IN THE UNITED STATES DISTRICT COURT; SACRAMENTO, CALIFORNIA
FOR THE EASTERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE WILLIAM B. SHUBB, JUDGE

CALIFORNIA VALLEY MIWOK TRIBE,
a federally-recognized Indian tribe,
et al.,
Plaintiffs,

vs. No. 2:16-cv-01345 WBS-CKD

S.M.R. JEWELL, in her official
capacity as U.S. Secretary of
Interior, et al.,
Defendants,

THE CALIFORNIA VALLEY MIWOK TRIBE,
et al.,
Intervenor-Defendants.

REPORTER'S TRANSCRIPT
PLAINTIFFS' MOTION TO STAY
OCTOBER 17, 2016; 1:37 P.M.

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THE CLERK: Calling civil case 16-cv-1335, Angelica Paulk, et al., versus Sally Jewell, et al.

MR. CORRALES: Good afternoon, Your Honor. Manuel Corrales for the plaintiffs.

MS. SCHWARZ: Good afternoon, Your Honor. Jody Schwarz on behalf of the federal defendants.

THE COURT: Somebody on behalf of the intervenor?

MR. RUSK: Yes, Your Honor. James Rusk with Sheppard Mullin for intervener defendants.

MR. URAM: And also Robert Uram.

THE COURT: Both for the intervener?

MR. URAM: Yes.

THE COURT: You're asking the court to stay the enforcement of the BIA's decision of December 30; correct?

MR. CORRALES: Yes, I am, Your Honor.

THE COURT: Proceed.

MR. CORRALES: Yes, Your Honor. First of all, I want to make clear that we're talking about two factions, the Burley Faction and the Dixie Faction. The prior litigation challenging the 2011 decision by Mr. Echo Hawk, the federal defendants, they chose not to appeal that decision and the Burley Faction, therefore, could not appeal, and to the extent that the defendants and the intervenors argue we're trying to

relitigate the issues, that's not correct because we could not appeal that decision.

THE COURT: Because you won?

MR. CORRALES: No. Because the order for remand was not final. I think there's case law and a statute that prohibits an intervener from appealing or the federal defendants choose not to appeal that agency's decision.

THE COURT: I see.

MR. CORRALES: So the challenge here is whether or not this 2015 decision should be stayed. We believe that it should be in order to maintain the status quo, preserve the status quo of the parties, because, really, the issues are the same. It's only reversed.

We prevailed when we received the Burley Faction, received the 2011 decision, and then the Dixie Faction prevailed when they received the 2015 decision. So the issues are the same. So there's no reason why there should be -- there's no reason we shouldn't have a stay to that decision because the 2011 decision was stayed.

THE COURT: Why are you in this court instead of the District of Columbia?

MR. CORRALES: Because the plaintiffs are residents of this county. The statute provides that they may sue in the place they reside.

THE COURT: Apparently they sued in the District of

Columbia previously.

MR. CORRALES: They did and that was a strategic decision made before I was involved in the case, but looking at the --

THE COURT: That's the one you won; right?

MR. CORRALES: Yes, Your Honor.

THE COURT: Why aren't you back there?

MR. CORRALES: Well, I don't know if you can say we won. Actually, I think we lost on that one, Your Honor. That was back in 2007, 2008. The 2015 decision is what we're looking at here and it's really the same issue, whether or not the governing faction, the tribal governing body, is recognized or should be recognized by the federal government and whether or not the membership should be limited to five people. That went back and forth.

The 2011 decision, Mr. Echo Hawk said it can be limited to five people and it is recognized. It has been recognized for many, many years. This is the general counsel that we're talking about.

The problem that we have here in terms of the likelihood of success, I don't think it's a problem for us, but I think it's a problem that creates this issue of merit -- and there is merit to this challenge -- that this 2015 decision is predicated on a time-barred claim.

They filed the lawsuit, Dixie Faction challenged their

lawsuit, January of 2011. Now, looking at --

THE COURT: You don't have those dates right. You said they're challenging the 2015 decision in 2011. You did not mean that.

