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UNITED STATES FEDERAL DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, et al., Plaintiffs, vs. S.M.R. JEWELL, Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	No.: 2:16-cv-01345-WBS-CKD FEDERAL DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STAY

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I. INTRODUCTION

This case arises out of a long-running internecine dispute that has divided the California Valley Miwok Tribe ("CVMT" or "Tribe") into two factions: the Burley group (Plaintiffs in this lawsuit, who purport to speak for the entire Tribe) and a group led by Mr. Yakima Dixie (Intervenor-Defendant Tribal Council). For over ten years, the competition for recognition has spawned a great deal of litigation, both in California state courts and federal district and appellate courts. In this latest lawsuit, Plaintiffs challenge a December 30, 2015, Decision ("December 2015 Decision") issued by the Department of the Interior Assistant Secretary – Indian Affairs ("Assistant Secretary") concluding that neither group established that they constituted the Tribe's valid representatives. ECF No. 11, Ex. 4. As part of his decision, the Assistant Secretary authorized the Regional Director ("RD") of the Pacific Regional Office of the Bureau of Indian Affairs ("BIA") to receive additional submissions from Yakima Dixie for the purpose of establishing whether the Tribe validly ratified a constitution in 2013. In addition to authorizing the RD to receive submissions, the December 2015 Decision encouraged the Tribe to petition for a Secretarial election under 25 C.F.R. Part 81 and to work with the RD to help the Tribe attain its manifest goal of reorganizing. Id.

In furtherance of the Assistant Secretary's authorization, the Regional Director met with the Burley- and Dixie-led groups several times this year to discuss the ongoing dispute. The Regional Director also accepted submissions from the Dixie group concerning the 2013 constitution. On June 9, 2016, the RD sent a letter to Plaintiff Silvia Burley notifying her that the Dixie group had submitted documentation concerning the 2013 constitution and inviting the Burley group to submit comments on the Dixie group submission by July 12, 2016. The RD's letter does not give any indication of what the RD's decision will be nor when she is likely to render that decision. Nonetheless, Plaintiffs (the Burley Group) allege that the letter reflects the

RD's intention to approve the 2013 constitution, allowing the Dixie group to "take over the Tribe." Pls.' Mot. at 5. Plaintiffs then extrapolate that if the Yakima Dixie group is recognized as the Tribe's government, the group successfully will petition the California Gambling Control Commission to release tribal funds to it. The tribal funds are significant. As a federally-recognized California tribe that does not own a gaming franchise, the Tribe is entitled to a share in California tribal gaming revenues to the tune of – according to Plaintiffs – more than ten million dollars. Plaintiffs seek an injunction staying the implementation of the December 2015 Decision in order to prevent these hypothetical events from transpiring.

Careful untangling of Plaintiffs' motion shows that, in fact, they have failed to identify any likelihood of success or irreparable harm. Plaintiffs' argument, in a nutshell, is that because it is possible the RD may reach conclusions that are adverse to Plaintiffs' interests, the whole process should be enjoined. While we address Plaintiffs' motion below according to the traditional four-factor analysis governing emergency relief, merely to state Plaintiffs' major premise is to refute it. While the December 2015 Decision is indisputably a final agency action amenable to review in federal courts under the Administrative Procedure Act, that decision was issued six months prior to Plaintiffs filing their complaint, and Plaintiffs do not identify any provision of the December 2015 Decision that threatens them with irreparable harm. Rather, Plaintiffs point to the RD's June 9, 2016, letter, which is not a final agency action subject to judicial review; indeed, any decision rendered by the RD on this matter, including a decision to recognize the validity of the 2013 tribal constitution, is amenable to administrative review. Furthermore, Plaintiffs fundamentally misrepresent the RD's letter, which merely identifies July 26 as the deadline for submission of documents. In short: neither the Assistant Secretary's December 2015 Decision nor the RD's June 9 letter purports to take any action at all, much less an action harmful to Plaintiffs. Plaintiffs' motion, therefore, should be denied.

II. BACKGROUND

A. Factual Background

The CVMT has been embroiled in over a decade-long leadership dispute, spawning numerous lawsuits in state and federal courts and administrative review boards. *See, e.g., Sheep Ranch Miwok Indian Tribe of California v. Burley*, No. 2:01-cv-01389-LKK-DAD (June 18, 2001 E.D. Cal.); *California Valley Miwok Tribe v. United States* ("*Miwok I*"), 424 F. Supp. 2d 197 (D.D.C. 2006); *California Valley Miwok Tribe v. United States* ("*Miwok II*"), 515 F.3d 1262 (D.C. Cir. 2008); *California Valley Miwok Tribe v. California Gambling Control Comm'n*, No. Civ. 08-984, slip op. (July 23, 2008 E.D. Cal.); *California Valley Miwok Tribe v. Kempthorne*, No. 2:08-cv-03164-FCD-EFB (Dec. 29, 2008 E.D. Cal.); *CVMT v. Pacific Regional Director, BIA*, 51 IBIA 103 (IBIA 2010); *California Valley Miwok Tribe v. Jewell* ("*Miwok III*"), 5 F. Supp. 3d 86 (D.D.C. 2013); *California Valley Miwok Tribe v. California Gambling Control Comm'n*, 231 Cal. App. 4th 885, 901 (2014); *California Valley Miwok Tribe v. California Gambling Control Comm'n*, No. 15cv622-AJB, ECF No. 18 (S.D. Cal. Sept. 11, 2015). It is within the backdrop of this history of litigation that the present lawsuit is best understood. The factual and procedural history of CVMT's leadership dispute has been described at length in these decisions. Federal Defendants here provide a summary of the facts limited to those necessary to understand this lawsuit and why Plaintiffs' motion is unfounded.

