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UNITED STATES FEDERAL DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Plaintiffs,

vs.

RYAN ZINKE, Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Intervenor-Defendants.

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

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREFOF

Hon. William B. Shubb

Hearing Date: May 30, 2017
Time: 1:30 p.m.
Courtroom: No. 5, 14th Floor

TO THE COURT, ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that on May 30, 2017, at 1:30 p.m., before the Hon. William B. Shubb in Courtroom 5 of the United States District Court for the Eastern District of California, located at 501 I Street, Sacramento, California, Federal Defendants Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior, Michael Black, in his official capacity as Acting Assistant Secretary – Indian Affairs, and Weldon 'Bruce' Loudermilk, in his official capacity as Director of the Bureau of Indian Affairs, (collectively "Federal Defendants")[1] will and hereby do move for an order granting summary judgment on all causes of action in Plaintiffs' amended complaint pursuant to Federal Rule of Civil Procedure 56. Plaintiffs challenge the Assistant Secretary – Indian Affairs' December 30, 2015, Decision as arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act. Federal Defendants move for summary judgment on the grounds that the Assistant Secretary – Indian Affairs' December 30, 2015, Decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Assistant Secretary – Indian Affairs considered the relevant factors and articulated a rational connection between the facts found and the choices made. The administrative record supports the decision and the decision should be upheld. Federal Defendants therefore are entitled to judgment as a matter of law.

This motion is based on this notice of motion and motion, the supporting memorandum of points and authorities, the Administrative Record lodged with the Court, all other papers and pleadings on record with the Court or of which this Court may take judicial notice at or before the time of the hearing of this motion, and on such arguments as may be presented to the Court at the hearing of this matter.

This motion is made pursuant to the Court's November 15, 2016, Status (Pretrial Scheduling) Order (ECF No. 41), which established the following schedule:

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[1] Ryan Zinke, Secretary of the Interior, Michael Black, Acting Assistant Secretary – Indian Affairs, and Weldon 'Bruce' Loudermilk, Director Bureau of Indian Affairs, are automatically substituted for S.M.R. Jewell, former Secretary of the Interior, Lawrence S. Roberts, former Acting Assistant Secretary – Indian Affairs, and Michael Black, former Director Bureau of Indian Affairs, respectively, under Federal Rule of Civil Procedure 25(d).

The parties shall file their motions for summary judgment no later than March 6, 2017;

The parties shall file their oppositions to summary judgment no later than April 3, 2017;

The parties shall file their reply to oppositions no later than May 8, 2017;

The Court will hear oral arguments for the cross-motions for summary judgment on May 30, 2017, at 1:30 p.m. in Courtroom No. 5.

Respectfully submitted March 6, 2017

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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 the December 30, 2015, Decision ("December 2015 Decision") issued by the Department of the Interior Assistant Secretary – Indian Affairs ("Assistant Secretary"). 2017AR001397-404.[2] Plaintiffs seek to set aside the decision as arbitrary and capricious under the Administrative Procedure Act. Plaintiffs' challenge is without merit. 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 previous courts considering the issues, including the Court of Appeals for the District of Columbia.

The December 2015 Decision was not arbitrary, capricious, an abuse of discretion, nor otherwise violative of any laws as reviewed under the APA. The Assistant Secretary explicitly considered the history and the record before him and offered a reasoned explanation for the findings that the Tribe's membership consists of more than five people and that a 1998 General Council is not the Tribe's valid representative. The December 2015 Decision was made after

[2] Full citations to the Administrative Record are either CVMT-2017-00XXXX or CVMT-2011-00XXXX. Shortened citations will be 2017AR00XXXX or 2011AR00XXXX.

consideration of all the relevant factors and is entitled to substantial deference. The Court should uphold the decision and grant Federal Defendants' Cross-Motion for Summary Judgment.

II. STATEMENT OF FACTS

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 Cal. v. Burley*, No. 2:01-cv-01389-LKK-DAD (E.D. Cal. filed June 18, 2001); *Cal. Valley Miwok Tribe v. United States* (*Miwok I*), 424 F. Supp. 2d 197 (D.D.C. 2006); *Cal. Valley Miwok Tribe v. United States* (*Miwok II*), 515 F.3d 1262 (D.C. Cir. 2008); *Cal. Valley Miwok Tribe v. Cal. Gambling Control Comm'n*, No. Civ. 08-984, slip op. (E.D. Cal. filed July 23, 2008); *Cal. Valley Miwok Tribe v. Kempthorne*, No. 2:08-cv-03164-FCD-EFB (E.D. Cal. filed Dec. 29, 2008); *CVMT v. Pac. 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 (S.D. Cal. Sept. 11, 2015), ECF No. 18. 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.