MR. CORRALES: No. You're right, Your Honor. They challenged the 2010 decision because there were two decisions. First, December 2010, and then the August 2011 decision. They filed a lawsuit first challenging the 2010 decision in January of 2011 and then they filed their amended complaint in October of 2011 and --

THE COURT: All right. That's the case -- didn't you win that case?

MR. CORRALES: We won the case where -- we're talking about the August 2011 decision. Judge Echo Hawk said that we are the recognized governing body and it's limited to five members. We won that, yes, Your Honor, we did.

THE COURT: All right. He set aside the decision of the Secretary?

MR. CORRALES: I'm sorry, Your Honor?

THE COURT: Judge Echo Hawk.

MR. CORRALES: No. It's not Judge Echo Hawk. It's the Assistant Secretary of the Interior, Echo Hawk.

THE COURT: Okay. You're telling me you won before the Commissioner or are you telling me you won in the court?

MR. CORRALES: We won before the Assistant Secretary.

This is the August 2011 decision. They challenged that decision by filing a lawsuit in the federal court and that was in D.C.

THE COURT: All right.

MR. CORRALES: The judge in the federal court, she said that judge -- not judge, but Mr. Echo Hawk should reconsider his decision because he assumed a lot of these facts he shouldn't have assumed, and one of them is whether or not the governing body was valid at the outset. This is the 1998 resolution establishing the general counsel. This is where Echo Hawk said, "I recognize it. It's limited to five people."

She said that the Assistant Secretary should re-evaluate that. She remanded it to him. By then, Echo Hawk left.

THE COURT: I see. So this decision in December 2015 was in furtherance of the District of Columbia court's decision setting aside Echo Hawk's termination?

MR. CORRALES: Yes, Your Honor, that's correct.

THE COURT: So they were following -- the Commissioner now is following the court for the District of Columbia's order?

MR. CORRALES: Yes, Your Honor. He's following the remand instructions saying that he should reconsider, and he's done that.

THE COURT: So you are asking me now to disagree with

the court in the District of Columbia?

MR. CORRALES: Yes and no. Mostly no. That is because we're asking you, Your Honor, this court, to stay the decision while we challenge that decision here in this court.

THE COURT: Okay. So you're going to challenge the decision of the Secretary?

MR. CORRALES: Yes.

THE COURT: But the Secretary was following the decision of the court in the District of Columbia?

MR. CORRALES: Correct.

THE COURT: So if I'm going to set aside the Secretary's decision, does it follow I'm going to be disagreeing with the decision in the District of Columbia?

MR. CORRALES: You might.

THE COURT: Isn't that the only way I could set aside the Secretary's decision?

MR. CORRALES: No, because there are other issues that would warrant setting aside his decision. Keep in mind, we could not challenge the district court's decision because we were the intervenors and the government said we're not going to appeal this, so we're kind of like without a remedy. So we had to challenge his decision in the same way they challenged the 2011 decision.

Now, this 2015 decision is predicated on a time-barred claim. Even according to the district court, the district

court basically said -- let me look at my notes here -- that from as early as April '99, Dixie contested the validity of the general counsel. She put that in her order, so we're talking about notice. We're talking about when did his claim accrue?

He was challenging the validity of the general counsel in various ways. He never really filed a lawsuit challenging it, but he was challenging it in the letters to the BIA, letters to the Department of Interior challenging the validity of the general counsel which was established under the 1998 resolution.

Our position is he waited until he hired Sheppard Mullin in 2010 and they filed their lawsuit in January of 2011 bringing up for the first time this issue of the validity of the general counsel, that it was invalid at the outset, and our position is, well, that's beyond the six-year statute of limitations and the district court should not have ordered or remanded or suggested that the Assistant Secretary of Interior reevaluate that claim.

In fact, that claim wasn't even referred to the Assistant Secretary. The Burley Faction, when they changed the BIA's actions in trying to bring about a reorganization -- and I don't know when it was -- back in the early 2000s, I think, or so, she challenged that in the IBIA. The IBIA did not have jurisdiction to resolve this membership dispute that it looked

at it as.

They referred that issue to the Assistant Secretary. That's how it works. They just don't have jurisdiction to do that. Membership enrollment is not what they resolve. It's important to know that the issue of the validity of the general counsel wasn't referred to the Assistant Secretary. That wasn't part of the appeal.

