efforts to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area.

Based upon the foregoing principles of tribal sovereignty, and our government-to-government relationship with the Tribe, I am directing that the following actions be undertaken:

1. The BIA will rescind its April 2007 public notice to, "assist the California Valley Miwok Tribe, aka, Sheep Ranch Rancheria (Tribe) in its efforts to organize a formal governmental structure that is acceptable to all members."

2. The BIA will rescind its November 6, 2006 letters to Sylvia Burley and Yakima Dixie stating that the BIA will initiate the reorganization process for the California Valley Miwok Tribe.

3. I am rescinding the February 11, 2005 letter from the Office of the Assistant Secretary to Yakima Dixie stating that the BIA does not recognize any government of the California Valley Miwok Tribe.

4. The BIA will rescind its letter of March 26, 2004 to Sylvia Burley stating that it "does not yet view your tribe to be an 'organized' Indian Tribe," and indicating that Ms. Burley is merely a "person of authority" within the Tribe.

5. Both my office and the BIA will work with the Tribe's existing governing body – its General Council, as established by Resolution # GC-98-01 – to fulfill the government-to-government relationship between the United States and the California Valley Miwok Tribe.

My decision addresses those issues referred to my office by the decision of the IBIA.

Lastly, I recognize that issues related to membership and leadership have been significant sources of contention within the Tribe in recent years. I strongly encourage the Tribe's governing body, the General Council, to resolve these issues through internal processes so as to mitigate the need for future involvement by the Department in these matters. To this point, I understand that Resolution #GC-98-01 provides for proper notice and conduct of meetings of the General Council. I likewise encourage the Tribe's General Council to act in accord with its governing document when settling matters relating to leadership and membership, so as to bring this highly contentious period of the Tribe's history to a close.

A similar letter has been transmitted to Mr. Yakima Dixie, and his legal counsel.

Sincerely,

For Larry Echo Hawk
Assistant Secretary – Indian Affairs

cc: Mike Black, Director of the Bureau of Indian Affairs
Amy Dutschke, BIA Pacific Regional Director
Robert Rosette, Rosette and Associates, PC

DOCUMENT NO. 74

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 22 2010

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95205

Dear Mr. Dixie:

This letter is to inform you of the Department of the Interior's response to the decision of the Interior Board of Indian Appeals (IBIA) in *California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs*, 51 IBIA 103 (January 28, 2010) (Decision).

The Decision stemmed from Sylvia Burley's appeal of the Bureau of Indian Affairs Pacific Regional Director's April 2, 2007 decision to affirm the Central California Agency Superintendent in his efforts to "assist" the Tribe in organizing a tribal government. In the Decision, the IBIA dismissed each of Ms. Burley's three complaints for lack of jurisdiction.[1] The IBIA did, however, refer Ms. Burley's second claim to my office, because it was in the nature of a tribal enrollment dispute. *Decision*, 51 IBIA at 122.

This letter is intended to address the limited issues raised by Ms. Burley's second complaint, as referred to my office by the IBIA: the BIA's involvement in the Tribe's affairs related to government and membership.

Background

This difficult issue is rooted in the unique history of the California Valley Miwok Tribe. A relatively small number of tribal members had been living on less than 1 acre of land in Calaveras County, California known as the Sheep Ranch Rancheria, since 1916. In 1966, the Department was preparing to terminate the Tribe pursuant to the California Rancheria Termination Act, as part of that dark chapter of Federal Indian policy known as the "Termination Era." As part of this effort, the Department had intended to distribute the assets of the Sheep Ranch Rancheria to Ms. Mabel Dixie, as the only eligible person to receive the assets.

The Department never completed the process of terminating the Tribe, and the Tribe never lost its status as a sovereign federally-recognized tribe.

[1] Ms. Burley's complaints were: 1.) The BIA Pacific Regional Director's April 2, 2007 decision violated the Tribe's FY 2007 contract with the BIA under the Indian Self-Determination and Education Assistance Act, or the Regional Director's decision constituted an unlawful reassumption of the contract; 2.) the Tribe is already organized, and the BIA's offer of assistance constitutes an impermissible intrusion into tribal government and membership matters that are reserved exclusively to the Tribe; and, 3.) the Regional Director erred in stating that the Tribe was never terminated and thus is not a "restored" tribe. *Decision*, 51 IBIA at 104.

In 1998, Yakima Dixie, a tribal member acting as the leader of the Tribe, adopted Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace as members of the Tribe. At that time, the Department recognized those five individuals, along with Yakima Dixie's brother Melvin, as members of the Tribe. *Decision*, 51 IBIA at 108.

On September 24, 1998, the Superintendent of the Bureau of Indian Affairs Central California Agency advised Yakima Dixie, then serving as Tribal Chairman, that Yakima Dixie, Melvin Dixie, Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristan Wallace were able to participate in an effort to reorganize under the Indian Reorganization Act. *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d. 197, 198 (D.D.C. 2006). In that same letter, the Superintendent also recommended that the Tribe establish a general council form of government for the organization process, and provided the Tribe with a draft version of a resolution to implement such a form of government. On November 5, 1998, by Resolution # GC-98-01, the Tribe established the General Council. *Id.*

Several months afterwards, in April 1999, Yakima Dixie resigned as Tribal Chairman. On May 8, 1999, the Tribe held a general election, in which Yakima Dixie participated, and elected Sylvia Burley as its new chairperson. The BIA later recognized Sylvia Burley as Chairperson of the California Valley Miwok Tribe. *Id.*

Shortly thereafter, the Tribe developed a draft constitution, and submitted it to the BIA for Secretarial review and approval in May 1999.[2] During this effort, it is apparent that a leadership dispute developed between Ms. Burley and Mr. Dixie.

On March 6, 2000, the Tribe ratified its Constitution and later requested that the BIA conduct a review and hold a secretarial election pursuant to the Indian Reorganization Act. *Id.* at 199. In the interim, on March 7, 2000, the Superintendent issued a letter to Sylvia Burley stating that the BIA "believed the Tribe's General Council to consist of the adult members of the tribe, i.e., Mr. Dixie, Ms. Burley, and Ms. Reznor,[3] and stated that the leadership dispute between Mr. Dixie and Ms. Burley was an internal tribal matter." *Id.*

In February 2004, Ms. Burley submitted a document to the BIA purporting to serve as the Tribe's constitution. The BIA declined to approve the constitution because it believed that Ms. Burley had not involved the entire tribal community in its development and adoption. Letter from Dale Risling, Sr. to Sylvia Burley (March 26, 2004). The BIA noted that there were other Indians in the local area who may have historical ties to the Tribe. In that same letter, the BIA indicated that it did not view the Tribe as an "'organized' Indian Tribe," and that it would only recognize Ms. Burley as a "person of authority" within the Tribe, rather than the Chairperson. Letter from Dale Risling, Sr. to Sylvia Burley (March 26, 2004). The Office of the Assistant Secretary – Indian Affairs affirmed this position in a letter stating:

> [T]he BIA made clear [in its decision of March 26, 2004] that the Federal government did not recognize Ms. Burley as the tribal Chairman. Rather, the BIA would recognize her has a 'person of

[2] The Tribe withdrew its original request for Secretarial review of its constitution in July 1999.

[3] Pursuant to the Tribe's Resolution # GC-98-01, the General Council shall consist of all adult members of the Tribe.

> 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.

Letter from Acting Assistant Secretary – Indian Affairs Michael D. Olsen to Yakima Dixie (February 11, 2005). At that point, the BIA became focused on an effort to organize the Tribe under the Indian Reorganization Act, and to include a number of people who were not officially tribal members in that effort.[4]

In 2005, the BIA suspended a contract with the Tribe, and later asserted that there was no longer a government-to-government relationship between the United States and the Tribe. 424 F. Supp. 2d. at 201.

Sylvia Burley, on behalf of the Tribe, filed a complaint against the United States in the United States District Court for the District of Columbia seeking declaratory relief affirming that it had the authority to organize under its own procedures pursuant to 25 U.S.C. § 476(h), and that its proffered constitution was a valid governing document. *Id.* The United States defended against the claim by arguing that its interpretation of the Indian Reorganization Act was not arbitrary and capricious, and that it had a duty to protect the interests of all tribal members during the organization process – which included those individual Miwok Indians who were eligible for enrollment in the tribe. See *Id.* at 202. The District Court ruled that the Tribe failed to state a claim for which relief could be granted, which was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 202; 515 F.3d. 1262.

On November 6, 2006, the Superintendent of the BIA Central California Agency issued letters to Sylvia Burley and Yakima Dixie, stating, "[i]t is evident, however, that the ongoing leadership dispute is at an impasse and the likelihood of this impasse changing soon seems to be remote. Therefore, we renew our offer to assist the Tribe in the organizational process." Letter from Troy Burdick to Sylvia Burley and Yakima Dixie (November 6, 2006). The Superintendent then stated "[t]he Agency, therefore, will publish notice of a general council meeting of the Tribe to be sponsored by the BIA in the newspapers within the Miwok region. This will initiate the reorganization process." *Id.*

Sylvia Burley appealed this decision to the BIA Pacific Regional Director, who affirmed the Superintendent's decision on April 2, 2007. That same month, the BIA Pacific Regional Office published notice of the reorganizational meeting in a newspaper in the region. Sylvia Burley appealed the Regional Director's decision to the IBIA, which subsequently dismissed her claims, while referring the second claim to my office.

Discussion

[4] The BIA, Yakima Dixie, and Sylvia Burley all agreed that there was a number of additional people who were potentially eligible for membership in the Tribe. See, *California Valley Miwok Tribe v. United States*, 515 F.3d 1267 - 1268 (D.C. Cir. 2008) (noting that the Tribe has admitted it has a *potential* membership of 250) (emphasis added).

I must decide whether to move forward with the BIA's previous efforts to organize the Tribe's government, or to recognize the Tribe's general council form of government – consisting of the adult members of the tribe – as sufficient to fulfill our nation-to-nation relationship.

The Department of the Interior is reluctant to involve itself in these internal tribal matters. To the extent that Department must touch upon these fundamental internal tribal matters, its actions must be limited to upholding its trust responsibility and effectuating the nation-to-nation relationship.

A. Tribal Citizenship

In this instance, the facts clearly establish that the Tribe is a federally recognized tribe which shares a nation-to-nation relationship with the United States. Moreover, the facts also establish that Mr. Dixie adopted Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace as members of the Sheep Ranch Rancheria in 1998.

The California Valley Miwok Tribe, like all other federally recognized tribes, is a distinct political community possessing the power to determine its own membership, and may do so according to written law, custom, intertribal agreement, or treaty with the United States. See, Cohen's Handbook of Federal Indian Law, § 4.01[2][b] (2005 Edition); see also, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978) ("To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it") quoting *Santa Clara Pueblo v. Martinez*, 402 F.Supp. 5, 18-19 (D.N.M. 1975).

I understand the difficult circumstances facing those individual Miwok Indians living in Calaveras County, California and who lack an affiliation with a federally recognized tribe. Affiliation with a tribe lies at the core of Indian identity. This is one reason why the Department is working to improve the process by which tribes can become federally recognized, and have their nation-to-nation relationship with the United States restored.

Nevertheless, the United States cannot compel a sovereign federally recognized tribe to accept individual Indians as tribal citizens to participate in a reorganization effort against the Tribe's will. See *Santa Clara Pueblo*, supra. It is possible that there are other individual Indians in the area surrounding Sheep Ranch who are *eligible* to become members of the Tribe. Mr. Dixie and Ms. Burley, along with the BIA, have previously indicated such. See 515 F.3d at 1267-68 (D.C. Cir. 2008).

There is a significant difference, however, between eligibility for tribal citizenship and actual tribal citizenship. Only those individuals who are actually admitted as citizens of the Tribe are entitled to participate in its government. The proper recourse for those individuals eligible for tribal citizenship, but who are not yet enrolled, is to work through the Tribe's internal process for gaining citizenship.

It is indisputable that Mr. Dixie adopted Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace as citizens of the Tribe. Moreover, it is indisputable that the BIA previously accepted the Tribe's decision to enroll these individuals as tribal citizens, as evidenced by its letter of September 24, 1998.

Whatever good reasons the BIA may have had for requiring the Tribe to admit new citizens to participate in its government are not sufficient to overcome the longstanding principles of reserving questions of enrollment to the Tribe.

B. Tribal Government

As with matters of enrollment, each tribe is vested with the authority to determine its own form of government. This authority is a quintessential attribute of tribal sovereignty. Cohen's Handbook of Federal Indian Law, § 4.01[2][a] (2005 Edition).

The Department recommended in a letter to the Tribe, that it "operate as a General Council," which would serve as its governing body. Letter from BIA Central California Superintendent Dale Risling to Yakima K. Dixie, Spokesperson for the Sheep Ranch Rancheria (September 24, 1998). In its letter to the Tribe, the Department advised the Tribe that, "[t]he General Council would then be able to proceed with the conduct of business, in a manner consistent with the authorizing resolution." *Id.* The Department previously considered this form sufficient to fulfill the government-to-government relationship. See award of P.L. 93-638 Contract CTJ51T62801 (February 8, 2000).

The determination of whether to adopt a new constitution, and whether to admit new tribal citizens to participate in that effort, must be made by the Tribe in the exercise of its inherent sovereign authority, and not by the Department.

Conclusion

I have reviewed the documents referenced in this letter, as well as the numerous submissions made by Mr. Dixie and Ms. Burley to my office since the issuance of the IBIA Decision in January 2010.

I conclude that there is no need for the BIA to continue its previous efforts to organize the Tribe's government, because it is organized as a General Council, pursuant to the resolution it adopted at the suggestion of the BIA. Consequently, there is no need for the BIA to continue its previous efforts to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area.

Based upon the foregoing principles of tribal sovereignty, and our government-to-government relationship with the Tribe, I am directing that the following actions be undertaken:

1. The BIA will rescind its April 2007 public notice to, "assist the California Valley Miwok Tribe, aka, Sheep Ranch Rancheria (Tribe) in its efforts to organize a formal governmental structure that is acceptable to all members."