1. The California Valley Miwok Tribe and Its Leadership Dispute

The CVMT is a federally-recognized Tribe, formerly known as the Sheep Ranch Rancheria. 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979) ("Sheep Ranch Rancheria"); 67 Fed. Reg. 46328 (July 12, 2002) ("California Valley Miwok Tribe"). In 1906, Congress authorized the BIA to purchase land for use by Indians in California living outside reservations or on reservations that did not contain land suitable for cultivation. Pub. L. No. 258, 34 Stat. 325, 333;

Miwok III, 5 F. Supp. 3d at 88. In 1916, the BIA acquired an acre of land in Sheep Ranch, California, for the benefit of Miwok Indians living in the area. The land, and the group of Indians associated with it, became the "Sheep Ranch Rancheria." The BIA has listed the Tribe as the California Valley Miwok Tribe since 2002.

In 1934, Congress passed the Indian Reorganization Act ("IRA"), which, among things, required the BIA to hold elections through which the adult members of a tribe would decide whether to reject the applicability of the IRA to their reservation. 25 U.S.C. §§ 5123, 5125; *Miwok III*, 5 F. Supp. 3d at 89. Jeff Davis, the adult Indian residing on the Sheep Ranch Rancheria in 1935, voted in favor of the IRA, but the Tribe did not organize under the IRA at that time. *Id.* at 89.

In 1958, Congress enacted the California Rancheria Act ("Rancheria Act"), Pub. L. No. 85-671, 72 Stat. 619, which it amended in 1964, Pub. L. No. 88-419, 78 Stat. 390. The Rancheria Act established a process for terminating the federal status of California Rancherias. Key to that process was distributing the Rancheria assets – chiefly, title to the Rancheria lands – to the "Indians of such reservation or rancheria." *Id.* at 390. In 1966, the BIA prepared a plan to distribute the assets of the Sheep Ranch Rancheria. The BIA determined that Mabel Hodge Dixie was the only adult Indian "of such reservation or Rancheria," and was entitled to receive the assets of the Rancheria. *Miwok III*, 5 F. Supp. 3d at 89. Ms. Dixie voted to accept distribution. *Id.* The BIA, however, failed to take the steps necessary to complete the Rancheria's termination. *Id.* After Ms. Dixie's death, five individuals were determined to be her heirs and to possess undivided interests in the Rancheria, including Yakima Dixie. *Id.* at 90. In 1998, it was represented to the BIA that Mr. Dixie and his brother Melvin Dixie were the only living heirs to Ms. Dixie. *Id.* During this time period, Silvia Burley contacted the BIA for

information related to her Indian heritage. *Id.* The BIA determined that Ms. Burley might be remotely related to Jeff Davis and, at its suggestion, Burley contacted Yakima Dixie. *Id.*

Ms. Burley contacted Yakima Dixie and on August 5, 1998, she wrote for Dixie's signature a statement purporting to enroll herself, her two daughters, and her granddaughter into the Tribe. *Id.* The statement did not mention Melvin Dixie or the criteria used to determine her membership eligibility. *Id.* After meeting with the BIA in September of 1998 to discuss issues related to the Tribe, the BIA drafted Resolution #GC-98-01 ("1998 Resolution"). The 1998 Resolution states that membership of the Tribe consists of at least Yakima Dixie, Silvia Burley, Silvia Burley's daughters and grandchild, and that membership may change in the future consistent with the Tribe's ratified constitution and any duly enacted tribal membership statutes. *Id.* at 91. The resolution also established a general council ("1998 General Council"). *Id.* Silvia Burley and Yakima Dixie executed the 1998 Resolution on November 5, 1998. *Id.*

In 1999, the Tribe's leadership dispute began and intensified with Silvia Burley and Yakima Dixie both claiming to be Chairperson of the Tribe. *Id.* The BIA attempted to have the groups work together to resolve their dispute, define the Tribe's membership criteria, and adopt a tribal constitution, without success. On July 20, 1999, the BIA and the Tribe entered into a "self-determination contract" that provided annual funding for the Tribe's development and organization. *Id.* Silvia Burley was the signatory for this contract. Yakima Dixie and Silvia Burley began to submit competing constitutions to the BIA for its consideration. Eventually, the BIA ceased recognizing Silvia Burley as the Tribe's representative and stopped funding the Tribe's self-determination contracts. The California Gaming Control Commission also suspended its yearly payments to the Tribe. The groups brought multiple lawsuits against the BIA, the State of California, and each other in various courts, including this one.

2. The 2006 and 2008 Litigation: *Miwok I* and *Miwok II*

In 2005, the Burley group submitted to the Secretary a constitution purporting to confer tribal membership only upon Silvia Burley and her descendants. The BIA refused to accept the constitution, finding that it did not reflect the participation of the greater tribal community. The Burley group challenged that decision as contrary to IRA section 476(h) (current version at 25 U.S.C. § 5123(h)). Both the district court and the D.C. Circuit upheld the agency's decision. *See Miwok I*, 424 F. Supp. 2d 197; *Miwok II*, 515 F.3d 1262. While recognizing the inherent sovereign power of tribes to regulate their internal and social relations, *Miwok II*, 515 F.3d at 1263, the court of appeals agreed that section 476(h) allows the Secretary to reject a constitution that failed to reflect the involvement of the whole tribal community. *Id.* at 1267. The court found the Secretary's rejection of the constitution reasonable given (1) the Secretary's broad power to manage Indian affairs; (2) the United States' trust obligations, which include an obligation to "promote a tribe's political integrity;" and (3) the majoritarian values embodied in other IRA provisions. *Id.* at 1267-68. The court stated that:

> This case involves an attempt by a small cluster of people within the [CVMT] to organize a tribal government under the Act. CVM[T]'s chairwoman, Silvia Burley, and a group of her supporters adopted a constitution to govern the tribe without so much as consulting its membership. The Secretary declined to approve the constitution because it was not ratified by anything close to a majority of the tribe.

Id. at 1262. The court found that the Burley group's "antimajoritarian gambit deserves no stamp of approval from the Secretary." *Id.* at 1267-68.