In fact, Burley never, never raised that issue on appeal, so I don't know why, but I believe it was because Sheppard Mullin in representing Dixie in 2011 was raising that issue for the first time, so the court basically adopted that issue and said maybe that's correct.

The general counsel was invalid at the outset, the 1998 resolution was invalid at the outset, and they allowed that claim to proceed despite the fact that the intervener, Burley Faction, was challenging that issue and raised that issue and made a motion to dismiss based upon the statute of limitations.

That's one of the issues. You can see in my papers that there are numerous dates where the statute of limitations first accrued. In fact, one of them was when the Dixie Faction submitted a name change to the Department of the Interior. This was in the 2000. The Department of the Interior said you have a general counsel. It's a small tribe and you pass your resolutions by this general counsel. We

accept your resolution changing the name from the Sheep Ranch to the California Valley Miwok Tribe. That was in, I think, May of 2000.

So what they did is they published that in the Federal Register, and from that point on, every year thereafter -- this was in 2002, I think -- they did, I believe, every year thereafter have been publishing the name of the tribe as the California Valley Miwok Tribe.

Under the case law that I cited in my briefs, Your Honor, that triggers notice of a claim that what the BIA was doing was recognizing and acknowledging that the general counsel had the authority to pass this resolution to change the name of the tribe and they published it in the Federal Register.

The cases that I cited follow the same line of thinking, that when there's a claim against the federal government and critical facts are published in the Federal Register, the claim that is put on notice that its cause of action has begun, has accrued, they can't sit on that claim and wait for years and years beyond the six-year statute of limitations and then say, okay, I think we have a claim.

The cases that I cite talk about recognition of tribes and so forth. This is the same issue. This critical fact, amongst the others that I cited in my brief, put Mr. Dixie and his followers on notice because it was published in the Federal Register beyond the six-year statute of limitations.

So there are lots of facts, lots of dates whereby Mr. Dixie and his followers should have made the claim against the federal government that the general counsel established under the 1998 resolution was invalid at the outset.

So what my position is is that that's a meritorious claim. We're here simply to maintain the status quo such that we can proceed with our case without them submitting their constitution to the BIA and have the BIA say, okay, Dixie fashion. We accept your constitution. Game over. You are now the tribe.

THE COURT: "Game over" is a little extreme. Wouldn't there be a procedure that you could review that decision?

MR. CORRALES: Well, they've raised that. There's an administrative procedure where you can challenge their decision to accept their constitution. Those issues are narrowed. We can't revisit all the issues we're trying to raise here challenging the 2015 decision. It's more narrowed, and at the same time we shouldn't be --

THE COURT: It depends on what they are going to do. You have to show irreparable harm, don't you?

MR. CORRALES: Yes.

THE COURT: Unless you know what they're going to do, how do you know that there is going to be any harm?

MR. CORRALES: Well, we know what they're going to do

because the 2015 decision says they can do that. They submitted their 2013 constitution to the BIA, but in the 2015 decision, Mr. Washburn said, well, it doesn't look like you crossed your t's and dotted your i's in terms of notice to the surrounding community. Make sure that you do that, and if you do, then maybe the BIA will accept it and then you're the tribe. That's the irreparable harm.

They submitted already their constitution and the BIA has said, okay, we want some discussion or whatever it was, and I think this was -- they gave them until July to provide feedback, at least the Burley Faction, so they're poised to accept that constitution.

Once it's accepted, then the Burley Faction -- the Dixie faction is going to turn around and go to the California Gambling Control Commission that has been holding up to this point $13 million in revenue-sharing trust fund money, and they are going to say, give us that money. We are the tribe now.

This is the same issue that Sheppard Mullin raised back in 2011 when it filed its first complaint challenging Echo Hawk's decision saying --

THE COURT: Why isn't the remedy at law adequate if what you're talking about is $13 million? That's a remedy of law.

MR. CORRALES: It is not a remedy of law, Your Honor.