A. The California Valley Miwok Tribe and Its Leadership Dispute

The CVMT is a federally-recognized tribe, formerly known as the Sheep Ranch Rancheria. 2017AR001397; Indian Tribal Entities That Have a Government-to-Government Relationship With the United States, 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979) ("Sheep Ranch Rancheria"); 67 Fed. Reg. 46328 (July 12, 2002) ("California Valley Miwok Tribe"). In 1916, the Bureau of Indian Affairs ("BIA") acquired an acre of land in Sheep Ranch, California, for the

benefit of Miwok Indians living in the area. 2017AR001397. The land, and the group of Indians associated with it, became the "Sheep Ranch Rancheria." *Id.* The current name of the Tribe is the California Valley Miwok Tribe. *Id.* at n.2; 2017AR001399, n.14.

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; AR001398.

In 1958, Congress enacted the California Rancheria Act ("Rancheria Act"), Pub. L. No. 85-671, 72 Stat. 619, which it amended in 1964, Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390; 2017AR001399. The Rancheria Act established a process for terminating the federal status of California Rancherias by distributing each Rancheria's assets to the Indians of the Rancheria. 2017AR001399. The process required development of a distribution plan identifying the distributees. *Id.* 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. *Id.*; *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 Mabel's son, Yakima Dixie. AR001399. In 1998, it was represented to the BIA that Yakima Dixie and his brother Melvin Dixie were the only living heirs to Ms. Dixie. *Miwok III*, 5 F. Supp. 3d at 90. Since the death of Melvin Dixie in 2009, Yakima Dixie is the only surviving son of Mabel Dixie. *Id.*; 2017AR001400.

In 1998, the BIA facilitated Yakima Dixie's enrollment of Plaintiffs Silvia Burley, Silvia's daughters Rashel Reznor and Anjelica Paulk, and Silvia's granddaughter Tristian Wallace into the Tribe. 2017AR001398. In November of 1998, Silvia Burley and Yakima Dixie signed Resolution #GC-98-01 ("1998 Resolution"), which established the adults of the Tribe as the General Council ("1998 General Council"). 2017AR001401. Soon after, disputes developed over who was the Tribe's valid representative. 2017AR001399, 1401-402. The groups brought multiple lawsuits against the BIA, the State of California, and each other in various courts, including this one.

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

In 2004, 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. 2011AR000499-502 (March 26, 2004, letter from Superintendent Risling to Silvia Burley noting that there was no evidence of efforts to involve the whole tribal community in organizing the Tribe including efforts to reach out to the Indian communities in and around Sheep Ranch Rancheria, to involve Yakima Dixie, his brother, of any offspring of Merle Butler, Tillie Jeff, or Lenny Jeff, all persons known to have resided at Sheep Ranch Rancheria, or to involve Indians known to have once lived adjacent to Sheep Ranch Rancheria.). 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, *id.* 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.

C. 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. 2011AR001261. 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. 2011AR001444-50. 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. 47 IBIA 91 (2008). 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; 2011AR001761-66. 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. 2011AR002049-57. 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; 2011AR002050. 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. *Miwok III*, 5 F. Supp. 3d at 95; 2011AR002049-50.

D. 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.

E. 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*. 2017AR001397-404. 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. 2017AR00001399-401. 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 1399. 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.* at 1400. 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 1401. 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.* at 1401. Noting that Burley 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 1402. 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 1403.

F. 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 APA.[3] 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 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 alleged that the Regional Director's request for comments on Yakima Dixie's submissions constituted immediate action to implement the December 2015 Decision to their detriment. On October 24, 2016, the Court denied Plaintiffs' motion on the grounds that they failed to demonstrate immediate and irreparable harm and that the balance of equities did not weigh in their favor. ECF No. 37.

III. STANDARD OF REVIEW

A. Scope of Review

In determining whether agency action was arbitrary and capricious, the Court must apply the highly deferential standard of review applicable to agency action under the APA, 5 U.S.C. §§ 551-559, 701-706. The Court must uphold the December 2015 Decision unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court's scope of review is narrow, and the Court should "not substitute its

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

judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). 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.

Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1224 (9th Cir. 2011). An agency's actions are valid if it "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id.* (internal quotation marks omitted). If the record supports the agency's decision, that decision should be upheld even if the record could support alternative findings. *Arkansas v. Oklahoma*, 503 U.S. 91, 112–113 (1992). Review of the agency's action is "highly deferential, presuming the agency action to be valid." *Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010).

There is a strong presumption in favor of upholding decisions where agencies have acted within their scope of expertise. *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 376, 378 (1989). For tribal matters, Interior has special expertise to which courts give substantial deference. *See, e.g., United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (Determinations about tribal matters "should be made in the first instance by [Interior] since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations." (citing 25 U.S.C. §§ 2, 9)).