2. The BIA will rescind its November 6, 2006 letters to Sylvia Burley and Yakima Dixie stating that the BIA will initiate the reorganization process for the California Valley Miwok Tribe.

3. I am rescinding the February 11, 2005 letter from the Office of the Assistant Secretary to Yakima Dixie stating that the BIA does not recognize any government of the California Valley Miwok Tribe.

4. The BIA will rescind its letter of March 26, 2004 to Sylvia Burley stating that it "does not yet view your tribe to be an 'organized' Indian Tribe," and indicating that Ms. Burley is merely a "person of authority" within the Tribe.

5. My office and the BIA will work with the Tribe's existing governing body – its General Council, as established by Resolution # GC-98-01 – to fulfill the government-to-government relationship between the United States and the California Valley Miwok Tribe.

My decision addresses those issues referred to my office by the decision of the IBIA.

Lastly, I recognize that issues related to membership and leadership have been significant sources of contention within the Tribe in recent years. I strongly encourage the Tribe's governing body, the General Council, to resolve these issues through internal processes so as to mitigate the need for future involvement by the Department in these matters. To this point, I understand that Resolution #GC-98-01 provides for proper notice and conduct of meetings of the General Council. I likewise encourage the Tribe's General Council to act in accord with its governing document when settling matters relating to leadership and membership, so as to bring this highly contentious period of the Tribe's history to a close.

A similar letter has been transmitted to Ms. Sylvia Burley, and her legal counsel.

Sincerely,

For Larry Echo Hawk
Assistant Secretary – Indian Affairs

cc: Mike Black, Director of the Bureau of Indian Affairs
Amy Dutschke, BIA Pacific Regional Director
Elizabeth Walker, Walker Law LLC

DOCUMENT NO. 75

From: Wilson Pipestem
To: Tracie_Stevens@ios.doi.gov; Stevens, Tracie; Gidner, Jerold;
Subject: California Valley Miwok Tribe
Date: Thursday, March 25, 2010 2:41:18 AM
Attachments: CA Valley Miwok-Mar 24 2010 letter to Larry EchoHawk.pdf

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Tracie and Jerry,

Attached is a letter following up on our meeting a few weeks ago concerning the California Valley Miwok Tribe. As you'll see, we provide additional information about the Tribe's formal organization, which was accomplished with the assistance of the BIA in 1998.

I'll be forwarding you the attachments in separate emails. Please forward this letter to Mike Smith; I don't have his email address. Please let me know if you have any questions or concerns.

Wilson

CALIFORNIA VALLEY MIWOK TRIBE

1163 E. March Lane, Ste. D, PMB#812, Stockton, CA 95210 Ph: (209) 931.4567 Fax: (209) 931.4333

http://www.californiavalleymiwoktribe-nsn.gov

March 24, 2010

VIA OVERNIGHT DELIVERY

The Honorable Larry EchoHawk
Assistant Secretary for Indian Affairs
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Assistant Secretary EchoHawk:

Thank you for the opportunity to meet with representatives of the Bureau of Indian Affairs ("BIA") a few weeks ago. I write to follow up on several issues that were raised in that meeting, to clarify the position of the California Valley Miwok Tribe ("Tribe"), and to provide additional information that is relevant to your decision. Again, because of our economic hardship, we ask for expedited consideration of this situation.

I. The Tribe is a federally-recognized Tribe

It is an undisputed fact, and the IBIA Order[1] reaffirms, that the California Valley Miwok Tribe is a federally-recognized Tribe that has never been terminated or subsequently restored.[2] As such, the BIA owes the Tribe a trust responsibility, which exists regardless of the Tribe's citizenry population or its form of government.

II. The Tribe has an existing federally-recognized membership consisting of five individuals

At our recent meeting, there seemed to be some confusion with regard to the existing membership of the Tribe. As discussed below, the BIA has acknowledged on several occasions that the membership of the Tribe consists of the following five individuals: Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristan Wallace. Further, the IBIA opinion also

[1] *California Valley Miwok Tribe v. Pacific Regional Director Bureau of Indian Affairs*, Docket No. IBIA 07-100-A (January 28, 2010).

[2] *See* 51 IBIA 105, stating that the Tribe's "legal status as a tribal political entity is undisputed as a matter of Federal law." 74 Fed. Reg. 40, 418, 40, 219.

confirms the recognized membership of the Tribe. These individuals possess the authority, as Tribal members, to make decisions regarding various Tribal matters, including membership and enrollment issues.

On August 5, 1998, Yakima Dixie formally acknowledged the enrollment of the following individuals into the Tribe (then known as the Sheep Ranch Rancheria): Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristan Wallace.[3] Subsequently, in September 1998, Yakima Dixie and Silvia Burley met with local BIA officials to discuss the criteria for membership in the Tribe, and BIA officials stated that Mr. Dixie "had both the authority and broad discretion to decide that issue."[4] Further, Brian Golding, BIA Tribal Operations Officer, characterized the eligible adult members of the Tribe, Mr. Dixie, Silvia Burley and Rashel Reznor, as the "golden members" of the Tribe and that these individuals comprised the General Council and further stated: "[t]hey're the body. They're the tribe. They're the body that has the authority to take actions on behalf of the tribe."[5]

Following this meeting, on September 24, 1998, Dale Risling, then Superintendent of the BIA Central California Agency, provided correspondence to Yakima Dixie stating that Mr. Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristan Wallace were recognized as enrolled members of the Tribe, and therefore "possess[ed] the right to participate in the initial organization of the Tribe."[6] As discussed in more detail below, the Tribe followed Mr. Risling's guidance and organized a formal, resolution form of government, whose actions were acknowledged and ratified by the BIA.

Further, on February 4, 2000, subsequent to its notice of an internal leadership dispute within the Tribe, the BIA provided a letter to Yakima Dixie reaffirming the five aforementioned as the recognized members of the Tribe "enjoying all benefits, rights, and responsibilities of Tribal membership."[7] Following its meeting with Yakima Dixie regarding the Tribe's leadership dispute, on March 7, 2000, the BIA provided a summary of this meeting which reaffirmed the BIA's position that the General Council of the Tribe was comprised of Yakima Dixie, Silvia Burley and Rashel Reznor (the then eligible adult members of the Tribe).[8] In this letter the BIA further explained that as members of the Tribe with no limitations on their enrollment, these individuals possessed full rights of membership.[9]

On February 11, 2005, Principal Deputy and Acting Assistant Secretary for Indian Affairs Michael D. Olsen dismissed an appeal filed by Yakima Dixie challenging the BIA's recognition of the Tribe's membership. In rejecting Mr. Dixie's appeal, Mr. Olsen reaffirmed the membership of the aforementioned individuals in the Tribe and encouraged Mr. Dixie to work with the "other tribal members."[10]

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3 Exhibit A.
4 51 IBIA 107.
5 51 IBIA 108.
6 Exhibit B.
7 Exhibit C, page 2.
8 Exhibit D, pages 1-2.
9 Exhibit D, page 2.
10 Exhibit E.

In the recent IBIA decision, the Judge Linscheid relied upon and cited to factual evidence that Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristan Wallace comprised the existing membership of the Tribe, and the fact that the Tribe may not be necessarily limited to those five individuals was an enrollment issue over which the IBIA lacked jurisdiction.[11]

Taken together and individually, these documents establish this Tribe's membership as comprised of five individuals. The BIA and the IBIA have repeatedly reaffirmed this Tribe's membership and stated that these five individuals possess full rights of membership and authority to take actions on behalf of the Tribe. In fact, there is not a single correspondence that demonstrates the contrary. As a never-terminated, federally-recognized Tribe with an established membership, this Tribe maintains its most basic power and authority to determine questions of its own membership.[12]

III. The Tribe is formally organized and operates under a resolution form of government

As we discussed in our meeting, the California Valley Miwok Tribe is formally organized and operates under a resolution form of government. On November 5, 1998, the Tribe adopted its first resolution that established its existing resolution form of government.[13] In the resolution, the Tribe, then known as the Sheep Ranch Band of Me-Wuk Indians, establishes the General Council, consisting of Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace, to serve as the governing body of the Tribe, and states that this General Council shall serve as the Tribe's governing body until a constitution is formally adopted by the Tribe. The resolution explicitly vests the General Council with the exclusive authority to negotiate contracts and otherwise maintain government-to-government relations with the BIA. Although the Tribe subsequently sought but never implemented the adoption of a formal constitution, these actions in no way negated the establishment of the Tribe's resolution form of government, whose actions were acknowledged and ratified by the BIA following its formation. Furthermore, pursuant to the explicit terms of this resolution, the General Council is the governing body of the Tribe and is authorized to maintain government-to-government relations with the United States until such time that a constitution is formally adopted by the Tribe or unless the resolution is rescinded through subsequent resolution of the General Council. Because the Tribe has neither adopted a constitution nor rescinded its organizing resolution, the General Council remains the governing body of the Tribe and the Tribe's resolution form of government remains intact.

The BIA should be familiar with this organizing resolution, because it was drafted by BIA officials. In doing so, Dale Risling, Superintendent of the BIA Central California Agency, stated that the purpose of the resolution "is to authorize the Bureau to charge expenses related to the organization of the Tribe to the Tribe's FY 1998 Tribal Priority Allocation Funding."[14]

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[11] 51 IBIA 120; 122. Those facts within the IBIA opinion which are cited and used to support the IBIA judge's decision regarding the existing Tribal members are found at pages 107-110 and 112.

[12] *See e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 v. 32 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence"); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995) (noting that "[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues").

[13] Exhibit F.

[14] Exhibit B, page 4.

Therefore, in drafting this resolution, the BIA itself envisioned the resolution as serving the purpose of establishing a government-to-government relationship between the Tribe and the U.S. government.

Finally, with regard to the issue of formal organization, there is no authority, federal or otherwise, which holds that a tribe can only formally organize itself through the adoption of an IRA constitution. In fact, the United States government has defined formally organized to mean "the adoption by all members of the tribe of a formal governing document which describes the full manner in which the tribe governs itself and includes a full definition of who its members are."[15] Therefore, because the resolution establishing the Tribe's resolution form of government clearly meets this standard, the Tribe's governing body is and has been formally organized since at least November 5, 1998.

IV. Requested Action

The Tribe respectfully requests that the BIA restore its government-to-government relationship with the Tribe and restore its desperately-needed federal benefits. The California Gaming Control Commission ("CGCC"), the State government agency that is withholding the Tribe's funds, based its decision to cease Tribal distributions "on information recently received from the Bureau of Indian Affairs regarding the fact that the California Valley Miwok Tribe does not have a recognized tribal government, nor a recognized tribal chairperson . . . ."[16] Therefore, the Tribe also requests that you immediately communicate to the CGCC that the five individuals are the Tribe's members and the Tribe's resolution form of government is adequate for purposes of government operations. For your convenience in communicating with the CGCC, I have provided a draft letter which addresses the pertinent issues.[17] Thank you for your consideration in this matter.

Sincerely,

Silvia Burley
Chairperson

cc: Tracie Stevens, Senior Advisor to the Assistant Secretary
Jerry Gidner, Director for the BIA
Mike Smith, Deputy Director, Field Operations

15 Exhibit G.
16 Exhibit H
17 Exhibit I

DOCUMENT NO. 76

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

APR 01 2011

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95205

Dear Mr. Dixie:

On December 22, 2010, my office issued a letter setting out the Department of the Interior's decision on a question respecting the composition of the California Valley Miwok Tribe. The question had been referred to my office by the Interior Board of Indian Appeals. On January 24, 2011, you filed suit in Federal district court seeking to have the Department's decision vacated.

Subsequent actions by the parties involved in this dispute have led me to reconsider the matters addressed in the December 22, 2010, decision letter. By means of today's letter, the December 22 decision is set aside.

I believe that the longstanding problems within the Tribe need prompt resolution, and I remain committed to the timely issuance of my reconsidered decision. I am mindful, however, that additional briefing may inform my analysis of the problems presented in this dispute. To that end, I will issue a briefing schedule in the coming week, requesting submissions from you and from Ms. Silvia Burley on specific questions of fact and law relevant to the referred question.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs

cc: Ms. Silvia Burley
10601 Escondido Place
Stockton, California 95212

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Sacramento, CA 95814

DOCUMENT NO. 77

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

APR 08 2011

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95205

Ms. Silvia Burley
10601 Escondido Place
Stockton, California 95212

Dear Mr. Dixie and Ms. Burley:

The Bureau of Indian Affairs (BIA) and the California Valley Miwok Tribe (Tribe) have worked for years to reach a shared understanding of the structure and composition of the Tribe, its government, and its relationship with the Federal government. Disputes within the Tribe, and between the Tribal factions and the BIA, have led to several administrative appeals as well as federal court litigation. On January 28, 2010, the Interior Board of Indian Appeals (IBIA) issued a decision respecting one of the administrative appeals. The IBIA remanded to my office one of the issues raised in that appeal, as being an enrollment question and thus beyond the IBIA's jurisdiction. On December 22, 2010, my office issued a letter attempting to set out a clear and final answer to the referred question.

After the December 22, 2010, decision, a number of issues were raised in litigation that challenged that decision; therefore, I have withdrawn if for reconsideration I would like to ensure that I consider all issues in my reconsideration of this matter. To ensure full and fair review, I am asking the parties to brief the issues. Parties may submit any legal arguments they wish for me to consider. In addition, the parties should consider addressing the following issues.

1. It is undisputed that the Federal government currently recognizes five people as members of the tribe. The September 24, 1998, letter from Superintendent Risling to Yakima Dixie, mentioned the development of enrollment criteria that "will be used to identify other persons eligible to participate in the initial organization of the Tribe" (emphasis added). Please brief your views on whether the Secretary has an obligation to ensure that potential tribal members participate in an election to organize the Tribe.

2. It is undisputed that the Tribe is federally recognized, being included on the Department's list of recognized tribes. The Tribal Resolution of November 5, 1998, signed by Ms. Burley and Mr. Dixie, said: "The Tribe, on June 12, 1935, voted to accept the terms of the Indian Reorganization Act . . . but never formally organized pursuant to federal statute, and now desires to pursue the formal organization of the Tribe." Please explain your position regarding the status of the Tribe's organization and the Federal Governments' duty to assist the Tribe in organizing.