3. The Assistant Secretary's December 2010 and August 2011 Decisions

In November 2006, while *Miwok II* was pending, the BIA notified Silvia Burley and Yakima Dixie that it would move forward with efforts to facilitate the organization of the Tribe under the IRA. The BIA published notices in local newspapers inviting "the members of the

Tribe and potential members" to participate in a General Council meeting intended to "initiate the reorganization process." *CVMT*, 51 IBIA at 113-114. Burley appealed the November 2006 decision to the Interior Board of Indian Appeals ("IBIA"), and the General Council meeting was stayed. Finding that certain aspects of Ms. Burley's appeal raised questions of tribal membership over which the IBIA has no jurisdiction, the IBIA referred the matter to the Assistant Secretary. On December 22, 2010, the Assistant Secretary issued a decision determining that there was no need for the BIA to pursue its efforts to organize a tribal government because it was organized as the 1998 General Council under the 1998 Resolution ("December 2010 Decision"). *Miwok III*, 5 F. Supp. 3d at 95. Yakima Dixie filed a federal lawsuit challenging the December 2010 Decision alleging, in part, that he had not been provided the opportunity to brief the issues before the Assistant Secretary. The Assistant Secretary withdrew the decision and requested briefing from all the parties. *Id.* Yakima Dixie stayed his suit pending the Assistant Secretary's reconsideration.

On August 31, 2011, the Assistant Secretary issued a revised decision ("August 2011 Decision") that reached the same conclusion as the December 2010 decision. In the August 2011 Decision, the Assistant Secretary acknowledged making "a 180-degree change of course from positions defended by [the] Department in administrative and judicial proceedings over the past seven years." *Miwok III*, 5 F. Supp. 3d at 96. Relevant to this lawsuit, the August 2011 Decision found, among other things, that (1) the citizenship of the Tribe consisted solely of Dixie, Burley, and Burley's two daughters and granddaughter; and (2) that the 1998 General Council was vested with the governmental authority of the Tribe, and could conduct the full range of government-to-government relations with the United States, and had exclusive authority to determine the Tribe's citizenship criteria. Based on those findings, the August 2011 Decision

ended the BIA's efforts to promote inclusion of a larger tribal community, finding those efforts to be an improper interference with the Tribe's internal governance. *Id.* at 95.

4. The 2011 District Court Litigation: *Miwok III*

In response to the August 2011 decision, the Dixie group renewed its lawsuit, amending its complaint to challenge the August 2011 Decision as arbitrary and capricious and unreasonable under the Administrative Procedure Act ("APA"). Based on the record, the district court found that the August 2011 Decision was unreasonable. *Miwok III*, 5 F. Supp. 3d at 99-100. The district court found that the Assistant Secretary's finding that the Tribe consisted of five members "ignores – entirely – that the record is replete with evidence that the Tribe's membership is potentially significantly larger[.]" *Id.* at 98. The district court found that the Assistant Secretary failed to explain his assumption that Dixie's adoption of the Burley group into the Tribe was valid, an assumption that the district court found questionable given that "at the time Burley first contacted Yakima, he was in jail and suffering from several serious illnesses and other disabilities." *Id.* at 99. In addition, the district court held that the Assistant Secretary failed to address the fact that Dixie adopted the Burley group without consulting his brother. As the district court noted, the adoption of the Burley group "effectively placed [Dixie's brother's] tribal rights at the mercy of the Burleys." *Id.* The district court concluded that:

> Put simply, the Assistant Secretary missed the first step of the analysis. Under these circumstances and in light of this administrative record, rather than simply assume that the Tribe consists of five members, the Assistant Secretary was required to first determine whether the membership had been properly limited to these five individuals.

Id.

Similarly, the district court found the Assistant Secretary "simply assumes, without addressing, the validity of the General Council." *Id.* at 100. The district court found this assumption unreasonable in light of various allegations in the record by Dixie that raise

significant doubts about the council and Burley's claimed status as chairperson of the Tribe. *Id.* Accordingly, the district court remanded to the agency for reconsideration consistent with its decision.

5. The California Gambling Control Commission Litigation

In addition to the above litigation, Plaintiffs filed suit against the California Gambling Control Commission ("Commission"), the entity responsible for disbursing funds to certain California tribes as discussed below.

Under the Indian Gaming Regulatory Act, 18 U.S.C. § 1166 *et seq.*; 25 U.S.C. § 2701 *et seq.*, the State of California entered into tribal-state gaming compacts with the various tribes in California authorized to operate gambling casinos (collectively, the "Compacts"). *California Valley Miwok Tribe*, 231 Cal. App. 4th at 888 (citing Cal. Gov't Code §§ 12012.25-12012.53 (ratifying tribal-state gaming compacts)). The Compacts set forth a revenue-sharing mechanism under which tribes that operate fewer than 350 gaming devices share in the license fees paid by the tribes entering into the Compacts, so that each "Non-Compact Tribe" in the state receives $1.1 million per year. *Id.* (citing Compacts, § 4.3.2.1). The license fees are paid into the Indian Gaming Revenue Sharing Trust Fund ("RSTF"). *Id.* at 889. The Commission serves as the trustee and administrator of the RSTF. *Id.* CVMT is a Non-Compact Tribe because it operates no gaming devices and is federally-recognized. *Id.*

Because of the Tribe's leadership dispute, the Commission began withholding the distribution of the RSTF funds to the Tribe. The Commission took the position that it lacked the authority to independently assess the legitimacy of a purported tribal leader or tribal leadership group, and instead chose to rely upon the assessment and conclusion of the Department of the Interior, acting through the BIA, which was still in process. *Id.* at 889-90. As of March 6, 2013, the Commission was holding $8,763,000.99, exclusive of interest, of the RSTF funds payable to

the CVMT. *Id.* at 890. Plaintiffs state that the funds are now in excess of $12 million. Pls.' Mot. at 6.