I respectfully disagree, because that issue has been thoroughly briefed and we've challenged that. We've sued the commission saying you can't -- you must distribute the funds to the tribe. We're the tribe, and the commission has said, we don't know who the tribe is. There are these two factions and federal litigation going on. We're going to still hold the money until the BIA makes a decision on who is the recognized governing body.

THE COURT: But you're asking for preliminary relief here.

MR. CORRALES: Only. Only, Your Honor.

THE COURT: That's correct. That's correct. So, again, I don't know what you mean when you say you've litigated this. If we wait until the end of this proceeding, you will know whether you're entitled to your $13 million or not.

MR. CORRALES: Yes. And I suspect that Mr. Dixie will probably challenge your decision if it's in our favor and vice versa, but the problem that we have is we need to maintain the status quo and have that money, at least that money, placed and remain in the bank where the commission is holding onto it, because once it's released to one of the factions, it's going to be difficult to retrieve it, if, for example, we prevail in challenging the 2015 decision.

So that's what we're asking for as one of the irreparable

harms, that once it's released, we can't get it back. There are other issues that I've raised in my brief. You probably read it. I don't want to rehash it, but the decision is rife with other kinds of erroneous statements.

One of them is that it concluded that the general counsel was established just merely to manage the process of reorganizing the tribe under the IRA. That is not the case at all. Factually that's not true, because if you look at the resolution, the resolution says that the general counsel was to serve as the governing body of the tribe. That's what Echo Hawk concluded and recognized when it said that's the governing body. It's the general counsel.

So all kinds of things give us, I think, a likelihood of success. We're not asking the court to make a decision now that we win, only that's there's a likelihood of success, irreparable harm, and that we should maintain the status quo. $13 million is a lot of money, and once it's given to one of the factions, the other faction can't get it back if they prevail.

THE COURT: You keep saying that, but I don't know why you can't get it back. You have a lawsuit, and if you get a judgment, you execute on the judgment.

MR. CORRALES: Well, there are lots of problems with sovereign immunity to sue the tribe back. I believe the best and most reasonable way to deal with this is simply to put a

stay in the same way that a stay was implemented with respect to the 2011 decision when Dixie was challenging that decision. I think it makes sense.

Thank you, Your Honor.

THE COURT: Thank you. Ms. Schwarz, do you want to speak first?

MS. SCHWARZ: Good afternoon. May it please the court. The issue before this case is that plaintiffs seek an injunction when they can't meet the four Winters factors.

One, they have to show that there is a likelihood of success. In essence, plaintiffs argue against the findings of three other federal courts that have addressed issues present before this court today.

Second --

THE COURT: Three other courts?

MS. SCHWARZ: You have the 2013 decision in the D.C. District Court, you have the 2008 decision that was before the D.C. Court of Appeals, and then there's the 2006 decision that was before the D.C. District Court, and prior to that, there's also decisions in the Eastern District of California which the D.C. courts previously in 2006 and 2008 took judicial notice of.

THE COURT: Well, Mr. Corrales suggested that this court need not disagree with the decision of the D.C. District Court in order to rule in his favor.

MS. SCHWARZ: Plaintiffs are incorrect. The question that they're putting before this court is they're asking you to do exactly that. They're asking you to say that the D.C. court in 2013 was wrong. Plaintiffs in their challenge specifically state that the tribe consists of more than five members, and that, two, the Assistant Secretary erred in finding that the 1998 general counsel is not the valid representative of the tribe.

Those are the two issues the court in 2013 found against plaintiffs in remanding the decision back to the Assistant Secretary.

THE COURT: What do you make of their argument that they didn't have an opportunity to repeal from that decision?

MS. SCHWARZ: Plaintiffs are correct that they did not have the opportunity to appeal because it was an administrative action and APA challenged. It's considered for third parties, and under the statute, they can't appeal it -- it's not considered a final appealable matter for them, only for the government.

It doesn't matter that they didn't have the opportunity to challenge that 2013 decision because their opportunity to challenge anything that went on remand is what's before the court today with the Merris decision, which is their challenge to the 2015 decision.

THE COURT: You're agreeing that their opportunity to

challenge the 2015 decision is here and now?

MS. SCHWARZ: That is correct.

THE COURT: So if it's wrong, then it's up to this court to set it aside?