3. It is undisputed that the position taken in the December 22 decision letter represented a change in direction regarding the Bureau's relations with the Tribe. Courts have found the BIA's past actions to be permissible under the APA, but did not state that those actions were mandatory under federal Indian law. Some statements in court opinions, however, must be read as statements of law with which my decisions must comply. In particular, the D.C. Circuit stated that (paraphrased for clarity): "It cannot be that the Secretary has no role in determining whether a tribe has properly organized itself to qualify for the federal benefits provided in the [Indian Reorganization] Act and elsewhere." 515 F.3d 1262, 1267 (D.C. Cir. 2008). Please brief your views on what the Secretary's role is in "determining whether a tribe has properly organized itself."

To ensure the promptness of my reconsidered decision, please provide your submission so that it is received by the Department no later than 9:00 am, eastern daylight savings time, Tuesday, May 3, 2011.

My office will give your submissions careful and objective consideration. No outcome in this matter will resolve all the disputes between the parties, but my duty under the APA is to reach, and explain, a carefully-considered decision that is not "arbitrary and capricious," and is "in accordance with law" (5 U.S.C. § 706(2)(a)).

Please limit your submissions to no more than 30 pages. We prefer, for timeliness and convenience, that you submit your response documents in pdf format via email to Mr. Brian Newland, one of my advisors, at bryan_newland@ios.doi.gov, and Mr. Jim Porter, an attorney in Solicitor's Office, at james.porter@sol.doi.gov. Please also transmit your response documents to each other at the same time you send them to this office.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs

cc: Robert A. Rosette, Esq.
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DOCUMENT NO. 78

From: Elizabeth T. Walker
To: Porter, James; Keep, Scott;
Subject: Transcript of Californina Hearing CVMT
Date: Friday, April 15, 2011 2:29:36 PM
Attachments: Elizabeth T. Walker (liz@liz-walker.com).vcf
2011-04-06 Wed - Dept 62 - STYN California Valley Miwok v California Gambling Control.pdf

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Jim and Scott, here is the transcript from the hearing in California concerning the revenue sharing funds for the CVMT. Go to page 10 and page 17, you will see that Corrales Burley's attorney states that he knows that the decision is to assist with the litigation, and the decision will come out in June. He states that certainty again on page 17. Corrales states he got this information from Attorney's at the Department. We know after the decision of Dec 22 there would be conversations with the BIA, between attorneys for the Department. But with regards to details about a decision to reconsider we object to conversations that provide the opportunity for Burley to have an advantage in terms of preparing their response. Liz

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"A firm dedicated to creating Visionary Integrity"

DOCUMENT NO. 79

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 3 1 2011

Ms. Silvia Burley
10601 N. Escondido Place
Stockton, California 95212

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95295

Dear Ms. Burley and Mr. Dixie:

Introduction and Decision

On December 22, 2010, I sent you a letter setting out my decision in response to a question referred to me by the Interior Board of Indian Appeals (IBIA) in *California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs,* 51 IBIA 103 (January 28, 2010) (IBIA decision). I determined that there was "no need for the BIA to continue its previous efforts to organize the Tribe's government, because it is organized as a General Council, pursuant to the [1998 General Council Resolution] it adopted at the suggestion of the BIA." I concluded further that there was "no need for the BIA to continue its previous efforts to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area."

I issued my December decision without providing the parties a formal opportunity to brief me on the facts and issues as they saw them. As a result of subsequent actions by both parties, I determined to withdraw the December decision, and, on April 8, 2011, I requested briefing from the parties. Counsel for the parties provided detailed responses with numerous exhibits. I appreciate the time and effort that went into providing these responses. I have considered them carefully.

Based on the litigation records in the prior Federal court actions in both California and Washington, D.C., the proceedings before the Department's Interior Board of Indian Appeals, and the material submitted in response to my April 8 letter, I now find the following:

(1) The California Valley Miwok Tribe (CVMT) is a federally recognized tribe, and has been continuously recognized by the United States since at least 1916;

(2) At the present date, the citizenship of the CVMT consists solely of Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace;

(3) The CVMT today operates under a General Council form of government, pursuant to Resolution #CG-98-01, which the CVMT passed in 1998, facilitated by representatives of the Bureau of Indian Affairs (Bureau or BIA)(1998 General Council Resolution);

(4) Pursuant to the 1998 General Council Resolution, the CVMT's General Council is vested with the governmental authority of the Tribe, and may conduct the full range of government-to-government relations with the United States;

(5) Although this current General Council form of government does not render CVMT an "organized" tribe under the Indian Reorganization Act (IRA) (*see e.g.*, 25 U.S.C. 476(a) and (d)), as a federally recognized tribe it is not required "to organize" in accord with the procedures of the IRA (25 U.S.C. § 476(h));

(6) Under the IRA, as amended, it is impermissible for the Federal government to treat tribes not "organized" under the IRA differently from those "organized" under the IRA (25 U.S.C. §§ 476(f)-(h)); and

(7) As discussed in more detail below, with respect to finding (6), on this particular legal point, I specifically diverge with a key underlying rationale of past decisions by Department of the Interior (Department) officials dealing with CVMT matters, apparently beginning around 2004, and decide to pursue a different policy direction.[1] Under the circumstances of this case, it is inappropriate to invoke the Secretary's broad authority to manage "all Indian affairs and [] all matters arising out of Indian relations," 25 U.S.C. § 2, or any other broad-based authority, to justify interfering with the CVMT's internal governance. Such interference would run counter to the bedrock Federal Indian law principles of tribal sovereignty and tribal self-government, according to which the tribe, as a distinct political entity, may "manag[e] its own affairs and govern[] itself," *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1832); and would conflict with this Administration's clear commitment to protect and honor tribal sovereignty.

Obviously, the December 2010 decision, and today's reaffirmation of that decision, mark a 180-degree change of course from positions defended by this Department in administrative and judicial proceedings over the past seven years. This change is driven by a straightforward correction in the Department's understanding of the California Valley Miwok Tribe's citizenship and a different policy perspective on the Department's legal obligations in light of those facts.

As discussed below, the BIA clearly understood in 1998 that the acknowledged CVMT citizens had the right to exercise the Tribe's inherent sovereign power in a manner they chose. It is unfortunate that soon after the 1998 General Council Resolution was enacted, an intra-tribal leadership dispute erupted, and both sides of the dispute found, at various points in time in the intervening years, that it served their respective interests to raise the theory that the BIA had a duty to protect the rights of approximately 250 "potential citizens" of the Tribe. A focus on that theory has shaped the BIA's and the Department's position on the citizenship question ever

[1] I recognize that the D.C. Circuit Court of Appeals' 2008 opinion upholding prior Department efforts to organize the CVMT pursuant to the IRA afforded broad deference to the Department's prior decisions and interpretations of the law. *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1264-68 (D.C. Cir. 2008).

since. By contrast, today's decision clears away the misconceptions that these individuals have inchoate citizenship rights that the Secretary has a duty to protect. They do not. The Tribe is not comprised of both citizens and potential citizens. Rather, the five acknowledged citizens are the only citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). I believe this change in the Department's position is the most suitable means of resolving this decade-long dispute and is in accord with principles of administrative law. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Background

This decision is necessitated by a long and complex tribal leadership dispute that resulted in extensive administrative and judicial litigation. Much of the factual background is set out in the prior decisions, so it is not necessary to repeat or even summarize all of it here.

The history of this Tribe, and the record of this case to date, demonstrates the following:

- The CVMT is a federally recognized tribe. 74 Fed. Reg. 40,218, 40,219 (Aug. 11, 2009);
- In 1916, the United States purchased approximately 0.92 acres in Calaveras County, California, for the benefit of 12 named Indians living on the Sheepranch Rancheria (now Sheep Ranch)(Rancheria) (51 IBIA at 106);
- The Indian Agent, who in 1915 recommended the purchase of the 0.92 acres, described the group of 12 named individuals as "the remnant of once quite a large band of Indians in former years living in and near the old decaying mining town known and designated on the map as 'Sheepranch.'" *Id.*;
- The record shows only one adult Indian lived on the Rancheria in 1935, a Jeff Davis, who voted "in favor of the IRA" *Id.*;
- In 1966, the record shows only one adult Indian, Mabel Hodge Dixie, Yakima Dixie's mother, lived on the Rancheria, when the BIA crafted a plan for distribution of tribal assets pursuant to the California Rancheria Act of 1958, Pub. L. No. 85-671, 72 Stat. 619, *as amended by* Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390;
- Mabel Hodge Dixie was to be the sole distributee of tribal assets under the 1966 Rancheria distribution plan;
- While the Bureau initiated the process to terminate the Tribe, it never declared the Tribe terminated and has never treated the Tribe as if it had been terminated;
- In 1994, Yakima Dixie wrote the BIA asking for assistance with home repairs and describing himself as "the only descendant and recognized . . . member of the Tribe." (51 IBIA at 107);
- At some point during the 1990s, Silvia Burley "contacted BIA for information related to her Indian heritage, which BIA provided, and by 1998—at BIA's suggestion—Burley had contacted Yakima[]" Dixie (as the IBIA has noted, "it appears that Burley may trace her ancestry to a 'Jeff Davis' who was listed on the 1913 census. . . .") 51 IBIA at 107, including footnote 7;
- On August 5, 1998, Mr. Dixie "signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolling Burley's two daughters and her granddaughter." *Id.*;

- The Tribe was not organized pursuant to the IRA prior to 1998 and did not have organic documents setting out its form of government or criteria for tribal citizenship;
- In September of 1998, BIA staff met with Mr. Dixie and Ms. Burley "to discuss organizing the Tribe," and on September 24, 1998 sent follow-up correspondence recommending that, "given the small size of the Tribe, we recommend that the Tribe operate as a General Council," which could elect or appoint a chairperson and conduct business. *Id.* at 108;
- On November 5, 1998, Mr. Dixie and Ms. Burley signed a resolution establishing a General Council, which consisted of all adult citizens of the Tribe, to serve as the governing body of the Tribe. *Id.* at 109;
- Less than five months later, leadership disputes arose between Mr. Dixie and Ms. Burley—and those conflicts have continued to the present day;[2]
- Initially the BIA recognized Mr. Dixie as Chairman, but later recognized Ms. Burley as Chairperson based primarily upon the April 1999 General Council action appointing Ms. Burley as Chairperson - an action concurred in by Mr. Dixie. *Id.*;
- Mr. Dixie later challenged Ms. Burley's 1999 appointment;
- In 2002, Ms. Burley filed suit in the name of the Tribe alleging that the Department had breached its trust responsibility to the Tribe by distributing the assets of the Rancheria to a single individual, Mabel Dixie, when the Tribe had a potential citizenship of "nearly 250 people[.]" *See* Complaint for Injunctive and Declaratory Relief at 1, *Cal. Valley Miwok Tribe v. United States*, No. 02-0912 (E.D. Cal. Apr. 29, 2002);
- In March, 2004, the BIA Superintendent rejected a proposed constitution from Ms. Burley because she had not involved the "whole tribal community" in the governmental organization process;
- On February 11, 2005, the Acting Assistant Secretary – Indian Affairs issued a decision on Mr. Dixie's 1999 appeal, ruling that the appeal of the Bureau's 1999 decision to recognize Ms. Burley as Chairperson was moot and that the BIA would recognize Ms. Burley only as a person of authority within the Tribe;
- Ms. Burley sued in D.C. District Court challenging the February 2005 decision;
- After the District Court dismissed her challenge, *Cal. Valley Miwok Tribe v. United States*, 424 F.Supp. 2d 197 (D.D.C. 2006), the D. C. Circuit Court of Appeals affirmed, *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008);
- In January 2010, the IBIA rejected Ms. Burley's appeal objecting to, among other matters, the Superintendent's decision to continue to assist the Tribe in organizing its government according to the IRA because it viewed the matter as "effectively and functionally a tribal enrollment dispute," and then referred the matter to me on jurisdictional grounds.

In response to the Board's referral, I issued my December 22, 2010 decision letter. I intended that decision to resolve the citizenship question referred to me by the IBIA by finding that the current Tribe's citizenship consisted of the five acknowledged citizens noted above and recognizing the Tribe's General Council as a tribal government with which the United States may

[2] I note that the Department repeatedly has offered to assist in mediating this dispute—to no avail. The amount of time and resources focused on these disputes reflects poorly on all the parties, and they must be mindful that continuing this imprudent dispute risks potential adverse consequences well beyond the Tribe and its citizens.

conduct government-to-government relations. Almost immediately, Mr. Dixie filed suit in the D.C. District Court challenging that decision. Recognizing the complex and fundamental nature of the underlying issues, and because I desired the benefit of submissions from the interested parties, I set aside that decision and requested formal briefing.

The submissions by the parties in response to my request were thorough. I have carefully reviewed the submissions and find they were most helpful in enhancing my understanding of the parties' positions.

Analysis

It is clear to me that the heart of this matter is a misapprehension about the nature and extent of the Secretary's role, if any, in determining tribal citizenship of a very small, uniquely situated tribe. Related to this issue is the Tribe's current reluctance to "organize" itself under the IRA, choosing instead to avail itself of the provisions in 25 U.S.C. § 476(h), first enacted in 2004, which recognizes the inherent sovereign powers of tribes "to adopt governing documents under procedures other than those specified . . . [in the IRA.]"