Plaintiffs brought several suits against the Commission, challenging its decision to withhold funds. In each one, the court upheld the Commission's decision or dismissed the case outright for lack of jurisdiction. *See California Valley Miwok Tribe*, 231 Cal. App. 4th at 912; *California Valley Miwok Tribe*, No. 15cv622-AJB, ECF No. 18 (Sept. 11, 2015).

6. The December 2015 Decision

On December 30, 2015, the Assistant Secretary issued the decision in response to the remand imposed by the United States District Court for the District of Columbia in *Miwok III*. In the December 2015 Decision, the Assistant Secretary addressed two issues related to the Tribe: (1) whether membership was limited to Dixie, Burley, Burley's two daughters and grandchild; and (2) whether the United States recognized leadership for the CVMT's government. ECF No. 11, Ex. 4 at 3-6. As to the Tribe's membership, the Assistant Secretary found that, as all of the federal court decisions examining the CVMT dispute make clear, the Tribe is not limited to five individuals. *Id.* at 3. The Assistant Secretary noted that the BIA decision under review in *Miwok I* plainly rejected the 1998 constitution offered by Burley as controlling the Tribe's organization because it had not been ratified by the "whole tribal community." *Id.* (quoting *Miwok II*, 515 F.3d at 1265-66). The Assistant Secretary noted that the circuit court in *Miwok II* emphasized that the Tribe consisted of more than five people and that the Burley group had attempted to adopt a constitution to govern the Tribe without so much as consulting its membership. *Id.* Although the district court remanded to the Assistant Secretary the question of tribal membership, it was only after noting that "the record is replete with evidence that the Tribe's membership is potentially significantly larger than just these five individuals." *Id.* (quoting *Miwok III*, 5 F. Supp. 3d at 98).

To determine the membership of the Tribe, in addition to consideration of the fact that all previous courts addressing the issue found that there are far more than five people eligible to take part in the organization of the Tribe, the Assistant Secretary also reviewed the Department's dealings with the Tribe and the history of the Tribe as a Rancheria. *Id.* The Assistant Secretary found that for purposes of reorganization, the Tribe's membership is properly drawn from the Miwok Indians for whom the Rancheria was acquired and their descendants. *Id.* The Assistant Secretary found that the history of the Rancheria and the administrative record demonstrates that the tribal group of eligible members consists of individuals listed on a 1915 census and their descendants, the descendants of Jeff Davis, and the heirs of Mabel Dixie (collectively referred to as the "Eligible Groups"). *Id.* The Assistant Secretary then noted that to the extent Plaintiffs are among individuals who make up the Eligible Groups, he encouraged them to participate in the Tribe's reorganization. *Id.* at 5. If Plaintiffs cannot demonstrate that they are part of the Eligible Groups, he left it up to the Tribe, as a matter of self-governance and self-determination, to clarify Plaintiffs' membership status. *Id.*

As to the leadership of the Tribe, the Assistant Secretary, for purposes of administering the Department's statutory responsibilities to Indians and Indian tribes, found that he could not accept either the Dixie or Burley groups' claims. *Id.* Noting that Plaintiffs relied on the 1998 Resolution as the basis for Silvia Burley's leadership, the Assistant Secretary found that the 1998 Resolution, while it seemed like a "reasonable, practical mechanism for establishing a tribal body to *manage the process* of reorganizing the Tribe, the actual reorganization . . . can be accomplished only via a process open to the whole tribal community." *Id.* (also citing to the courts' findings in *Miwok II* and *Miwok III*) (emphasis in original). Because the people who approved the resolution are not the majority of those eligible to take part in the reorganization of

the Tribe, the Assistant Secretary found that he could not recognize the actions to establish a tribal governing structure taken pursuant to the 1998 Resolution. *Id.*

The Assistant Secretary also found that the Dixie group's purported ratification of a constitution in 2006 and 2013 did not establish leadership for the Tribe. The constitution purportedly ratified in 2006 failed to explain the significance of those who signed it or how it was ratified, including whether it was ratified through a process that provided broad notice to individuals eligible to take part in the Tribe's organization. *Id.* at 6. For the constitution purportedly ratified by the Dixie group in 2013 ("2013 Constitution"), the Assistant Secretary found that the record was silent on the effort to notify all those eligible to take part in the Tribe's organization to ratify the 2013 Constitution. *Id.* The Assistant Secretary, however, did not foreclose the possibility that the Dixie group could provide additional evidence demonstrating adequate notice for the BIA's acceptance of the 2013 Constitution, and authorized the Regional Director to receive additional submissions from the Dixie group for the purpose of establishing whether the 2013 Constitution was validly ratified. *Id.* As an alternative, the Assistant Secretary encouraged the Tribe to petition for a Secretarial election under 25 C.F.R. Part 81 within 90 days of the decision. *Id.* The December 2015 Decision is final agency action. *Id.* at 7.

7. The 2016 Regional Director Request for Comment

In 2016, RD Amy Dutschke and her staff met with both the Burley and Dixie groups to discuss the ongoing dispute. Aff. of Amy Dutschke ("Dutschke Aff."), ¶ 6 (Ex. A). As authorized by the December 2015 Decision, the RD accepted the Dixie group's submitted documentation in support of their assertion that the Tribe successfully organized via the ratification of the 2013 Constitution. *Id.*, ¶ 7. The RD and her staff reviewed the Dixie submissions and, on June 9, 2016, sent correspondence to Burley, care of her attorney, providing Burley with a copy of the submissions. *Id.*, ¶¶ 7-8. The RD also invited Burley to submit her

own comments and documents no later than July 12, 2016, on the issue of whether the Tribe was successfully organized by the ratification of the 2013 Constitution. *Id.* ¶ 8. The RD did not identify July 12 or any other date as the date by which BIA would act on the Dixie group's submissions, nor did she indicate whether the BIA had taken any position on the merits of the Dixie group's submissions. *Id.* ¶ 9. A decision has not yet issued. *Id.* ¶ 10. When issued, the RD's decision will be subject to administrative appeal.