MS. SCHWARZ: That is correct.

THE COURT: So they're arguing it is wrong?

MS. SCHWARZ: Yes.

THE COURT: And you are telling me the only reason it could be wrong is if the Secretary was wrongfully following the orders of the District of Columbia District Court?

MS. SCHWARZ: That is correct, Your Honor.

THE COURT: He's saying it could be wrong for other reasons.

MS. SCHWARZ: Yes. And as an initial matter, to get into that, there's two clarifications that have to be made before the court. First is, plaintiffs bring up the issue of trying to stay the 2015 decision. As we stated in our briefs, the proper remedy of this court would be to enjoin the decision, it would not be to stay.

I'm just making that clarification because a lot of the case law the parties state in their brief deal with preliminary injunctions and the court's power to enjoin, but not to stay. It's the Assistant Secretary's decision.

THE COURT: Well, it's pretty much the same effect.

MS. SCHWARZ: Yeah, it's the same effect. It gets

just a little bit confusing when we're saying "enjoined" and they're saying "stay."

THE COURT: All right.

MS. SCHWARZ: The second is, as part of their reply, plaintiffs have raised new arguments in their brief, and although courts ordinarily decline to consider arguments that are raised in their reply brief, for the sake of the argument and the presentation before the court today, we will address those issues, the main one being plaintiffs' argument concerning the statute of limitations and any preclusive effect it may have on the Assistant Secretary's administrative decision.

Getting back to the likelihood of success, in addition to arguing against the other courts that have ruled on it, plaintiffs are ignoring the history of the case in citing to several instances. Over the time period of this dispute, the BIA has not recognized that the tribe consists of only five individuals and that the BIA has found that the 1998 general counsel is not the valid tribal representatives, and they have also overstated the duration and the comprehensiveness of any recognition of the 1998 general counsel.

Second, plaintiffs can't establish irreparable harm. Basically, they're basing their entire argument on speculative future events that haven't happened, may not happen, may happen, but even if they do happen, there's still further

relief that may be had. There's no immediate harm nor is it irreparable.

Finally, one thing that plaintiffs haven't addressed is the balance of equities and the public interest in this matter. Setting aside the balance of equities, just the public interest in this matter, there's the long-standing court recognition that the agency action in this case, there's the long-recognized policy of furthering Indian self-determination and self-government.

I'm turning now to the likelihood of success, which would be the first prong. Plaintiffs fail to show that they would have a likelihood of success. As the court has recognized, the question before this court is what exactly are they challenging and do they have a new chance on the merit?

Here we see they do not. The court has to determine their likelihood of success, in essence, by holding that the D.C. court in 2013 was wrong when it remanded the decision back to the Assistant Secretary for his reconsideration.

In their actual motion, plaintiffs base their request for leave on the assumption that the Assistant Secretary found that the enrollment of the Burleys was not an appropriate step; however, a reading of the decision shows that the Assistant Secretary actually found that the enrollment of the Burleys and their tribe was an appropriate step for Mr. Dixie to take, even though the Assistant Secretary did express

concerns about prejudicing the interest of Mr. Melvin Dixie, who is Mr. Dixie's brother.

Second, getting into the issue of whether it was proper for the Assistant Secretary to find that the tribe consisted of more than five people, as the D.C. court found in 2013, the record that was before the Assistant Secretary in 2011 showed that due to the history of the tribe, there was many sides they considered that the tribe consists of more than five people.

The record that hasn't yet been produced in this case will show that the -- the facts before the Assistant Secretary and will be before the court show that at various points in time that parties have recognized that the tribe consists of more than five people.

In fact, in 2002 plaintiffs represented in a sworn statement before the court in the Eastern District of California that they believed that the tribe consisted of 250 members. Court decisions in 2006 and 2008 visited both the decisions concerning the 2004 submissions of the constitution by the plaintiffs, and in those instances, the reason the Assistant Secretary's decision to not ratify the constitution was on the basis that plaintiffs only represented a very small minority of the membership of the tribe.

Next, turning to whether the Assistant Secretary could consider whether the 1998 general counsel was the tribe filed

representative, plaintiff brings up a lot about the statute of limitations and whether this claim is time barred; however, the statute of limitations is inapplicable to this case.