Applicability of General Legal Authorities of the Secretary of the Interior in Indian Affairs

The D.C. Circuit viewed § 476(h) as ambiguous, and then granted *Chevron* deference to the then-Secretary's interpretation of that provision. 513 F.3d at 1266-68. The D.C Circuit put great weight on the Secretary's broad authority over Indian affairs under 25 U.S.C. § 2, writing that "[w]e have previously held that this extensive grant of authority gives the Secretary broad power to carry out the federal government's unique responsibilities with respect to Indians." *Id.* at 1267, *citations omitted.* In addition to § 2, 25 U.S.C. §§ 9, and 13, and 43 U.S.C. § 1457, are often cited as the main statutory bases for the Department's general authority in Indian affairs. *Cal. Valley Miwok Tribe v. United States*, 424 F.Supp. 2d 197, 201 (D.D.C. 2006); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.03[2] at 405 (2005 ed.) [hereinafter COHEN]. The D.C. Circuit also cited two cases involving separate bands of the Seminole Nation for the general propositions that the United States has an "obligation" "to promote a tribe's political integrity" as well as "the responsibility to ensure that [a tribe's] representatives, with whom [it] must conduct government-to-government relations, are valid representatives of the [tribe] *as a whole.*" 513 F.3d at 1267(*emphasis added by the Court), citing, Seminole Nation v. United States,* 313 U.S. 286, 296 (1942), and *Seminole Nation of Oklahoma v. Norton*, 223 F.Supp. 2d 122, 140 (D.D.C. 2002).

In my view, prior Department officials misapprehended their responsibility when they: (1) took their focus off the fact that the CVMT was comprised a five individuals, and (2) mistakenly viewed the Federal government as having particular duties relating to individuals who were not citizens of the tribe. I decline to invoke the broad legal authorities cited above to further intrude into internal tribal citizenship and governance issues in the instant case. In making this decision, I also am mindful of the Supreme Court's recent guidance concerning: (1) the importance of identifying "specific rights creating or duty-imposing statutory or regulatory prescriptions" before concluding the United States is obligated to act in a particular manner in Indian affairs,

and (2) the central role Federal policy plays in administering Indian affairs. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24, 2326-27 (June 13, 2011).

Application of Specific Legal Authorities

In my view, prior Department officials (from 2003 to the present) fundamentally misunderstood the role of the Federal government in addressing the CVMT citizenship and governance issues: (1) they misunderstood and ignored the legal authority of CVMT to govern itself through its General Council structure without being compelled to "organize" under the IRA; and (2) they confused the Federal government's obligations to *possible* tribal citizens with those owed to *actual* tribal citizens.

The February 11, 2005, decision of Acting Assistant Secretary – Indian Affairs Michael D. Olsen stated that, until the Tribe organized itself, the Department could not recognize anyone as the Tribe's Chairperson, and that the "first step in organizing the Tribe is identifying the putative tribal members." (2005 Decision at 1-2, *discussed in* 51 IBIA at 112). The D.C. Circuit, after citing the Secretary's broad authority under 25 U.S.C. § 2, endorsed this approach as a reasonable interpretation of 25 U.S.C. § 476(h) because "[t]he exercise of this authority is especially vital when, as is the case here, the government is determining whether a tribe is organized, and the receipt of significant federal benefits turns on the decision." 515 F.3d at 1267. As I have stated above, I reject as contrary to § 476(h) the notions that a tribe can be compelled to "organize" under the IRA and that a tribe not so organized can have "significant federal benefits" withheld from it. Either would be a clear violation of 25 U.S.C. § 476(f).

The CVMT currently consists of the five citizens identified above. Under the current facts, the Department does not have a legitimate role in attempting to force the Tribe to expand its citizenship.[3] Department officials previously referred to "the importance of participation of a greater tribal community in determining citizenship criteria." (Superintendent's 2004 Decision at 3, *discussed in* 51 IBIA at 111-112). The D.C. Circuit, referring to the Tribe's governance structure that arguably would maintain a limited citizenship, stated "[t]his antimajoritarian gambit deserves no stamp of approval from the Secretary." 515 F.3d at 1267. However, I know of no *specific statutory or regulatory authority* that warrants such intrusion into a federally recognized tribe's internal affairs. (As to the more general sources of authority cited in support of Federal oversight of tribal matters, I have explained my views on the proper scope of those authorities above). "Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57, 72 n.32 (1978); *United States v. Wheeler*, 435 U.S., 313, 322 n.18 (1978); COHEN § 3.03[3] at 176, *citations omitted*. "[I]f the issue for which the determination is important involves internal affairs of the Indian nation, it is more consistent with principles of tribal sovereignty to defer to that nation's definition." *Id.* at 180. As discussed in the previous paragraph, I also believe that, based on an incorrect interpretation of § 476(h), the previous Administration's views on the IRA's application to this case were erroneous and led to an improper focus on expanding the size of the Tribe and altering the form of its government.

[3] While I believe that it is *equitably* appropriate for the CVMT General Council to reach out to potential citizens of the Tribe, I do not believe it is proper, *as a matter of law*, for the Federal government to attempt to impose such a requirement on a federally recognized tribe.

Mr. Dixie invokes the *Alan-Wilson* IBIA cases to support the theory that the Secretary has a duty to ensure that the potential citizens are involved in the organization of an unorganized, but federally recognized tribe.[4] 30 IBIA 241. But, in fact, *Alan-Wilson* works directly against Mr. Dixie's position, and this distinction provides additional support for my decision. Unlike CVMT, the Cloverdale Rancheria was a federally recognized tribe terminated under the California Rancheria Act. It was later restored pursuant to the *Tillie Hardwick* litigation and settlement, which required the Rancheria to organize its tribal government under the IRA.

30 IBIA 241, 248.

My review of the history of the CVMT compels the conclusion set out in the December decision and reaffirmed here: the CVMT has been continuously recognized, and its political relationship with the Federal government has not been terminated. The five acknowledged citizens are the only current citizens of the Tribe, and the Tribe's General Council is authorized to exercise the Tribe's governmental authority. In this case, again, the factual record is clear: there are only five citizens of CVMT. The Federal government is under no duty or obligation to "potential citizens" of the CVMT. Those potential citizens, if they so desire, should take up their cause with the CVMT General Council directly.

Given both parties' acknowledgment of the existence of other individuals who could potentially become tribal citizens, the Department's prior positions are understandable. The Department endeavored to engage both parties in a resolution of the tribal citizenship issues, including offers of assistance from the Department's Office of Collaborative Action and Dispute Resolution (CADR) – to no avail. By the time this matter was referred to me by the IBIA in January 2010, serious doubts existed about the likelihood of the parties ever being able to work together to resolve the issues involving the citizenship and governance of the Tribe.

Absent an express commitment from the parties to formally define tribal citizenship criteria, any further effort by the Department to do so would result in an unwarranted intrusion into the internal affairs of the Tribe. Moreover, given the unfortunate history of this case, most likely such efforts would not succeed in accomplishing this objective. While there may be rare circumstances in which such an intrusion would be warranted in order for the Secretary to discharge specific responsibilities, no such specific law or circumstances exist here.

Accordingly, unless asked by the CVMT General Council, the Department will make no further efforts to assist the Tribe to organize and define its citizenship. I accept the Resolution #GC-98-01 as the interim governing document of the Tribe, and as the basis for resuming government-to-government relations between the United States and the Tribe.

While I appreciate that the General Council Resolution may prove lacking as to certain aspects of tribal governance, I also recognize that this tribe is very small and uniquely situated. Many tribes have been able to govern effectively with limited or no written governing documents.

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[4] Mr. Dixie also invokes the case of *Seminole Nation of Oklahoma* v. *Norton*, 223 F.Supp.2d 122 (D.D.C. 2002) in support of his position. *Seminole Nation* involved a dispute where a particular faction of the Tribe asserted rights to tribal citizenship under an 1866 treaty. *Id.* at 138. There is no overriding treaty or congressional enactment governing tribal citizenship at issue in this dispute.

Conclusion

Based upon the foregoing analysis, I re-affirm the following:

- CVMT is a federally recognized tribe whose entire citizenship, as of this date, consists of the five acknowledged citizens;
- The 1998 Resolution established a General Council form of government, comprised of all the adult citizens of the Tribe, with whom the Department may conduct government-to-government relations;
- The Department shall respect the validly enacted resolutions of the General Council; and
- Only upon a request from the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents.

In my December 2010 decision letter I rescinded several earlier decisions. I am persuaded that such attempts to rewrite history are fraught with the risk of unintended consequences. Past actions, undertaken in good faith and in reliance on the authority of prior Agency decisions, should not be called into question by today's determination that those prior Agency decisions were erroneous. Thus, today's decision shall apply prospectively.

This decision is final for the Department and effective immediately, but implementation shall be stayed pending resolution of the litigation in the District Court for the District of Columbia, *California Valley Miwok Tribe v. Salazar*, C.A. No. 1:11-cv-00160-RWR (filed 03/16/11).

Finally, I strongly encourage the parties to work within the Tribe's existing government structure to resolve this longstanding dispute and bring this contentious period in the Tribe's history to a close.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs

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DOCUMENT NO. 80

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 06-5023

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
DIRK KEMPTHORNE, Secretary of the Interior; and
MICHAEL D. OLSEN, Principal Deputy, Acting Assistant
Secretary-Indian Affairs,

Defendants-Appellees.

On appeal from the United States District Court for the District of Columbia,
No. 05-CV-739 (Honorable James Robertson, Jr., Judge)

BRIEF AND SUPPLEMENTAL APPENDIX OF APPELLEES

OF COUNSEL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici – All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant California Valley Miwok Tribe.

B. Ruling under Review – References to the rulings at issue appear in the Brief for Plaintiff-Appellant. The district court's Order of March 31, 2006 is published at 424 F. Supp. 2d 197 (D.D.C. 2006).

C. Related Cases – The case on review has not previously been before this Court or any other court. United States is not aware of any related cases currently pending in this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

*Authorities upon which we chiefly rely are marked with asterisks

FEDERAL STATUTES

FEDERAL REGULATIONS

RULES OF PROCEDURE

GLOSSARY

BIA	Bureau of Indian Affairs
IRA	Indian Reorganization Act
Tribe	California Valley Miwok Tribe

JURISDICTION

A. District court – The district court had jurisdiction under 28 U.S.C. § 1331 (federal question).

B. Court of Appeals – The district court entered final judgment on all claims on March 30, 2006. Dkt. 37; A211. On April 10, 2006, the United States filed a timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Dkt. 38. The district court granted the motion on May 2, 2006. Dkt. 41; A212. Plaintiff-Appellant timely filed its notice of appeal on June 16, 2006. Dkt. 42; A213. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are included in the attached addendum.

ISSUES ON APPEAL

Silvia Burley and her two daughters, who purport to be the elected government (the "Burley Government") of the California Valley Miwok Tribe (the "Tribe")[1] appeal the district court's judgment dismissing its claims that the United States, the Secretary of the Interior, and the Assistant Secretary-Indian Affairs

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[1] Throughout this brief we refer to Plaintiff-Appellant as the "Burley Government" when necessary to distinguish it from the larger entity – the Tribe – that the Burley Government purports to represent.

(collectively the "United States") violated (1) the Administrative Procedure Act ("APA"), and (2) 25 U.S.C. § 476(h), a provision of the Indian Reorganization Act ("IRA")[2], by declining to recognize the Tribe as "organized" under the IRA, declining to recognize Silvia Burley as chairperson of the Tribe, and declining to accept the tribal constitution and other governing documents proffered by the Burley Government to the Bureau of Indian Affairs ("BIA"). The issues on appeal are:

I. Whether, under 25 U.S.C. § 476(h), BIA was required to recognize the Tribe as organized and recognize the Burley Government and its governing documents, where the vast majority of the Tribe's potential membership did not have the opportunity to participate in Burley's election or the adoption of the documents.

II. Whether the district court abused its discretion when it denied the Burley Government's motions for leave to file supplemental complaints.

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[2] Act of June 18, 1934, Ch. 576, 48 Stat. 984, codified at 25 U.S.C. §§ 461 through 479.

STATEMENT OF THE CASE

A. Introduction

This case arises out of a long-running leadership dispute within a federally-recognized Tribe which, in the view of BIA, has never been "organized" or "reorganized."[3] The current appeal involves a challenge to BIA decisions finding that the Tribe is not organized and declining to recognize the tribal government and governing documents proffered by Silvia Burley, who claims to be the chairperson of the Tribe. The district court dismissed for failure to state a claim, finding that Plaintiff-Appellant could not demonstrate that the Burley Government and its governing documents reflect the will of a majority of the tribal community as required by the IRA.[4]

On appeal, the Burley Government does not dispute that the vast majority of the potential membership of the Tribe did not have an opportunity to participate in the election of Burley as chairperson or in the adoption of the governing documents. Instead, the Burley Government argues that BIA was required, under

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[3] A "reorganized tribe" is a tribe that has adopted a constitution pursuant to the IRA or certain other federal statutes. An "organized tribe" is a tribe that has adopted a constitution outside of those statutes. 25 C.F.R. § 81.1(p); 25 C.F.R. § 82.1(g), (k), (l).

[4] The district court also found that summary judgment would be available on the Burley Government's APA claim. Supp. App. 44, Slip Op. 14 n.8.

25 U.S.C. § 476(h), to recognize the Tribe as organized, and to recognize the Burley Government and its proffered governing documents, notwithstanding this lack of participation. The district court properly rejected this argument, reasoning that while Section 476(h) recognizes the "inherent sovereign power" of "each Indian tribe" to "adopt governing documents under procedures other than those specified in" the IRA, Section 476(h) does not eliminate the IRA's requirement that governing documents be ratified by a majority vote of the adult members of the tribe.

B. Statutory Framework – The Indian Reorganization Act

Congress enacted the IRA to improve the economic status of Indians by, among other things, ending the United States' prior policy of "allotment" of tribal land, and permitting and encouraging each tribe to "organize for its common welfare."[5] 25 U.S.C. § 476(a); see *Morton v. Mancari,* 417 U.S. 535, 542 (1974). Sections 476(a) through (d) set out standards and procedures by which a federally-recognized tribe that wishes to organize "may adopt an appropriate constitution

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[5] From the 1870's until passage of the IRA in 1934, the United States followed a policy of dismantling the tribal land base, allotting parcels of tribal land to individual members, and conveying "surplus" tribal land to non-Indians. See General Allotment Act, ch. 119, 24 Stat. 388; *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 253-254 (1992); *Hodel v. Irving,* 481 U.S. 704, 707-708 (1987).

and bylaws" and secure the Secretary's approval of those documents.