8. Plaintiffs' Complaint and the Current Litigation

Plaintiffs filed this complaint on June 16, 2016, challenging the December 2015 Decision as arbitrary and capricious under the Administrative Procedure Act.[1] ECF Nos. 1 and 4. Plaintiffs allege that the December 2015 Decision is arbitrary and capricious for refusing to recognize Silvia Burley's leadership of the Tribe under the 1998 Resolution and for directing the Tribe's organization process to include individuals beyond Plaintiffs and Yakima Dixie. ECF No. 4, ¶ 1. On July 1, Plaintiffs filed their *ex parte* application seeking an emergency stay of the December 2015 Decision on the grounds that the Regional Director's June 2016 letter represented an intent to make a decision on the validity of the 2013 Constitution. ECF No. 8. This Court denied the motion sua sponte without prejudice to Plaintiffs' refiling of a properly noticed motion.

On July 8, Plaintiffs filed their Motion for Stay and Memorandum of Points and Authority in Support of a Motion for an Order Staying the December 2015 Decision. ECF Nos. 9 and 10. In their motion, Plaintiffs allege that they seek to preserve the status quo pending resolution of their litigation. Pls.' Mot. at 7-8. Plaintiffs allege that they will suffer irreparable harm because the "BIAS [sic] is already implementing Washburn's decision by accepting for review the Dixie Faction's constitution. Once accepted, the BIA will turn over the Tribe to the

[1] Plaintiffs filed their amended complaint on June 17, 2014. ECF No. 4.

Dixie Faction, and the Dixie Faction will then turn around and collect the $13 million in RSTF payments being withheld for the Tribe. Once released, the Tribe cannot retrieve those funds, and, if the [December 2015] Decision is set aside, then the funds would be irretrievable lost." *Id.* at 7.

III. STANDARD OF REVIEW

A. Standard of Judicial Review for a Preliminary Injunction

A preliminary injunction "is a matter of equitable discretion" and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24, 32 (2008)).[2] A plaintiff seeking a preliminary injunction must establish that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest.[3] *Winter*, 555 U.S. at 20; *see also Am. Trucking Ass'ns v. City*

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[2] Although Plaintiffs caption their motion as seeking an order staying the December 2015 Decision, Plaintiffs are actually seeking preliminary injunctive relief from the Court to prevent the BIA from taking certain actions pending a decision on the merits. *See* Pls.' Mot. at 7-8; *see also Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (an injunction is the means by which the court directs the conduct of a party, whereas a stay operates only on the judicial proceeding itself or by temporarily divesting an order of enforceability) (quotations omitted). The terminology does not change the Court's standard of review. *Leiva-Perez*, 640 F.3d at 966-70 (analyzing stay request using the four factors considered in analyzing a request for preliminary injunction). The two Sixth Circuit cases Plaintiffs cite – *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991) and *In re EPA*, 803 F.3d 804 (6th Cir. 2015) – both couch the requested relief in terms of seeking a stay and in both cases, the courts considered the same four factors traditionally considered in evaluating a request for a preliminary injunction. *Mich. Coal.*, 945 F.2d at 153; *In re EPA*, 803 F.3d at 806.

[3] The Ninth Circuit has also articulated an alternate formulation of the *Winter* test, suggesting that injunctive relief is appropriate where plaintiffs can show "serious questions" going to the merits and that "the balance of hardships tips sharply" towards the plaintiffs. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). To the extent that the "serious questions" formulation is different than the "likelihood" standard, *see, e.g.*, *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1141 n.6 (C.D. Cal.

of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). When one party is a United States agency, the public interest "merge[s]" with the United States' interest, and the public interest weighs in favor of the agency's decision. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("[The third and fourth factors, harm to the opposing party and the public interest,] merge when the Government is the opposing party."). If the plaintiff cannot demonstrate a likelihood of success on the merits or that the balance of equities weighs in its favor, a preliminary injunction should be denied – even if there is evidence of irreparable harm. *DBOC v. Salazar*, 921 F. Supp. 2d 972, 995 (N.D. Cal. 2013), *aff'd* 747 F.3d 1073, 1092 (9th Cir. 2013).

Moreover, even if success on the merits is likely, or "serious questions" are raised, an injunction "is not a remedy which issues as of course . . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citation omitted); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545-46 (1987). An injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curium) (citation omitted). The plaintiff must do "more than merely allege imminent harm sufficient to establish standing." *Associated Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, . . . a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").

B. Scope of Review

Plaintiffs challenge the December 2015 Decision under the APA. The Court reviews Plaintiffs' likelihood of success on the merits under the APA's deferential "arbitrary and capricious" standard, 5 U.S.C. §§ 701-706. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th

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2012) (declining to apply the "serious questions" standard), Plaintiffs here have not satisfied their burden under either standard.

Cir. 2008). Under that standard, an agency action such as the December 2015 Decision will be set aside only if the challenging party demonstrates that the agency's decision was "arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A decision is arbitrary and capricious "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *McNair*, 537 F.3d at 987 (quotation marks and citation omitted). "This standard or review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Independent Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotation marks omitted).

IV. ARGUMENT

Plaintiffs fail to meet any of the preliminary injunction factors. First, Plaintiffs do not have a likelihood of success on the merits. The Assistant Secretary arrived at the December 2015 Decision after careful consideration of the record and reconsideration of the August 2011 Decision, consistent with the terms of the district court's remand order. Indeed, Plaintiffs' primary allegations – that the Tribe comprises just five people and is organized under the 1998 General Council Resolution – have already been rejected by the D.C. Circuit Court and thus are *res judicata*. Plaintiffs' are not likely to prevail on these already-decided issues. Second, Plaintiffs have not alleged any imminent and irreparable harm. Their motion misreads the RD's June 2016 letter providing Plaintiffs an opportunity to provide comments. The letter contains no language stating that a decision would be made at that time, and indeed, no decision has been

made. Finally, Plaintiffs cannot show that the balance of equities and the public interest weigh in their favor. Therefore, their motion should be denied.