Here, plaintiffs are specifically challenging a 2015 decision by the Assistant Secretary. It's not the intervening defendants challenging a decision. It's not intervening defendants challenging an action that was taken by plaintiffs, rather it's what the United States has done.

The statute of limitations in 2401 speaks to limits on filing actions against the United States. It does not apply to administrative proceedings or bar the department from addressing the issue. It does not limit the Assistant Secretary's ability to hear challenges to actions that accrued more that six years ago.

In fact, in the Secretary's -- district court's decision in 2013, intervening defendants had raised an issue regarding the timeliness of some of the claims, and in footnote 15, the district court in addressing those claims specifically noted that any interpretation that directly undermines the wealth of authority that establishes the secretary's plenary administrative authority in discharging the federal government's trust obligations to Indians.

Next, in addressing the timeliness of any challenge, in their reply briefs, plaintiffs have cited to several examples of BIA recognition of the 1998 general counsel as being the

valid representative of the tribe; however, it's important for the court to note that all of those examples, the few examples that plaintiff have cited, all occurred prior to 2004. In 2004 the BIA actually found that the 1998 general counsel is not the valid representative of the tribe.

And, in fact, Ms. Burley had previously been recognized as the chairman and instead it recognized her as a person of authority within the tribe.

THE COURT: Things can change. Isn't it your point that just because they may have recognized the counsel as representing the tribe at one point in time doesn't mean they are bound to recognize the counsel as representing the tribe at other points in time?

MS. SCHWARZ: That is correct, Your Honor. That has in deed happened in the history of the case. Initially in 1998 the parties could work together in assisting to reorganize the tribe, but as the record shows before the court --

THE COURT: What authority do you thinks assists you in that argument that Mr. Corrales suggests that you're bound by your decision because you put it in the Federal Register or for some reason? What authority supports your position that the Secretary can make a decision at one time that the counsel represents the tribe and at another time that it does not?

MS. SCHWARZ: If you look at the most recent case,

Fox News case, the Supreme Court dealing with what an agency has to show when they reconsider a decision, it's a matter of administrative law that the administration isn't bound by the previous decisions of the agency official or things that happened in the past. What the agency has to show is that it made a reasonable decision and there are circumstances that support changing its position.

THE COURT: Which case is that?

MS. SCHWARZ: I can provide the cite.

THE COURT: Is that in your brief?

MS. SCHWARZ: Yes, Fox Television.

THE COURT: Fox TV?

MS. SCHWARZ: Yes. That's a 2014 case. It is in our brief though, Your Honor. Plaintiffs' challenge to the 2015 decision is an administrative challenge under the APA, so we have to look at was the decision arbitrary and capricious?

And the wealth of administrative law dealing with how agencies form their opinion support the fact that the agency can change its opinion, define its opinion, and it's not limited in any way by the statute of limitations which is applicable to civil actions against the United States and is the United States defense, not one raised by the plaintiff.

THE COURT: All right. You're running out of time, but I would like you to address the irreparable harm argument.

MS. SCHWARZ: Sure. Plaintiffs claim irreparable

harm on the fact that initially their motion was filed and they claim they were harmed because the regional director was about to make a decision finding that the intervening defendants were the valid representatives, and they were not.

Indeed, that letter that they cited was a June 2016 letter. That letter didn't say any such thing. That letter merely provided plaintiff an opportunity to comment on submissions that the regional director had received.

The regional director is still deciding the issues, has not made any decisions. Even if the regional director makes a decision, there's no guarantee, as plaintiffs state, that they will find that a constitution that was submitted by intervening defendants shows that they're the valid representative.

There's nothing that says that the regional director will send the issues back to the parties. Even if the regional director decides that the 2013 constitution that was submitted by intervening defendants does represent the tribe and is a valid representative of the tribal government, plaintiffs still have administrative appeals that they have to follow to that decision.

And then even taking that into account, spinning this out further, there's no guarantee what the California Gaming Commission is going to do. What this all comes down to is plaintiffs' argument: If you don't grant us our relief, the

other side is going to get this revenue trust gaming money. But we don't know that. That's not imminent. That's not irreparable. They're asserting a right to something that they don't have a right in at this time.