Specifically, Section 476(a) provides:

> Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when –
>
> > (1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and
> >
> > (2) approved by the Secretary pursuant to [25 U.S.C. § 476(d)]

25 U.S.C. § 476(a).

The IRA does not require tribes to organize (or reorganize), however, and it allows tribes and the residents of Indian reservations to exclude themselves from the application of most of the Act's provisions through "a majority vote of the adult Indians[.]" 25 U.S.C. §§ 478, 478a, 478b.

In 2004, Congress enacted the Native American Technical Corrections Act, Pub. L. No. 108-204, 118 Stat. 542 (2004), which, among other things, amended Section 476 by adding a new Subsection (h). It states:

> 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). Thus, this section merely codifies the right to organize that tribes inherently posses independent of the IRA.

C. Facts

1. Background

The California Valley Miwok Tribe, formerly known as the Sheep Ranch Rancheria of Me-Wuk Indians of California,[6] is a federally recognized tribe.[7] 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979); 60 Fed. Reg. 9250, 9253 (Feb. 16, 1995). While the parties dispute the legitimacy of the current (purported) tribal government, there is no dispute that, prior to 1999, the Tribe was never organized and never had a government or governing documents that were recognized by the United States. A12, A96.

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[6] The Burley Government purported to re-name the Tribe in June 2001. A15.

[7] Recognized tribes and their members are eligible for various federal services and benefits. *See, e.g.*, 25 U.S.C. §§ 450f, 450b(e) (recognized tribes eligible for certain self-determination contracts). In addition, only recognized tribes are eligible to operate gaming facilities under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.*

The land known as the Sheep Ranch Rancheria, which consists of 0.92 acres located in Calaveras County, California, was purchased by the United States in 1916 for the benefit of approximately 14 landless and homeless California Indians in the area. A96; Supp. App. 3. Those Indians had rights to the Rancheria's land and the right to participate in its governance. See A96. In 1967, title to the Rancheria land passed to the Rancheria's sole Indian resident, Mabel Hodge Dixie.[8] Supp. App. 9. Ms. Dixie died in 1971, and the Rancheria land is now held in trust by the United States for Ms. Dixie's heirs. See Supp. App. 6. As discussed below, the Rancheria land was the subject of separate litigation brought by the Burley Government in the Eastern District of California.

2. The Tribe's initial efforts to organize

Ms. Dixie's heirs included four sons, one of whom – Yakima Dixie ("Dixie") – claims to be a hereditary chief of the Tribe. Supp. App. 33, Slip Op. 3. In August 1998, Dixie "adopted" Silvia Burley, her daughters Rashel Reznor and Anjelica Paulk, and her granddaughter, Tristan Wallace, as members of the Tribe. See A13; Supp. App. 33, Slip Op. 3 n.2. On September 24, 1998, BIA advised Dixie that he, his brother Melvin Dixie, Burley, and Burley's daughters and

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[8] The United States transferred title to Ms. Dixie pursuant to California Rancheria Act, Pub. L. 85-671, 72 Stat. 619 (1958), as amended, Pub. L. 88-419, 78 Stat. 390 (1964), which provided for the distribution of the land and assets of certain Indian reservations and rancherias in California.

granddaughter "possess the right to participate in the initial organization of the Tribe" under the IRA. See A12. This group then formed an "unorganized" tribal government – that is, a government without a constitution. A13; see 25 C.F.R. § 81.1(g), (p), (v); 25 C.F.R. § 82.1(e), (k), (l), (p). The group named Dixie as Chairperson. A13. Shortly thereafter, Dixie allegedly resigned that position, and on May 8, 1999, the group held a "general election" at which Burley was elected Chairperson and Dixie was elected Vice Chairperson. A12.

BIA recognized Burley as tribal Chairperson in June, 1999. A12. The following month, BIA and the Tribe entered into a self-determination contract (also known as a Public Law 93-638 contract) pursuant to 25 U.S.C. § 450f.[9] A12. Under this contract, BIA provides funding to support and assist the Tribe in becoming organized through the development of a tribal constitution and

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[9] Dixie contends that he did not resign as Chairperson and disputes Burley's claim to be Chairperson; his claims have been the subject of separate administrative appeals and litigation. In 1999, Dixie asked BIA to reverse its recognition of Burley and the award of the self-determination contract to her tribal government. On February 4, 2000, BIA informed Dixie that this was an internal leadership dispute that should be resolved by the Tribe. A13. Dixie then filed suit in the United States District Court for the Eastern District of California, challenging Burley's claim to be Chairperson. *Sheep Ranch Miwok v. Silvia Burley,* No. 01-1389 (E.D. Cal. Jan. 24, 2002). A15, A34. On January 24, 2002, the district court dismissed without prejudice, holding that Dixie had failed to exhaust his administrative remedies because he had not administratively appealed BIA's February 4, 2000 decision. A34. As discussed below, Dixie then waited until June 2003 before attempting to raise his claim with BIA. A34.

organized government. A12, A16, A30.[10] The amount of this funding has been approximately $400,000 per year. [11]

3. BIA's October 31, 2001 letter finding the Tribe to be unorganized and its elected officials to be only an interim tribal council

On March 6, 2000, the Burley Government ratified a proposed tribal constitution. The Burley Government forwarded the proposed constitution to BIA and requested that BIA review and approve it and conduct a Secretarial election under the procedures of the IRA. A14; 25 U.S.C. § 476 (c), (d). On June 7, 2001, before BIA had taken action,[12] the Burley Government withdrew its request for a Secretarial election. A15.

In September 2001, the Burley Government submitted an amended version of the tribal constitution to BIA for approval under the IRA. A15. On October 31,

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[10] BIA suspended the contract on June 19, 2005, but reinstated it on August 19, 2005. A119, A204. BIA disputes the Burley Government's characterization (A189) of the reinstatement as "partial[]."

[11] As the district court noted, the Tribe receives additional funding from the California Gambling Control Commission, a state agency that makes payments to non-gaming tribes from the California Revenue Sharing Trust Fund. These payments are made on a per-tribe basis – the amount does not change based on the number of tribe members – and amounted to over $1 million in 2005. Supp. App. 43, Slip Op. at 13 n. 7.

[12] Section 476(c) provides that the Secretary "shall call and hold an election" within 180 days of a tribal request.

2001, BIA returned the amended constitution without taking action on it, and advised that

> [t]he 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[.]

A15

4. The Burley Government's "land-into-trust" litigation

On April 29, 2002, the Burley Government filed a complaint in the Eastern District of California alleging the United States violated the California Rancheria Act and breached a fiduciary duty to the Tribe when it transferred title to the Rancheria to Mable Hodge Dixie in 1967. *California Valley Miwok Tribe v. United States,* No. 02-0912 (E.D. Cal.), Supp. App. 1. The complaint[13] sought an order compelling the Department of the Interior to (1) declare the Tribe a "restored tribe" within the meaning of the Indian Gaming Regulatory Act; and (2) to take land into trust for the Tribe. *Id.* As the district court explained, the apparent goal

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[13] This Court may take judicial notice of the allegations in the Burley Government's complaint. *Veg-Mix, Inc. v. U.S. Dept. of Agriculture,* 832 F.2d 601, 607 (D.C. Cir. 1987) (courts may take judicial notice of official court records); *Trudeau v. Federal Trade Com'n.,* 456 F.3d 178, 183 (D.C. Cir. 2006) (court may consider matters subject to judicial notice when deciding motion to dismiss for failure to state a claim).

of the lawsuit was to use the land taken into trust to build and operate a casino.[14] Supp. App. 12. Of particular relevance here, the Burley Government's complaint asserted that, as of April 2002, the Tribe had "a potential membership of 250 people." Supp. App. 1, 2.

The district court dismissed for lack of a waiver of sovereign immunity and, in the alternative, on statute of limitations grounds. Supp. App. 7. The Burley Government appealed and the Ninth Circuit affirmed in an unpublished decision. *California Valley Miwok Tribe v. United States,* 197 Fed. Appx. 678 (9th Cir. 2006).

5. BIA's March 26, 2004, decision finding the Tribe to be unorganized.

On February 11, 2004, the Burley Government again provided a copy of the tribal constitution to BIA, but stated that it was doing so only for BIA's records, and not for Secretarial review. A17. BIA responded on March 26, 2004, stating that it still considered the Tribe to be unorganized and Burley to be only a "person of authority" within the Tribe. A28. BIA explained that "this view is borne out not only by the document that you have presented as the tribe's constitution," but

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[14] The Indian Gaming Regulatory Act generally does not authorize gaming on lands acquired by the Secretary in trust for an Indian tribe after October 17, 1988. 25 U.S.C. § 2719(a). The Act provides an exception, however, for certain land of an Indian tribe "that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii).

also by BIA's "relations over the last several decades with members of the tribal community in and around Sheep Ranch Rancheria." A28. BIA further explained that

> 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.

A29. After identifying several other individuals and groups with known or potential ties to Sheep Ranch, BIA advised that the Tribe's governing documents, base rolls, and membership criteria should not be drafted until "after the greater tribal community is initially identified." A29. BIA concluded by emphasizing "the importance of the participation of a greater tribal community in determining membership criteria," and reiterated the agency's continued willingness to "facilitate the organization or reorganization of the tribal community" through Public Law 93-638 self-determination contracts and other forms of assistance. A30.

The March 26, 2004 letter stated that it was subject to administrative appeal under 25 C.F.R. Part 2, and that the decision contained in the letter would become

final for the Department of the Interior in 30 days unless an administrative appeal was filed. A30-A31. Neither the Burley Government nor any other person filed an administrative appeal.

6. The February 11, 2005, decision in Dixie's administrative appeal

In October 2003, Dixie filed an administrative appeal challenging BIA's June 1999 recognition of Burley as tribal Chairperson; Dixie also sought to nullify his 1998 adoption of Burley, her daughters and granddaughter into the Tribe. See A33; see also n. 9 above. On February 11, 2005, the Principal Deputy, Acting Assistant Secretary–Indian Affairs dismissed Dixie's appeal on multiple procedural grounds. A33-34. Among other things, the decision found that Dixie's challenge to BIA's recognition of Burley as tribal Chairperson was rendered moot by the BIA's decision of March 26, 2004, rejecting the Tribe's proposed constitution. The decision explained that

> 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 outlines in the March 26, 2004, letter[.]

A33.

D. Proceedings below

On April 12, 2005, the Burley Government filed its complaint in this case, naming the United States, the Department of the Interior, the Secretary of the Interior, and the Acting Assistant Secretary–Indian Affairs (collectively, the "United States") as defendants. A9. The complaint alleged that by declining to recognize the Burley Government, constitution, and other governing documents, the United States had violated 25 U.S.C. § 476(h) and the APA. The Burley Government sought declaratory judgment that

– the Tribe "retains inherent sovereign power to adopt governing documents under procedures other than those specified" in 25 U.S.C. § 476(a) through (g);

– the constitution and various resolutions of the Burley Government are "valid governing document[s] for the Tribe";

– the Tribe is lawfully organized pursuant to the IRA, 25 U.S.C. § 476; and

– the February 11, 2005 decision of the Principal Deputy, Acting Assistant Secretary–Indian Affairs is invalid.

A20-A21.

On August 5, 2005, the United States moved to dismiss. Dkt. 15; A35. On September 29, 2005, after briefing was completed on that motion, the Burley Government moved for leave to file a supplemental complaint under Federal Rule of Civil Procedure 15(d), alleging an additional claim based on events that occurred after the complaint was filed. The supplemental complaint alleged that BIA violated 25 U.S.C. § 450m-l, a provision of the Indian Self-Determination and Education Assistance Act (the "Self-Determination Act"), by allegedly modifying the Tribe's self-determination contract in July and August 2005 without the Tribe's consent. A131. On January 11, 2006, the Burley Government moved for leave to file a second supplemental complaint adding two more claims based on post-complaint events: specifically, that BIA violated (1) the Self-Determination Act by allegedly failing to approve the Tribe's 2006 budget proposal; and (2) the Indian Tribal Justice Act, 25 U.S.C. § 3601, by allegedly suspending government-to-government relations with the Tribe and declining to recognize the Tribe's inherent authority to establish a tribal justice system. A193-A194.

On March 30, 2006, the district court dismissed. Dkt. 36, 37; Supp. App. 31. The court reasoned that the Burley Government's claims were all predicated on the mistaken view that, under 25 U.S.C. § 476(h), the Secretary was required to

recognize the Burley Government and its government documents even though Burley was elected, and the governing documents were adopted, without the participation of the majority of the Tribe's potential membership. Supp. App. 41-42, Slip Op. 11-12. The court rejected that view, holding that while Section § 476(h) recognizes the power of Indian tribes "to adopt governing documents under procedures other than those specified" elsewhere in Section 476, its references to documents adopted by a tribe must be understood as references to documents that have been "ratified by a majority vote of the adult members," as required by Section 476(a). Supp. App. 43, Slip Op. 13. The court further reasoned that "[s]ubsection 476(h) did not repeal the provisions of subsection 476(a), nor will it be construed to repeal or water down the protections afforded by the IRA when tribes organize: notice, a defined process, and minimum levels of tribal participation." *Id.*

Accordingly, the court concluded that both the first count, alleging a violation of 25 U.S.C. § 476(h), and the second count, asserting arbitrary, capricious, or unlawful action under the APA, failed to state a claim upon which relief could be granted. Supp. App. 44, Slip Op. 14. In addition, the court found the second count was subject to summary judgment. Supp. App. 44, Slip Op. 14 and n.8. Finally, the court denied the Burley Government's motions for leave to

file supplemental complaints, reasoning that the proposed claims were "derivative of [the Burley Government's] subsection 476(h) theory and would also fail to state a claim if leave to file them were granted." Supp. App. 45, Slip Op. 15.