A. Plaintiffs Fail to Show a Likelihood of Success on the Merits

Plaintiffs assert that they are likely to succeed in their challenge of the December 2015 Decision because: (1) Mr. Dixie's enrollment of Plaintiffs in 1998 was appropriate; (2) Mr. Dixie's enrollment of Plaintiffs did not compromise Mr. Dixie's brother Melvin Dixie's interests; (3) enrolling Plaintiffs did not impair the interests of "unenrolled potential tribal members;" and (4) the 1998 General Council is the Tribe's authorized and legitimate government. Pls.' Mot. at 8-10. Plaintiffs, however, ignore binding decisions issued by federal courts and the administrative record before the Assistant Secretary, which demonstrate that the Assistant Secretary had more than a reasonable basis for his decision.

1. The December 2015 Decision did not Decide Issues Relating to Plaintiffs' Enrollment in the Tribe

Plaintiffs contend that they possess a likelihood of success on the merits because Dixie properly enrolled Plaintiffs and such enrollment did not compromise Melvin Dixie's interests or impair the interests of Eligible Groups. But these contentions have no relevance to the decision Plaintiffs challenge.[4] Whether Plaintiffs were properly enrolled and whether such enrollment had any impact on the interests of others had no bearing on the decision. The December 2015 Decision limited its conclusions to whether the Tribe was made up of more than five people and whether the United States recognized any leadership for the Tribe. In discussing whether the Tribe was limited to five people, the Assistant Secretary found that binding decisions of federal courts, and the administrative records on which those decisions were based, establish that the

[4] Plaintiffs use the term "unenrolled potential Tribal members" to describe the individuals who may be eligible to take part in the organization of the Tribe. The December 2015 Decision defines these individuals collectively as the "Eligible Groups."

Tribe consists of more than five individuals. ECF No. 11, Ex. 4 at 3-4. The Assistant Secretary noted that the district court in *Miwok III* expressed concern that Plaintiffs' enrollment prejudiced the interests of Melvin Dixie, but stated that: "[t]he BIA's decision to strengthen a dwindling tribe by facilitating the enrollment of a family of relatives was an appropriate step to the benefit of Mr. Dixie and Melvin as well as to the Burley family. The ensuing difficulties were unforeseeable . . . ." *Id.* at 4 n.20. Thus, rather than find that Plaintiffs' enrollment was inappropriate, as Plaintiffs assert in their motion, the Assistant Secretary found that their enrollment was an appropriate step at the time.

Likewise, Plaintiffs' assertion that their enrollment did not impair the interests of Eligible Groups is plainly repudiated by controlling case law. As the D.C. Circuit Court observed:

> This case involves an attempt by a small cluster of people within the [CVMT] to organize a tribal government under the Act. CVM[T]'s chairwoman, Silvia Burley, and a group of her supporters adopted a constitution to govern the tribe without so much as consulting its membership. The Secretary declined to approve the constitution because it was not ratified by anything close to a majority of the tribe . . . . [W]e conclude that the Secretary lawfully refused to approve the proposed constitution . . . .

515 F.3d 1262, 1263. In light of ten-plus years of litigation, the whole focus of which has been the exclusion of all "potential members" from the benefits of tribal membership, Plaintiffs' assertion that their enrollment has not been prejudicial to the interests of other Indians associated with the Sheep Ranch Rancheria is profoundly untrue. The December 2015 Decision precisely follows the decision of the circuit court. Plaintiffs fail to demonstrate any likelihood of success on the merits as to this assertion.

2. The Assistant Secretary did not Err in Finding that the 1998 General Council is not the Tribe's Valid Representative

Plaintiffs also argue that the December 2015 Decision is arbitrary and capricious because it failed to recognize the validity of the 1998 General Council. Plaintiffs argue that because the BIA previously recognized and provided federal funds to the Burley group-led council, it is now

erroneous for the BIA to reconsider its recognition. Plaintiffs' argument, however, misconstrues the Assistant Secretary's findings and mischaracterizes the BIA's previous actions.

The BIA drafted the 1998 Resolution to assist in the Tribe's initial organization. *Miwok III*, 5 F. Supp. 3d at 91. The 1998 Resolution provided that the membership of the Tribe at the time consisted of *at least* the Burley group and Yakima Dixie, and that the membership could change in the future consistent with the Tribe's ratified constitution and any duly enacted membership statutes. *Id.* (citations omitted). The 1998 Resolution further provided that the Burley group and Yakima Dixie, as a majority of the Tribe's adult members, established a General Council to serve as the Tribe's governing body. *Id.* As discussed, the December 2015 Decision noted that the 1998 Resolution "seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of organizing the Tribe," but that the actual reorganization could be accomplished only by a process open to the whole tribal community. ECF No. 11, Ex. 4 at 5 (emphasis added). Because the 1998 Resolution was approved by only Dixie and Burley, it could not serve as the actual reorganization of the whole tribal community, which includes the Eligible Groups. *Id.*

It is not true that the BIA has recognized Plaintiffs as the Tribe's authorized government since 1999. Pls.' Mot. at 10. While correspondence from the BIA acknowledged the authority of the General Council until at least November 24, 2003, the Superintendent's letter of March 26, 2004, explained that the BIA recognized Ms. Burley as "a person of authority within the California Valley Miwok Tribe," for the purposes of providing the Tribe with federal funds under the Indian Self-Determination Act. As explained in the Rogers-Davis declaration of June 13, 2005, in 2004 the BIA "determined that it was inappropriate to continue to acknowledge Burley as a tribal chairperson who leads an organized tribe or to acknowledge a governing council for the Tribe."