We don't know how this is going to shake out. That money is the tribe's money, and when there's a recognized government, the money will presumably go to the tribal government, but that is pretty far down the road from where we are today.

THE COURT: All right. Anything else?

MS. SCHWARZ: Yeah. The one thing that we do want the court to take into account is the balances -- equities in the public's interest in this matter. The plaintiffs have stated that the public has no interest in this matter because it's just a tribe and its members, but as stated before, the agency's actions serves the long-recognized policy of furthering self-government and self-determination.

That's been recognized by other courts that have addressed this issue. Courts look at whether an injunction would further that policy, and it doesn't. An injunction would prevent the BIA from assisting the tribe in reorganizing and undermines the public policy of tribal self-government.

Furthermore, it interferes with the statutory duty of the Secretary who has an obligation to determine who is eligible for the programs and benefits that are associated with the

reorganization of the tribe and an obligation to recognize the tribal government and to work to facilitate the organization of the tribal governing body.

THE COURT: Thank you.

MS. SCHWARZ: Thank you, Your Honor.

THE COURT: Mr. Uram or Mr. Rusk, anything you need to add?

MR. RUSK: Yes, Your Honor, if I may. James Rusk for intervening defendants. First, I would like to touch on the issue that federal defendants have already raised, which is the host of new issues plaintiffs raise for the first time in their reply brief.

THE COURT: Don't repeat what Ms. Schwarz has already gone over.

MR. RUSK: Yes, Your Honor. The thing I would like to point out is plaintiffs included two pages of argument on the merits in their original motion. They included more than 20 pages of argument on the merits in the reply, all of which were new issues not previously raised and which the parties haven't had a chance to brief.

The statute of limitations argument that Mr. Corrales spent most of his time on, brand new. He raised another issue which is really at the core of their challenge claiming that limiting tribe's membership to five people is correct because the tribe's membership should be limited to the distribution

claim in 1966.

It's a complex issue that we didn't get a chance to brief. We did brief it in the D.C. Court in 2013, and I can address it here, but it's certainly not something that the court and the parties should be deprived of any opportunity to brief because Mr. Corrales is conducting a trial by ambush here.

I would like to just briefly clarify, both parties here are claiming to represent the tribe. We represent the intervener tribal counsel, which members are in the courtroom today who represent approximately 200 adult members of the tribe. Those people voted in 2013 after extensive discussion within the tribal community to adopt tribal constitution and to be governed by this tribal counsel.

Plaintiffs, on the other hand, consist of Sylvia Burley, her two daughters, and granddaughter, and they maintain that the tribal's membership is limited to themselves. So when we're talking about the tribe, we're talking about two very different things.

Our position is that all lineal descendents of historical tribal members are eligible for membership in the tribe if they choose to affiliate with the tribe. The Burleys haven't done so, but we understand from material that they have submitted to the BIA that they are likely eligible to do so and meet the criteria in the outline in the 2015 decision. They've chosen not to participate with the tribal community

today.

If I may, Your Honor, give a very brief history of this dispute because I think --

THE COURT: This dispute has been going on for decades and it's been in the courts and before the BIA. It's not before this court in this motion.

MR. RUSK: Correct, Your Honor, but it does inform many of plaintiffs' arguments.

THE COURT: I don't have the time to hear it. I'm sorry.

MR. RUSK: I don't want to repeat what federal defendants have said. We do agree completely that plaintiffs have failed to meet their burden of showing they meet the high standard for injunctive relief.

I would like to selectively address a few points raised in Mr. Corrales' argument. One, on the statute of limitations issues, the government decided in 2005 that notwithstanding anything that might have happened before that it was not going to recognize the Burley's government and that it didn't recognize any government for this tribe and would not do so until the whole tribal community was allowed to participate in a process to adopt a tribal government.

For them to say -- plaintiffs made the statute of limitations argument that they're making now in the D.C. District Court and the court rejected it, finding among other

things, that any running of the statute of limitations was cut off or rendered moot when the department ended its recognition of the 1998 counsel. For them to argue now somehow the department was precluded from reconsidering that position is a little absurd.