This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly dismissed the Burley Government's complaint for failure to state a claim. Section 476(h) does not impose a duty on BIA to recognize a tribal government or governing documents where, as here, they are adopted without the consent or participation of a majority of the tribal community. Nothing in Section 476(h) suggests that Congress intended to alter the substantive standards that apply when a tribe seeks to organize, including Section 476(a)(1)'s the requirement that governing documents be "ratified by a majority of adult members of the tribe." In addition, for an "Indian tribe" to organize under the IRA, action by the tribe as a whole is required; action by an unrepresentative faction is insufficient. Finally, nothing in Section 476(h) limits the Secretary's broad authority – independent of the IRA – to ensure the legitimacy of any purported tribal government that seeks to engage in that government-to-government relationship with the United States.

STANDARD OF REVIEW

This Court's review of the district court's order granting the motion to dismiss for failure to state a claim is *de novo*. *Trudeau v. Federal Trade Com'n.*, 456 F.3d 178, 183 (D.C. Cir. 2006). In determining whether a complaint fails to state a claim, this Court, like the district court, may consider only the facts alleged in the complaint, and documents either attached to or incorporated in the complaint and matters of which the court may take judicial notice. *Id.* While the Court must treat the complaint's factual allegations as true and grant plaintiff the benefit of all reasonable inferences from the facts alleged, it is "not bound to accept as true a legal conclusion couched as a factual allegation," or to "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Id.* at 193 (internal quotation marks and citations omitted).

The district court's alternative holding that the Burley Government's APA claim was subject to summary judgment is also reviewed *de novo*. *Brubaker v. Metropolitan Life Ins. Co.*, 482 F.3d 586, 588 (D.C. Cir. 2007).

The district court's denial of the Burley Government's motions for leave to file supplemental complaints is reviewed for abuse of discretion. *See Belizan v. Hershon,* 434 F.3d 579, 582 (D.C. Cir. 2006).

ARGUMENT

I. Section 476(h) does not require BIA to recognize a tribe as organized or to accept a tribal government or governing documents created without the participation of a majority of the tribal community.

The district court correctly concluded that the Burley Government's complaint fails to state a claim, because both counts [15] of the complaint are entirely dependent on a misreading of Section 476(h). Section 476(h) provides that "each Indian tribe shall retain inherent sovereign power to adopt governing documents

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[15] The first count purports to assert a claim under Section 476(h). A18. Section 476(h) does not create a private cause of action, however, so the Burley Government must rely on the "generic cause of action" supplied by the APA. *See Trudea,* 456 F.3d at 188. The second count is an APA claim. A19. Thus, both claims are subject to the APA's "final agency action" requirement, 5 U.S.C. § 704, which protects agencies from "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-149 (1967); *see also Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (action must be one by which rights or obligations have been determined, or from which legal consequences will flow); *IPAA v. Babbitt,* 235 F.3d 588, 594 (D.C. Cir. 2001). Furthermore, even final agency action may be unripe for judicial review if "consideration of the issue would benefit from a more concrete setting." *General Electric Co. v. EPA,* 290 F.3d 377, 380 (D.C. Cir. 2001) (quoting *Abbott Labs.,* 387 U.S. at 149).

The district court assumed, consistent with the standards applicable to a motion to dismiss for failure to state a claim, that BIA's March 26, 2004 letter and February 11, 2005 decision were final agency action. Supp. App. 40, Slip Op. 10 n.5; See *Trudea,* 456 F.3d at 193. That assumption remains appropriate for purposes of this appeal. In the event this Court declines to affirm the judgment of dismissal and remands for further proceedings, however, the United States believes the evidence would show that neither claim satisfies the final agency action requirement and that neither claim is ripe.

under *procedures* other than those specified in" the IRA. 25 U.S.C. § 476(h) (emphasis added). The term "procedures" in Section 476(h) is a reference to the Secretarial election procedures described in 25 U.S.C. §§ 476(a), (c) and (d), which include mandatory schedules for Secretarial elections and for the Secretary to approve or disapprove governing documents ratified in those elections. In addition, regulations promulgated by the Secretary pursuant to Section 476(a)(1) include detailed provisions on election notices, voter registration, voting procedures, and other matters. 25 C.F.R. Parts 81 and 82. In other words, Section 476(h) confirms that a tribe may adopt or revoke governing documents without following the IRA's Secretarial election procedures. But nothing is Section 476(h) suggests that Congress also intended to alter the substantive standards that apply when a tribe seeks to organize, including the requirement in Section 476(a)(1) that governing documents be "ratified by a majority of adult members of the tribe."

In the guise of a "plain meaning" analysis (Br. at 12-15), the Burley Government attempts to expand Section 476(h) from what it is – a exception from the otherwise required procedures – into a complete repeal of the IRA's substantive standards and a mandate that the Secretary recognize any purported

tribal government or governing documents when Section 476(h) is invoked. This interpretation is without merit, for several reasons.

First, it ignores Congress's use of the word "procedures" in Section 476(h). Black's Law Dictionary (5th ed.) defines that term as "[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right," and "the machinery, as distinguished from its product." Thus, the requirement in Section 476(a)(1) for "a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe," the requirement in Section 476(a)(2) for "approv[al] by the Secretary pursuant to [Section 476(d)]," and the timetables and default rules of Sections 476(c) and (d) are procedures, and are not mandatory when a tribe seeks to organize under Section 476(h).

In contrast, Section 476(a)'s basic requirement that governing documents be "ratified by a majority of adult members of the tribe" is not merely a "procedure" – it is also a substantive requirement that members of a tribe be allowed to vote on fundamental questions of tribal organization when the tribe seeks to organize under the IRA. See *Shays v. FEC,* 414 F.3d 76, 91 (D.C. Cir. 2005) (describing litigants' interests in fair administrative decisionmaking and fair elections as both procedural and substantive). This requirement that fundamental matters of tribal

organization under the IRA be ratified by majority vote is reflected in other sections of the IRA as well, such as the provisions governing a decision by a tribe or reservation to exclude itself from the Act's coverage. 25 U.S.C. § 478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary * * * shall vote against its application."); see also 25 U.S.C. 478a (requiring majority vote, and total vote of not less than 30 percent of those entitled to vote, on questions of adoption of a constitution, bylaws, or amendments). If, as the Burley Government contends, Congress had intended to alter the substantive standards by which tribes may organize under the IRA, Congress would not have used the word "procedures" in Section 476(h). Further, the Burley Government's reading of Section 476(h) would produce the anomalus result that a majority vote is required for a tribe to exclude itself from application of the IRA under Sections 478, while no majority vote is required for a tribe to adopt or amend a constitution under the IRA.

Second, the Burley Government's interpretation ignores the fact that Section 476(h) refers to the "inherent sovereign power" of an "Indian tribe" to adopt governing documents. 25 U.S.C. §§ 476(h)(1), (h)(2). Similarly, Section 476(a) addresses the right of "[a]ny Indian tribe" to organize. This requirement for action by the "tribe" means that action by a mere subset or faction of a tribe is not

enough, and is also consistent with a requirement for a majority vote, since such a vote is an obvious way in which a tribe can exercise its inherent sovereign power. See *Harjo v. Andrus,* 581 F.2d 949, 951-52 (D.C. Cir. 1978) (affirming district court remedial order requiring "a referendum among all Creek adults on certain issues raised by a recently drafted, proposed constitution for the tribe" so that "democratic self-government could be restored to the Creek Nation with maximum participation by tribal members and minimum intrusion by the court."); *Morris v. Watt,* 640 F.2d 404, 406, 415 (D.C. Cir. 1981) (referenda conducted by governments of the Choctaw and Chickasaw Nations of Indians were insufficient to "ensure fair elections that will accurately reflect the desires of the tribal members" because they did not "fully and fairly involve the tribal members in the proceedings leading to constitutional reform.").[16] Moreover – and even if Section 476(a)'s requirement for majority ratification were deemed a "procedure" for purposes of Section 476(h) – Section 476(h)'s reference to the "inherent sovereign power" of an "Indian tribe" would still require, at a minimum, action by a

[16] The right to vote is a fundamental attribute of self-government that is protected under the equal protection clauses of the U.S. Constitution, see *Reynolds v. Sims,* 377 U.S. 533, 555 (1964) and the Indian Civil Rights Act, 25 U.S.C. § 1302(8) ("No Indian tribe in exercising powers of self-government shall * * * deny to any person within its jurisdiction the equal protection of its laws").

legitimate tribal government that is authorized to act on behalf of the tribe, because anything less would render those terms meaningless.[17]

Third and more broadly, nothing in Section 476(h) suggests that Congress intended to limit the Secretary's authority – independent of the IRA – to ensure the legitimacy of any purported tribal government that seeks to engage in that government-to-government relationship with the United States. The federal-tribal relationship is a government-to-government relationship, and the right of tribal self-government is a fundamental aspect of that relationship. See, *e.g., United States v. Lara,* 541 U.S. 193, 202 (2004); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-45 (1980). While deference to principles of self governance typically weighs against federal involvement in internal tribal matters, "courts have recognized that the Secretary of the Interior occasionally is forced to identify which of two or more competing tribal political groups to recognize as the proper representative of the tribe." Felix Cohen, *Handbook of Federal Indian Law*

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[17] The Burley Government attempts to buttress its "plain meaning" argument by relying on the canon of statutory construction that requires that ambiguities be resolved in the Indians' favor. Br. at 20-21; see, *e.g., Bryan v. Itasca County,* 426 U.S. 373, 392 (1976). That canon has no application here, in the context of a leadership dispute when Indians are on all sides of an issue. Nor does the Burley Government explain how BIA's refusal to recognize governing documents adopted without the participation of the majority of the potential Tribal membership could be contrary to the canon. See *Shakopee Mdewakanton v. Babbitt,* 107 F.3d 667, 670 (8th Cir. 1997).

290 (2005 ed.). See, *e.g., Wheeler v. U.S. Dept' of Int.,* 811 F.2d 549, 552 (10th Cir. 1987); *Goodface v. Grassrope,* 708 F.2d 335, 339 (8th Cir. 1983) (" BIA, in its responsibility for carrying on government to government relations with the Tribe, is obliged to recognize and deal with some tribal governing body"); *Seminole Nation v. Norton,* 223 F. Supp. 2d 122, 140 (D.D.C. 2002) ("DOI has the authority and the responsibility to ensure that the Nations's representatives, with whom it must conduct government-to-government relations, are valid representatives of the Nation as a whole").

BIA's refusal to recognize the Burley Government is consistent with the foregoing principles, particularly given the unusual facts of the case and the history of the Sheep Ranch Rancheria. As the Interior Board of Indian Appeals explained in another case involving the efforts of competing factions to organize a California Rancheria, "[t]his is not an ordinary tribal government dispute, arising * * * in an already existing tribal entity. * * * Rather, this case concerns, in essence, the creating of a tribal entity from a previously unorganized group. In such a case, BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so." *Jeffrey Alan-Wilson, Sr., v. Sacremento Area Director,* 30 I.B.I.A. 241, 252 (1997). See also *Ransom v. Babbitt,* 69 F. Supp. 2d 141, 150 (D.D.C. 1999) ("In

situations of federal-tribal government interaction where the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination.")

Thus, the issue in this case is not, as the Burley Government would have it (see, *e.g.,* Br. at 8, 14,21), whether the California Valley Miwok Tribe has the sovereign power to adopt governing documents without employing the IRA's procedures. The Tribe plainly has that power. Rather, the issue is whether the Burley Government in fact speaks for the Tribe in the exercise of that sovereign power. The answer to that question is no, because the undisputed facts show that the Burley Government was elected, and its governing documents adopted, by just three people and without the participation of the vast majority of the potential members of the Tribe.

The Burley Government implies that its legitimacy is beyond question because BIA has on several occasions recognized Burley as chairperson of the Tribe and has continued to fund the Tribe's self-determination contract. See Br. at 3-5. The Burley Government's brief mischaracterizes BIA's actions, however. BIA's initial recognition of Burley as Chairperson occurred in 1999 and 2000, before the problematic nature of the Burley Government and its proposed constitution were fully apparent. See A12-A13. In October, 2001, in response to

those issues, BIA announced that it would "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." A15. Thereafter, consistent with the Self-Determination Act's strong policy in favor of self-determination funding, BIA continued to acknowledge Burley as Chairperson and continued to fund the Tribe's self-determination contract – awarded to support the organization of the tribe – in order to encourage the organization process. See 25 U.S.C. § 450a; A30 (BIA March 26, 2004 letter to Burley Government stating "the importance of the participation of the greater tribal community" in the tribal organization process, and that the agency's Public Law 93-638 contracts are "intended to facilitate organization or reorganization of the tribal community"). When, after several more years of this funding, the Burley Government submitted a purported tribal constitution that was developed by Burley and her two daughters without the participation of the many persons with documented connections to the Sheep Ranch Rancheria, BIA on March 26, 2004 reaffirmed its view that the Tribe was unorganized. A28-A29. This conclusion was repeated in the Principal Deputy, Acting Assistant Secretary's February 11, 2005 decision in Dixie's administrative appeal. A33-A34. Thus, far from demonstrating the legitimacy of

the Burley Government, this course of events confirms that it is not representative of the majority of the potential membership of the Tribe.

In sum, the district court correctly dismissed the second count of the Burley Government's complaint for failure to state a claim. Section 476(h) does not impose a duty on BIA to recognize a tribal government or governing documents where, as here, they are adopted without the consent or participation of a majority of the tribal community.

II. The district court did not abuse its discretion when it denied the Burley Government's motions for leave to file supplemental complaints.

Federal Rule of Civil Procedure 15(d) provides, in relevant part:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.

Fed. R. Civ. P. 15(d).

The Burley Government's proposed third claim for relief, filed September 29, 2005, alleged that BIA violated the Self-Determination Act, 25 U.S.C. § 450m-l, by modifying the Tribe's self-determination contract in July and August 2005 without the Tribe's consent. A131. The proposed fourth and fifth claims, filed January 11, 2006, alleged that BIA violated (1) the Self-Determination Act by allegedly failing to approve the Tribe's 2006 budget proposal; and (2) the

Indian Tribal Justice Act, 25 U.S.C. § 3601, by allegedly suspending government-to-government relations with the Tribe and declining to recognize the Tribe's inherent authority to establish a tribal justice system. A193-A194. The district court denied leave to supplement on the ground that the new claims in the Burley Government's proposed supplemental complaints were "derivative of plaintiffs' subsection (h) theory" and would, like the claims in the original complaint, "fail to state a claim if leave to file them were granted." Supp. App. 44-45, Slip Op. 14-15.