The BIA considered the 1998 General Council a mechanism to assist with the Tribe's organization, not the final statement of tribal membership or leadership. In 2004, the BIA rejected the governing documents submitted by Plaintiffs for failure to involve the greater tribal community, a decision affirmed by federal courts. *Miwok II*, 515 F.3d at 1265-66. In 2005, the BIA rescinded its interim recognition of Plaintiffs and the 1998 General Council. *Miwok III*, 5 F. Supp. 3d at 93-94.

The Assistant Secretary provided a reasonable basis for his decision and detailed his explanations that comported with binding decisions of the district court and the circuit court in the *Miwok* decisions. Plaintiffs fail to demonstrate a likelihood of success on the merits and their request should be denied.

B. Plaintiffs Fail to Demonstrate Irreparable Harm

1. Plaintiffs Fail to Show that they are Irreparably Harmed by the December 2015 Decision or by the RD's June letter

Plaintiffs cannot show that they will suffer irreparable harm if the December 2015 Decision is not stayed. A specific finding of irreparable harm to the movant is one of the most important elements for the Court to consider in deciding whether preliminary injunctive relief is warranted. *See Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 162 (2010) (an injunction should only issue if it is "needed to guard against any present or imminent risk of likely irreparable harm."). To warrant injunctive relief, it is not enough that the claimed harm be irreparable; it must be imminent as well. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Los Angeles Mem'l Coliseum v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980); s*ee also Amylin Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 456 Fed. Appx. 676, 679 (9th Cir. 2011) (Unpub. Disp.) ("[E]stablishing a threat of irreparable harm in the indefinite future is not enough."). Nor does speculative injury constitute irreparable harm sufficient to warrant granting a preliminary injunction. *Caribbean Marine Servs.*, 844 F.2d at

674 (citing *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)). Here, Plaintiffs cannot demonstrate that irreparable injury is likely or imminent.

Plaintiffs' alleged irreparable harm is premised on a future series of events that may or may not transpire. Plaintiffs allege that they will suffer harm because "[t]he BIA is poised to give the Tribe over to the Dixie Faction in the immediate future, based upon the [December 2015] Decision. Once that occurs, the Dixie Faction will request and obtain $13 million in RSTF payments belonging to the Tribe." Pls.' Mot. at 10. Plaintiffs' speculation about possible future events appears to originate from that portion of the December 2015 Decision authorizing the RD to accept additional submissions from Dixie for the purpose of establishing whether the 2013 Constitution was validly ratified. As discussed, Dixie submitted his documentation concerning the 2013 Constitution, which the RD and her office reviewed. Dutschke Aff., ¶ 7. The RD then invited Plaintiffs to comment on Dixie's submissions. *Id.* ¶ 8; ECF No. 11, Ex. 1. That invitation to comment serves as the basis of Plaintiffs' request for emergency relief. But Plaintiffs' premise their motion on a misreading of the letter. It did not – as they assert – "notify[] Plaintiffs that [BIA] intends to act on the submission by July 12, 2016." Pls.' Mot. at 5. Rather, the letter merely invited Plaintiffs to provide their comments. Dutschke Aff., ¶ 9; ECF No.11, Ex. 1 ("**By close of business on July 12, 2016,** please provide your comments and any documents that support your position.") (emphasis in original). This letter does not provide any support for Plaintiffs' assertions that the BIA is "poised to give the Tribe over to the Dixie Faction," Pls.' Mot. at 10, and Plaintiffs' misunderstanding cannot serve as the basis for emergency injunctive relief.

Even if the RD finds that the 2013 Constitution was validly ratified, it does not immediately follow that the Dixie group will obtain the RSTF funds. Should the RD determine that the 2013 Constitution was validly ratified, that decision does not become effective

immediately. Plaintiffs will have the opportunity – and, indeed are required by regulation and thus the APA itself – to challenge the decision administratively and exhaust their administrative remedies prior to seeking judicial review. The Secretary of the Interior has delegated some of her responsibilities under the IRA to BIA Regional Directors. *See* 25 U.S.C. § 1a (authorizing delegations of authority). Decisions made by BIA Regional Directors are subject to administrative appeal. *See id.*; 25 C.F.R. §§ 2.1-2.21 (setting forth appeal procedures); 43 C.F.R. §§ 4.200-4.340 (additional procedures made relevant under 25 C.F.R. § 2.4(e)). The regulations governing the BIA require exhaustion of administrative appeals within the BIA before a decision can be considered "final" for purposes of judicial review. *See* 25 C.F.R. §§ 2.4(e), 2.8; *see also White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988). Any administrative appeal automatically stays the RD's decision. *See* 25 C.F.R. § 2.6(b). Courts have recognized that "[a]gency review . . . prior to judicial consideration is desirable even where pure questions of law are concerned, in order to provide the court with the benefit of the agency's considered interpretation of its enabling authority" and to "preserve[] the opportunity for the agency to correct an ill-conceived regulation and moot the issue without judicial interference." *St. Regis Paper Co. v. Marshall*, 591 F.2d 612, 614 (10th Cir. 1979) (citations omitted). The RD's future decision regarding the validity of the 2013 Constitution, and any associated future action based upon it, is not imminent and irreparable. Plaintiffs thus fail to establish the *likelihood* of irreparable harm. *See Monsanto*, 561 U.S. at 162 ("injunction is not now needed to guard against any present or imminent risk of likely irreparable harm").[5] Plaintiffs' motion, therefore, should be denied.