The department has taken that position for more than a decade since 2005. If anybody has a statute of limitations problem here, Your Honor, it's the plaintiffs. They could have challenged in 2005 the federal government's decision not to recognize their government and they apparently decided not to do so.

Second, on the injury claim, Your Honor, you are correct that if and when the BIA makes a decision to recognize our tribal government, which we hope they will, there will be ample opportunity for plaintiffs to challenge that before any injury can occur.

First, there's an opportunity for administrative appeal and, in fact, that's required before the regional director's decision can be final for the department and subject to judicial review. Once it's final, they can bring an action for judicial review, and if they meet the criteria, including showing a likelihood of success on the merits, they can obtain injunctive relief.

I would just add that they assume that if successful the intervenors will go to the California Gaming Control

Commission and that the Commission will then release funds to interveners. That's, again, speculative and involves parties not even before the court.

THE COURT: Anything else?

MR. RUSK: I'd like to keep it brief, Your Honor, but if I may address the final point that was raised for the first time on reply in plaintiffs' brief. What they have said about the 2015 decision is that it erroneous concluded the tribe's membership was larger than five people because it failed to realize that a distribution plan for the assets of the tribe's Rancheria prepared in 1966 defined tribe's membership.

First of all, it makes no sense this argument because plaintiffs are not named on the distribution plan. Second, it's very clear, legal authority is very clear, that a distribution plan prepared under the California Rancheria Act did not and was never intended to define the membership of an unorganized tribe.

Plaintiffs in their brief talk about the Tillie Hardwick case. Tillie Hardwick was a case involving other tribes, not this tribe, that had been terminated, which this tribe has not, and then sought restoration and federal recognition. It ended in a settlement, not a court decision. This tribe wasn't a party to this case and the case has no binding effect on this tribe and there is authority saying that not only does the BIA not have a policy of applying the Hardwick principle

to other tribes, but that it couldn't lawfully do so. That is in Williams versus Gover, which is 490 F.3d 785, Ninth Circuit case from 2007.

Also the regulations in effect at the time -- this is going back to 1965 -- specifically provided that distribution plans prepared for tribes didn't reflect membership. They merely reflected people who were using the residence on the Rancheria.

THE COURT: You need to wrap it up.

MR. RUSK: Yes, Your Honor. That's 25 CFR 242.2 and 242.3 from the 1965 Edition, so the only substantive basis that plaintiffs have offered for saying that the 2015 decision was wrong shouldn't be limited to five people is simply incorrect as a matter of law.

THE COURT: Thank you. Mr. Corrales, you have five minutes for rebuttal.

MR. CORRALES: I'll be less than that in light of the court's time restraints. I want to hit three issues real quick. The issue of whether or not the statute of limitations is applicable to the ABA, I think I cited in my brief the Wind River Mining Corporation case, Ninth Circuit case, 946 F.2 710, which says that the judicial review of final agency actions brought under the APA are subject to the six-year statute of limitations.

And then the issue of all the other federal courts, I

think she said that all these federal courts have said that the tribe is limited to five people. That's really not correct. Even the --

THE COURT: The tribe is not limited to five.

MR. CORRALES: Yes, correct. The District Court in D.C. said in a footnote when the intervenors raised this issue, the only issue before the courts in CMVT1 and CMVT2 was whether the Secretary had the authority to refuse to approve a constitution submitted under the IRA.

The courts, talking about all these previous federal courts, did not directly address the issues raised here, namely, whether the tribe's membership consisted of five members and whether the general counsel is the duly constituted government of the tribe. She was in agreement that -- actually, she was disputing their position that other courts have said that the tribe is not limited to five people. That was never held.

Then the other issue here is whether or not -- I just addressed it. I wanted to hit two issues. I know the court is constrained by time. I will submit.

THE COURT: All right. Thank you very much. Motion is taken under submission.

(Proceedings concluded at 2:26 p.m.)

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CERTIFICATION

I, Michelle L. Babbitt, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: November 15, 2016.

/s/ MICHELLE L. BABBITT
MICHELLE L. BABBITT CSR #6357
Official Court Reporter
United States District Court