We disagree with the district court's rationale for denying leave to supplement. In our view, the standards for organization under the IRA are distinct from the standards applicable to the Burley Government's proposed supplemental claims under the Self-Determination Act and Indian Tribal Justice Act.[18] Nevertheless, the district court would have been justified in denying leave to supplement on the ground that the supplemental claims could be the subject of a separate action, because they are based on events that post-date the original complaint. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure;* Civil 2D § 1509 (1990); *Planned Parenthood of Southern Arizona v. Neely,* 130 F.3d 400, 402 (9th Cir. 1997). And in any event,

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[18] The United States did not oppose the Burley Government's motions for leave to file the supplemental complaints.

even if it were error for the district court to deny leave to supplement, that error would be harmless, because the district court's denial does not prevent the Burley Government from bringing the supplemental claims as a separate action. *See Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.,* 750 F.2d 731, 739 (9th Cir. 1984) (for purposes of *res judicata,* "[t]he scope of litigation is framed by the complaint at the time it is filed"); *Computer Associates International, Inc., v. Altai, Inc.,* 126 F.3d 365, 369-70 (2d Cir. 1997) (the filing of a supplemental complaint based on events occurring after filing of the original complaint is not mandatory, and *res judicata* "does not apply to new rights acquired during the action which might have been, but which were not, litigated.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Acting Assistant Attorney General

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90-2-4-11585
June 2007

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2007, copies of the Brief and Supplemental Appendix of Appellees were served by United States Mail upon counsel of record at the addresses listed below:

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DOCUMENT NO. 81

INTERIOR BOARD OF INDIAN APPEALS

California Valley Miwok Tribe Appellant, vs. Pacific Regional Director, Appellee.	)	Docket No.: IBIA 07-100-A

DECLARATION OF TROY BURDICK

I, Troy Burdick, do hereby state as follows:

1. I am employed by the Bureau of Indian Affairs (BIA) within the United States Department of the Interior as the Superintendent of the Central California Agency.

2. In my capacity as Superintendent, I am responsible for managing the government-to-government relationship between the United States and the California Valley Miwok Tribe (CVMT or Tribe).

3. CVMT is an unorganized tribe, meaning the BIA does not recognize that the tribe has a functioning government or a governmental leader.

4. On November 6, 2006 I sent a letter to Silvia Burley and Yakima Dixie, both of whom claim to be the legitimate leader of CVMT with authority to organize the Tribe. Both Silvia Burley and Yakima Dixie were working separately to organize the Tribe.

5. My letter indicated that their dispute had reached and impasse and threatened the Tribe's government-to-government relationship with the United States. It further indicated that the BIA would assist the Tribe in organizing itself. As

the first step in the Tribe's effort to organize itself, the BIA would call a general council meeting of the Tribe's members and potential members

6. Silvia Burley appealed that decision to the Regional Director. On April 2, 2007, the Regional Director affirmed the November 6, 2006, letter and remanded the matter back to me to proceed with the plans to assist the Tribe organize itself by first calling a general council meeting of the Tribe's member's and putative members.

7. I did not call a general council meeting. Instead, I took a step in preparation of calling a general council meeting. On April 10, 2007, I had published in local newspapers a notice that the BIA was accepting applications from persons who claim lineal decadency from a list of 14 historic members of the Tribe and who sought to be included in the class of putative members who would be eligible to participate in the Tribe's organizational process.

8. By May 25, 2007, the BIA received 505 applications. Between the dates of May 25, 2007, and April 20, 2007, the BIA was only engaged in the internal review of these applications.

9. On April 20, 2007, Silvia Burley, allegedly acting in the name of the Tribe, appealed the Regional Director's April 2 2007, letter to the Interior Board of Indian Appeals (IBIA)

10. The BIA reviewed those applications and determined which applicants qualify as lineal descendents and which do not. The BIA drafted letters to send to all applicants notifying them of their status and, as needed, informing them of their rights of appeal, after completing that review.

11. Because of the stay in this case, the BIA has not and will not send those letter to the applicants until the IBIA issues a decision in Silvia Burley's appeal in the BIA's favor. Moreover, the BIA will not initiate the process by which the Tribe will organize itself by calling a general council meeting of the Tribe until IBIA issues a decision in Silvia Burley's appeal in the BIA's favor. The BIA will not take any action to assist the Tribe organize itself until IBIA decides Silvia Burley's appeal in the BIA's favor.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on the 6th day of December, 2007.

Troy Burdick
Superintendent, BIA
Central California Agency

DOCUMENT NO. 82

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Our File Number: 26RJ-159149

May 3, 2011

VIA E-MAIL AND U.S. MAIL

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

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

Dear Assistant Secretary Echo Hawk:

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

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

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

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

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

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

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

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

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

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

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

Thank you for the opportunity to submit this information.

Sincerely yours,

Robert J. Uram

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

W02-WEST:5JAR1\403502336.1

Attachment: Brief Dated May 3, 2011

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

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

CALIFORNIA VALLEY MIWOK TRIBE, *et al.*,
Appellant

v.

PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,
Appellee.

IBIA Docket No. 07-100-A

In re 51 IBIA 103

W02-WEST:5JAR1\403503600.3

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

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

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Dated: May 3, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

DOCKETED CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

EXHIBITS

Exhibit 1: Letter from Troy Burdick, Superintendent, BIA Central California Agency, to Silvia Burley (Nov. 6, 2006) ("2006 Decision")

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

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

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

Exhibit 5: Letter from BIA Pacific Regional Director to Silvia Burley (Apr. 2, 2007) ("2007 Decision")

Exhibit 6: Resolution # GC-98-01 ("1998 Resolution")

Exhibit 7: Letter from Dale Risling, Sr., Superintendent, BIA Central California Agency, to Silvia Burley ("Mar. 26, 2004) ("2004 Decision")

Exhibit 8: Letter from Michael Olsen, Acting Assistant Secretary - Indian Affairs, to Yakima Dixie (Feb. 11, 2005) ("2005 Decision")

Exhibit 9: Affidavit of Yakima Dixie

Exhibit 10: Affidavit of Velma Whitebear

Exhibit 11: Affidavit of Antonia Lopez

Exhibit 12: Affidavit of Michael Mendibles

Exhibit 13: Affidavit of Evelyn Wilson

Exhibit 14: Affidavit of Antone Azevedo

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

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

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

Exhibit 18: Letter from California Valley Miwok Tribe to Members of Tribal Community Re Tribal Organization (Apr. 23, 2007)

Exhibit 19: California Valley Miwok Tribe Resolution 2011-04-30 and Tribal Roster (Apr. 30, 2011)

Exhibit 20: Letter from California Valley Miwok Tribe to Silvia Burley re Proposal to Meet (Feb. 2, 2006)

Exhibit 21: Affidavit of Pete Ramirez

Exhibit 22: Affidavit of Briana Creekmore

Exhibit 23: Affidavit of Gilbert Ramirez

Exhibit 24: Letter from California Valley Miwok Tribe to Members of Tribal Community Re Tribal Meeting on April 19, 2008 (Apr. 19, 2008)

Exhibit 25: Constitution of the California Valley Me-Wuk Tribe of the Sheep Ranch Rancheria ("Amended Constitution")

Exhibit 26: Purported Tribal Enrollment Document Dated Aug. 5, 1998

Exhibit 27: Letter from Yakima Dixie to Silvia Burley (Apr. 21, 1999)

Exhibit 28: Letter from Edith Blackwell, Associate Solicitor, Indian Affairs, to Peter Kaufman, California Deputy Attorney General (Dec. 12, 2008)

I. Introduction

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

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

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

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

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

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

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

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

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

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

II. Background of 2006 Decision and Burley Appeal

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

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

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

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

A. The Board's Referral

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

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

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

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

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

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

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

B. The 2010 Decision

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

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

C. The Scope of the Reconsidered Decision

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

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

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

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

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

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

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

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

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

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

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

A. Formation of the Tribal Council

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

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

B. The 2006 Constitution

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

C. Identification of the Tribal Community

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

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

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

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

D. The Council Has Restored a Functioning Tribal Community

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

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

1. Child Custody Proceedings

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

2. Cultural Resources Consultations

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

3. Cultural Preservation and Religious Rituals

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

4. Language Preservation

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

5. Gathering of Religious Materials, and Traditional Crafts

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

6. Food Distribution Programs

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

7. Construction of Ceremonial Buildings

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

8. Community Development and Environmental Restoration Programs

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

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

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

E. The Revised Constitution and Completion of the Organization Process

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

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

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

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

IV. The April 8, 2011 Request for Briefing

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

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

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

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

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

V. Responses to the Request for Briefing

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

A. Issue Number One

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

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

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

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

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

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

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

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

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

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

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

> Where a tribe that has not previously organized seeks to do so, BIA also has a responsibility to determine that the organizational efforts reflect the involvement of the whole tribal community. . . . It is only after the greater tribal community is initially identified that governing documents should be drafted and the Tribe's base and membership criteria identified.

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

Likewise, in briefs submitted to the Court of Appeals in the Burley litigation, the Secretary asserted that, "for an 'Indian tribe' to organize under the IRA, action by the tribe as a whole is required; action by an unrepresentative faction is insufficient." The Secretary argued that she could not recognize Burley's purported tribal government, or its constitution, because "the undisputed facts show that the Burley Government was elected, and its governing documents adopted, by just three people and without the participation of the vast majority of the *potential members of the Tribe*." Brief and Supplemental Appendix of Appellees, *California Valley Miwok Tribe v. U.S.*, 2007 WL 1700313, 12, 14-15 (D.C. Cir.) (emphasis added). For the Department to abandon its position now would not only violate the law, it would also represent a "quintessentially arbitrary and capricious" reversal of agency position. *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1, 18 (D.D.C. 2009) (internal quotation and citation omitted). Moreover, any attempt to defend such a reversal in federal court would be precluded by the doctrine of judicial estoppel. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001); *Valentine-Johnson v. Roche*, 386 F.3d 800, 810-812 (6th Cir. 2004) (judicial estoppel applies to government entities).

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

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

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

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

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

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

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

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

B. Issue Number Two

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

1. The Tribe Is Not Yet Organized

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Tribe Requires No Further Assistance With Organization

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

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

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

C. Issue Number Three

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> This is not an ordinary tribal government dispute, arising from an internal dispute in an already existing tribal entity. In such cases, BIA and this Board must exercise caution to avoid infringing upon tribal sovereignty. Rather, this case concerns, in essence, the creation of a tribal entity from a previously unorganized group. In such a case, BIA and this Board have a responsibility to ensure that the initial tribal government is organized by individuals who properly have the right to do so.

Jeffrey Alan-Wilson, Sr. v. Sacramento Area Director, Bureau of Indian Affairs, 30 IBIA 241, 252 (1997).[11]

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

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

VI. Disposition of Ms. Burley's Appeal

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

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

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

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

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

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

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

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

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

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

B. The 2007 Decision Was Consistent With Controlling Law

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

1. Organization Must Involve the Entire Tribal Community

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Conclusion

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

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

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

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

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

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

Respectfully submitted,

/s/ Robert J. Uram

ROBERT J. URAM
JAMES F. RUSK
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Dated: May 3, 2011

DOCUMENT NO. 83

EXHIBIT 1

to Brief of Chief Yakima Dixie and the Tribal Council of the California Valley Miwok Tribe (May 3, 2011)

Letter from Troy Burdick, Superintendent, BIA Central California Agency, to Silvia Burley (Nov. 6, 2006) ("2006 Decision")

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Central California Agency
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

IN REPLY REFER TO

CERTIFIED MAIL NO. 7003 1680 0002 3892 1019
RETURN RECEIPT REQUESTED

NOV - 6 2006

Ms. Silvia Burley
10601 Escondido Place
Stockton, California 95212

CERTIFIED MAIL NO. 7003 1680 0002 3892 1002
RETURN RECEIPT REQUESTED

Mr. Yakima K. Dixie
c/o Mr. Chadd Everone
2054 University Avenue, #407
Berkeley, California 94704

Dear Ms. Burley and Mr. Dixie:

The Bureau of Indian Affairs (BIA) remains committed to assist the California Valley Miwok Tribe (Tribe) (formerly Sheep Ranch Rancheria of the Me-Wuk Indians of California) in its efforts to reorganize a formal governmental structure that is representative of all Miwok Indians who can establish a basis for their interest in the Tribe and is acceptable to the clear majority of those Indians. We are writing you because of your claim of leadership of the Tribe.

The Central California Agency (Agency) has been meeting with both of you and your representatives for some time to discuss issues and to offer assistance in your organizational efforts for the Tribe. It is evident; however, that the ongoing leadership dispute is at an impasse and the likelihood of this impasse changing soon seems to be remote. Therefore, we renew our offer to assist the Tribe in the organizational process. Our intention is not to interfere with the Tribe's right to govern itself. Rather, we make this offer consistent with the well-established principle that the BIA has a responsibility to determine that it is dealing with a government that is representative of the Tribe as a whole. The authority and responsibility to take this action becomes evident once there is clear evidence that the dispute between competing leadership factions, such as yours, threatens to impair the government-to-government relationship between the Tribe and the United States.

The Agency, therefore, will publish a notice of a general council meeting of the Tribe to be sponsored by the BIA in the newspapers within the Miwok region. This will initiate the reorganization process. The notice shall invite the members of the Tribe and potential members to the meeting where the members will discuss the issues and needs confronting the Tribe. We have used this sort of general council meeting approach in other instances to help tribes reorganize when for various reasons the tribes lacked an organized tribal government that represented the entire membership.

It appears that you each have determined your membership criteria, and membership, and developed constitutions or governing documents. We understand, however, you do not agree on certain issues that are fundamental to the process of building an organized government. We propose to discuss the following issues that are preventing you from moving forward as a unified tribe:

- form of government;
- organization under a federal statute (should the tribe decide to adopt a constitution);
- should the tribe adopt a constitution, what constitution will be used: the Dixie or Burley constitution, combination of both, or another;
- determining the census where membership is first listed, i.e., 1916 Sheep Ranch Rancheria census or other document;
- determining leadership of the tribe, i.e., holding a transitional election or agreeing to some type of power sharing.