[5] The Court should disregard Plaintiffs' suggestion that it stay the December 2015 Decision in the same manner that the 2011 Decision was stayed. Pls.' Mot. at 6. As discussed above, the district court did not stay the decision. The Assistant Secretary stayed the 2011 Decision because the decision it reconsidered was already being challenged in court. There was no federal

2. Plaintiffs' Own Delay Counsels Strongly Against Granting Their Motion

The alleged urgency of Plaintiffs' motion is entirely of their own making. On December 30, 2015, the Assistant Secretary issued his decision. That decision specifically authorized the Pacific Regional Director to "receive additional submissions from Mr. Dixie for the purpose of establishing whether the 2013 Constitution was validly ratified." ECF No. 11, Ex. 4 at 6. In furtherance of that authorization, the RD's office met with both the Burley group and the Dixie groups to discuss the ongoing dispute. Dutschke Aff., ¶ 6. In June, the RD notified Silvia Burley, through Burley's attorney, that she had received submissions from Dixie, provided the submissions to the Burley group, and provided an opportunity to comment. Thus, Plaintiffs have been aware of the December 2015 Decision since the time of the decision, and Plaintiffs have also been aware of the actions taken by the Regional Director pursuant to that decision.

Plaintiffs, aware of the December 2015 Decision and having met with the Regional Director, could have brought suit to challenge the decision's lawfulness of the Decision earlier, but declined to do so. Instead, Plaintiffs waited six months to file a complaint and request emergency injunctive relief, and only did so then because they misread the Regional Director's letter. There is simply no emergency and Plaintiffs' use of this strategy militates against granting their motion. *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its own rights a plaintiff demonstrates the lack of need for speedy action." (citations omitted)); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Quince Orchard Valley Citizens Ass'n v.*

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litigation pending when the Assistant Secretary issued the December 2015 Decision.

Hodel, 872 F.2d 75, 79 (4th Cir. 1989) ("Whatever irreparable harm Plaintiffs face . . . is very much the result of their own procrastination." (citation omitted)); *Kan. Health Care Ass'n v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) ("As a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury." (citation omitted)); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (delay in seeking an injunction suggests "an absence of the kind of irreparable harm required to support a preliminary injunction.").

The fact that Plaintiffs waited over six months to file their complaint and did not file their motion for hearing until September 6 demonstrates the lack of urgency and immediate harm. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (where a plaintiff waited 44 days to file a complaint and motion for a temporary restraining order, the court found such action to be "inexcusable."). Accordingly, Plaintiffs' motion should be denied.

C. Plaintiffs Cannot Show that the Balance of the Equities and the Public Interest Weigh in Their Favor

The "balance of equities" refers to the relative burdens or hardships to parties, while the public interest inquiry primarily addresses impact on non-parties rather than parties. *Winter*, 555 U.S. at 26; *Bernhardt v. L.A. Cnty*, 339 F.3d 920, 931 (9th Cir. 2003). As an initial matter, because Plaintiffs cannot show both a likelihood of success on the merits and irreparable harm, the Court should not find that the balance of equities weighs in favor of granting injunctive relief. *See Earth Island Inst. v. Carlton*, No. CIV-S-09-2020 FCD, 2009 WL 9084754, at *28 (E.D. Cal. Aug. 20, 2009) *aff'd*, 626 F.3d 462 (9th Cir. 2010) ("While the court must seriously consider the potential harm to the environment caused by the Project, where plaintiff has not made the requisite showing on the merits which, in turn, undermines the likelihood of irreparable injury, the balance of equities cannot be found in plaintiff's favor."). However, even considered

separately, the balance of equities and the public interest weigh in favor of denying injunctive relief.

In considering the extraordinary remedy of an injunction, "courts must balance the competing claims of injury and must consider the effects on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences . . . ." *Winter*, 555 U.S. at 24 (internal quotations and citations omitted). With respect to the government, assessing the balance of equities and the public interest merge. *See Nken*, 556 U.S. at 435. Here, the balance of equities and the public interest favor denial of Plaintiffs' requested injunction.

Plaintiffs make no effort to demonstrate that the balance of equities weighs in their favor. Plaintiffs assert that "[i]t is in the public interest to grant a stay," and offer a single conclusory and unsupported sentence in support of that assertion: "The 'public interest' factor is not directly implicated, given the fact that the issues to be decided affect an Indian Tribe and its members." Pls.' Mot at 11. Contrary to Plaintiffs' naked assertion, the agency action at issue serves the long-recognized policy of "furthering Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In analyzing whether injunctive relief would advance the public interest, courts properly consider whether an injunction would further this policy. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) (finding that "tribal self-government may be a matter of public interest"); *Bowen v. Doyle*, 880 F. Supp. 99, 137 (W.D.N.Y. 1995) (finding "the public's interest and the interests of [an Indian tribe] coincide" insofar as "there is a strong federal policy favoring tribal self-government [and] tribal self-sufficiency"). The issuance of an injunction preventing the BIA from assisting the CVMT in reorganizing would undermine and undercut the public policies favoring the promotion of tribal self-governance and self-determination, particularly given the uncertain length of the litigation.

The harm to Federal Defendants, the CVMT, and other parties with an interest in the Tribe's reorganization if an injunction is issued is concrete and clear; whereas there is no harm to Plaintiffs if a preliminary injunction is not issued, particularly in light of the absence of immediate and irreparable harm. The Court should deny Plaintiffs' requested emergency relief.

V. CONCLUSION

Plaintiffs fail to show that they will succeed on the merits, that they face immediate and irreparable harm, or that the balance of equities and the public interest weigh in their favor necessitating emergency injunctive relief. Plaintiffs' request stems from an invitation for their opinion on the validity of the 2013 Constitution, not a declaration of immediate action. Even if the Regional Director should find the constitution validly ratified, Plaintiffs still cannot show any resulting immediate or irreparable harm, since such a decision would be subject to administrative appeal. The public interest and equity all favor the long-recognized policy of furthering Indian self-government. Plaintiffs' request should therefore be denied.

Respectfully submitted October 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I electronically filed the foregoing Federal Defendants' Brief in Opposition to Plaintiffs' Motion to Stay by using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Jody H. Schwarz
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