The general council first needs to determine the type of government your tribe will adopt. Tribes do not always adopt constitutions; some govern according to the tribe's tradition or have some sort of power sharing in an open participatory type of government. Next, the general council needs to agree to the census or other documents that establishes the original members of the Rancheria. That census should be the starting point from which the tribe develops membership criteria. The immediate goal is determining membership of the tribe. Once membership is established and the general council determines the form of government, then the leadership issues can be resolved.

The Agency will coordinate the meeting by setting the date, time, location and other arrangements, but we would appreciate your suggestions, date, time, location, and possible agenda items. The BIA offers the assistance of an independent observer/mediator to facilitate the meeting or meetings. Please respond to the Agency concerning your willingness to participate in a meeting to discuss the issues in depth and begin the resolution process.

We very much desire that you both participate. We intend to conduct a fair and open process in which supporters of each of you can participate and be heard. We will proceed with this process, however, even if one or both of you declines to participate.

Please contact Carol Rogers-Davis, Acting Tribal Operations Officer, Central California Agency, at (916) 930-3764, to work with her on setting up the meeting.

Sincerely,

Troy Burdick
Superintendent

cc: Director, Pacific Region
Regional Solicitor
Director, Bureau of Indian Affairs
Assistant Solicitor, Branch of Tribal Government & Alaska

EXHIBIT 2

to Brief of Chief Yakima Dixie and the Tribal Council of the California Valley Miwok Tribe (May 3, 2011)

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

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 22 2010

Mr. Yakima Dixie
1231 E. Hazelton Avenue
Stockton, California 95205

Dear Mr. Dixie:

This letter is to inform you of the Department of the Interior's response to the decision of the Interior Board of Indian Appeals (IBIA) in *California Valley Miwok Tribe v. Pacific Regional Director, Bureau of Indian Affairs*, 51 IBIA 103 (January 28, 2010) (Decision).

The Decision stemmed from Sylvia Burley's appeal of the Bureau of Indian Affairs Pacific Regional Director's April 2, 2007 decision to affirm the Central California Agency Superintendent in his efforts to "assist" the Tribe in organizing a tribal government. In the Decision, the IBIA dismissed each of Ms. Burley's three complaints for lack of jurisdiction.[1] The IBIA did, however, refer Ms. Burley's second claim to my office, because it was in the nature of a tribal enrollment dispute. *Decision*, 51 IBIA at 122.

This letter is intended to address the limited issues raised by Ms. Burley's second complaint, as referred to my office by the IBIA: the BIA's involvement in the Tribe's affairs related to government and membership.

Background

This difficult issue is rooted in the unique history of the California Valley Miwok Tribe. A relatively small number of tribal members had been living on less than 1 acre of land in Calaveras County, California known as the Sheep Ranch Rancheria, since 1916. In 1966, the Department was preparing to terminate the Tribe pursuant to the California Rancheria Termination Act, as part of that dark chapter of Federal Indian policy known as the "Termination Era." As part of this effort, the Department had intended to distribute the assets of the Sheep Ranch Rancheria to Ms. Mabel Dixie, as the only eligible person to receive the assets.

The Department never completed the process of terminating the Tribe, and the Tribe never lost its status as a sovereign federally-recognized tribe.

[1] Ms. Burley's complaints were: 1.) The BIA Pacific Regional Director's April 2, 2007 decision violated the Tribe's FY 2007 contract with the BIA under the Indian Self-Determination and Education Assistance Act, or the Regional Director's decision constituted an unlawful reassumption of the contract; 2.) the Tribe is already organized, and the BIA's offer of assistance constitutes an impermissible intrusion into tribal government and membership matters that are reserved exclusively to the Tribe; and, 3.) the Regional Director erred in stating that the Tribe was never terminated and thus is not a "restored" tribe. *Decision*, 51 IBIA at 104.

In 1998, Yakima Dixie, a tribal member acting as the leader of the Tribe, adopted Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace as members of the Tribe. At that time, the Department recognized those five individuals, along with Yakima Dixie's brother Melvin, as members of the Tribe. *Decision*, 51 IBIA at 108.

On September 24, 1998, the Superintendent of the Bureau of Indian Affairs Central California Agency advised Yakima Dixie, then serving as Tribal Chairman, that Yakima Dixie, Melvin Dixie, Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristan Wallace were able to participate in an effort to reorganize under the Indian Reorganization Act. *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d. 197, 198 (D.D.C. 2006). In that same letter, the Superintendent also recommended that the Tribe establish a general council form of government for the organization process, and provided the Tribe with a draft version of a resolution to implement such a form of government. On November 5, 1998, by Resolution # GC-98-01, the Tribe established the General Council. *Id.*

Several months afterwards, in April 1999, Yakima Dixie resigned as Tribal Chairman. On May 8, 1999, the Tribe held a general election, in which Yakima Dixie participated, and elected Sylvia Burley as its new chairperson. The BIA later recognized Sylvia Burley as Chairperson of the California Valley Miwok Tribe. *Id.*

Shortly thereafter, the Tribe developed a draft constitution, and submitted it to the BIA for Secretarial review and approval in May 1999.[2] During this effort, it is apparent that a leadership dispute developed between Ms. Burley and Mr. Dixie.

On March 6, 2000, the Tribe ratified its Constitution and later requested that the BIA conduct a review and hold a secretarial election pursuant to the Indian Reorganization Act. *Id.* at 199. In the interim, on March 7, 2000, the Superintendent issued a letter to Sylvia Burley stating that the BIA "believed the Tribe's General Council to consist of the adult members of the tribe, i.e., Mr. Dixie, Ms. Burley, and Ms. Reznor,[3] and stated that the leadership dispute between Mr. Dixie and Ms. Burley was an internal tribal matter." *Id.*

In February 2004, Ms. Burley submitted a document to the BIA purporting to serve as the Tribe's constitution. The BIA declined to approve the constitution because it believed that Ms. Burley had not involved the entire tribal community in its development and adoption. Letter from Dale Risling, Sr. to Sylvia Burley (March 26, 2004). The BIA noted that there were other Indians in the local area who may have historical ties to the Tribe. In that same letter, the BIA indicated that it did not view the Tribe as an "'organized' Indian Tribe," and that it would only recognize Ms. Burley as a "person of authority" within the Tribe, rather than the Chairperson. Letter from Dale Risling, Sr. to Sylvia Burley (March 26, 2004). The Office of the Assistant Secretary – Indian Affairs affirmed this position in a letter stating:

> [T]he BIA made clear [in its decision of March 26, 2004] that the Federal government did not recognize Ms. Burley as the tribal Chairman. Rather, the BIA would recognize her has a 'person of

[2] The Tribe withdrew its original request for Secretarial review of its constitution in July 1999.

[3] Pursuant to the Tribe's Resolution # GC-98-01, the General Council shall consist of all adult members of the Tribe.

> 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.

Letter from Acting Assistant Secretary – Indian Affairs Michael D. Olsen to Yakima Dixie (February 11, 2005). At that point, the BIA became focused on an effort to organize the Tribe under the Indian Reorganization Act, and to include a number of people who were not officially tribal members in that effort.[4]

In 2005, the BIA suspended a contract with the Tribe, and later asserted that there was no longer a government-to-government relationship between the United States and the Tribe. 424 F. Supp. 2d. at 201.

Sylvia Burley, on behalf of the Tribe, filed a complaint against the United States in the United States District Court for the District of Columbia seeking declaratory relief affirming that it had the authority to organize under its own procedures pursuant to 25 U.S.C. § 476(h), and that its proffered constitution was a valid governing document. *Id.* The United States defended against the claim by arguing that its interpretation of the Indian Reorganization Act was not arbitrary and capricious, and that it had a duty to protect the interests of all tribal members during the organization process – which included those individual Miwok Indians who were eligible for enrollment in the tribe. See *Id.* at 202. The District Court ruled that the Tribe failed to state a claim for which relief could be granted, which was affirmed by the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 202; 515 F.3d. 1262.

On November 6, 2006, the Superintendent of the BIA Central California Agency issued letters to Sylvia Burley and Yakima Dixie, stating, "[i]t is evident, however, that the ongoing leadership dispute is at an impasse and the likelihood of this impasse changing soon seems to be remote. Therefore, we renew our offer to assist the Tribe in the organizational process." Letter from Troy Burdick to Sylvia Burley and Yakima Dixie (November 6, 2006). The Superintendent then stated "[t]he Agency, therefore, will publish notice of a general council meeting of the Tribe to be sponsored by the BIA in the newspapers within the Miwok region. This will initiate the reorganization process." *Id.*

Sylvia Burley appealed this decision to the BIA Pacific Regional Director, who affirmed the Superintendent's decision on April 2, 2007. That same month, the BIA Pacific Regional Office published notice of the reorganizational meeting in a newspaper in the region. Sylvia Burley appealed the Regional Director's decision to the IBIA, which subsequently dismissed her claims, while referring the second claim to my office.

Discussion

[4] The BIA, Yakima Dixie, and Sylvia Burley all agreed that there was a number of additional people who were potentially eligible for membership in the Tribe. See, *California Valley Miwok Tribe v. United States*, 515 F.3d 1267 - 1268 (D.C. Cir. 2008) (noting that the Tribe has admitted it has a *potential* membership of 250) (emphasis added).

I must decide whether to move forward with the BIA's previous efforts to organize the Tribe's government, or to recognize the Tribe's general council form of government – consisting of the adult members of the tribe – as sufficient to fulfill our nation-to-nation relationship.

The Department of the Interior is reluctant to involve itself in these internal tribal matters. To the extent that Department must touch upon these fundamental internal tribal matters, its actions must be limited to upholding its trust responsibility and effectuating the nation-to-nation relationship.

A. Tribal Citizenship

In this instance, the facts clearly establish that the Tribe is a federally recognized tribe which shares a nation-to-nation relationship with the United States. Moreover, the facts also establish that Mr. Dixie adopted Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace as members of the Sheep Ranch Rancheria in 1998.

The California Valley Miwok Tribe, like all other federally recognized tribes, is a distinct political community possessing the power to determine its own membership, and may do so according to written law, custom, intertribal agreement, or treaty with the United States. See, Cohen's Handbook of Federal Indian Law, § 4.01[2][b] (2005 Edition); see also, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978) ("To abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it") quoting *Santa Clara Pueblo v. Martinez*, 402 F.Supp. 5, 18-19 (D.N.M. 1975).

I understand the difficult circumstances facing those individual Miwok Indians living in Calaveras County, California and who lack an affiliation with a federally recognized tribe. Affiliation with a tribe lies at the core of Indian identity. This is one reason why the Department is working to improve the process by which tribes can become federally recognized, and have their nation-to-nation relationship with the United States restored.

Nevertheless, the United States cannot compel a sovereign federally recognized tribe to accept individual Indians as tribal citizens to participate in a reorganization effort against the Tribe's will. See *Santa Clara Pueblo*, supra. It is possible that there are other individual Indians in the area surrounding Sheep Ranch who are ***eligible*** to become members of the Tribe. Mr. Dixie and Ms. Burley, along with the BIA, have previously indicated such. See 515 F.3d at 1267-68 (D.C. Cir. 2008).

There is a significant difference, however, between eligibility for tribal citizenship and actual tribal citizenship. Only those individuals who are actually admitted as citizens of the Tribe are entitled to participate in its government. The proper recourse for those individuals eligible for tribal citizenship, but who are not yet enrolled, is to work through the Tribe's internal process for gaining citizenship.

It is indisputable that Mr. Dixie adopted Sylvia Burley, Rashel Reznor, Anjelica Paulk, and Tristian Wallace as citizens of the Tribe. Moreover, it is indisputable that the BIA previously accepted the Tribe's decision to enroll these individuals as tribal citizens, as evidenced by its letter of September 24, 1998.

Whatever good reasons the BIA may have had for requiring the Tribe to admit new citizens to participate in its government are not sufficient to overcome the longstanding principles of reserving questions of enrollment to the Tribe.

B. Tribal Government

As with matters of enrollment, each tribe is vested with the authority to determine its own form of government. This authority is a quintessential attribute of tribal sovereignty. Cohen's Handbook of Federal Indian Law, § 4.01[2][a] (2005 Edition).

The Department recommended in a letter to the Tribe, that it "operate as a General Council," which would serve as its governing body. Letter from BIA Central California Superintendent Dale Risling to Yakima K. Dixie, Spokesperson for the Sheep Ranch Rancheria (September 24, 1998). In its letter to the Tribe, the Department advised the Tribe that, "[t]he General Council would then be able to proceed with the conduct of business, in a manner consistent with the authorizing resolution." *Id.* The Department previously considered this form sufficient to fulfill the government-to-government relationship. See award of P.L. 93-638 Contract CTJ51T62801 (February 8, 2000).

The determination of whether to adopt a new constitution, and whether to admit new tribal citizens to participate in that effort, must be made by the Tribe in the exercise of its inherent sovereign authority, and not by the Department.

Conclusion

I have reviewed the documents referenced in this letter, as well as the numerous submissions made by Mr. Dixie and Ms. Burley to my office since the issuance of the IBIA Decision in January 2010.

I conclude that there is no need for the BIA to continue its previous efforts to organize the Tribe's government, because it is organized as a General Council, pursuant to the resolution it adopted at the suggestion of the BIA. Consequently, there is no need for the BIA to continue its previous efforts to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area.

Based upon the foregoing principles of tribal sovereignty, and our government-to-government relationship with the Tribe, I am directing that the following actions be undertaken:

1. The BIA will rescind its April 2007 public notice to, "assist the California Valley Miwok Tribe, aka, Sheep Ranch Rancheria (Tribe) in its efforts to organize a formal governmental structure that is acceptable to all members."

2. The BIA will rescind its November 6, 2006 letters to Sylvia Burley and Yakima Dixie stating that the BIA will initiate the reorganization process for the California Valley Miwok Tribe.