B. Summary Judgment

A motion for summary judgment may be used to review agency administrative decisions within the limitations of the APA. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1481 (9th Cir. 1994). A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The moving

party bears the initial burden of informing the court of the basis for the motion, showing that no genuine issue of material fact exists, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In deciding whether to grant summary judgment in an APA challenge, the Court "is not required to resolve any facts in a review of an administrative proceeding." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). The purpose of the Court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.*

IV. ARGUMENT

A. Plaintiffs' Challenge to the Assistant Secretary's Finding that the Tribe Consists of more than Five People is barred by Res Judicata and Collateral Estoppel Principles

Plaintiffs have previously asserted challenges to a determination that the Tribe consists of more than five individuals and have also defended that position. Plaintiffs' claim that the Tribe consists of only five individuals, the Burley Group and Yakima Dixie, was thrice rejected in published opinions, as discussed above, that found the Tribe's membership was not limited to five individuals. *Miwok I*, 424 F. Supp. 2d at 203 n.7 (finding that references to documents adopted by a tribe must be understood as references to documents "ratified by a majority of the adult members"); *Miwok II*, 515 F.3d at 1267-68 (affirming the Assistant Secretary's decision not to approve the Burley Group's constitution on the basis that it was adopted by only a small group of people); *Miwok III*, 5 F. Supp. 3d at 98-99 (finding it was unreasonable for the Assistant Secretary to assume that the Tribe's membership was limited to five people and that the record was replete with evidence that the Tribe's membership was much larger).[4] Accordingly,

[4] In footnote 15 at the end of *Miwok III*, the district court rejected Dixie's argument that the *Miwok I* and *II* decisions had already established that the Tribe consisted of more than five people. The court opined that "the only issue before the courts in [*Miwok I*] and [*Miwok II*] was whether the Secretary had the authority to disapprove a constitution. . . . The courts did not directly address the issues raised here, namely, whether the Tribe's membership consists of five

Plaintiffs' challenge to the Assistant Secretary's determination that the administrative record demonstrates that the Tribe consists of more than five people is barred.

The Supreme Court has consistently emphasized the importance of res judicata and issue preclusion in fulfilling the purpose for which civil courts were established—the conclusive resolution of disputes within their jurisdiction. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979). Res judicata and issue preclusion derive from the general principle that a party who has litigated an issue and prevailed should not be subjected to the cost and vexation of multiple lawsuits which challenge the same incident, activity or decision, and the losing party should be bound to the decision. *United States v. Mendoza*, 464 U.S. 154, 158 (1984); *Allen*, 449 U.S. at 94; *Peck v. Comm'r*, 904 F.2d 525, 526 (9th Cir. 1990). *See also Montana*, 440 U.S. at 153-54.

1. Issue Preclusion

Plaintiffs' allegations that the Tribe's membership consists of only the Burley Group and Yakima Dixie are precluded by the doctrine of issue preclusion because that issue was squarely decided against Plaintiffs. Plaintiffs are barred from asserting claims and issues which were litigated in their previous challenges to the Assistant Secretary's determinations regarding the Tribe's governance.

Issue preclusion, traditionally known as collateral estoppel, bars the relitigation of issues, i.e., factual questions or mixed questions of fact and law, which were resolved by a court in a previous lawsuit, even if they are brought in connection with different causes of action. *United*

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members and whether the General Council is the duly constituted government of the Tribe." *Miowk III*, 5 F. Supp. 3d 86, 101 n.15. Plainly, *Miwok I* and *II* addressed more than whether the Secretary had the authority to disapprove a constitution. The courts found not only that the Secretary had the authority to, but that the Secretary was correct in disapproving the Constitution submitted by Ms. Burley. As stated by the D.C. Circuit, the Secretary's rejection of Burley's constitution was appropriate for the specific reason that Ms. Burley and her family comprise "a small cluster of people within the California Valley Miwok tribe" and went on to note "[t]he Secretary declined to approve the constitution because it was not ratified by anything close to a majority of the tribe." *Miwok II*, 515 F.3d at 1263. Contrary to the footnoted dicta in *Miwok III*, the membership of CVMT was fundamental to the decisions in *Miwok I* and *II*.

States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980). Under this doctrine, issues that have been litigated before a court of competent jurisdiction are normally conclusive in a subsequent suit involving parties to the prior litigation or their privies. *Montana* ,440 U.S. at 153; *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Peck*, 904 F.2d at 527 n.3; *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978).

Under Ninth Circuit law, relitigation of an issue is foreclosed when the following three requirements are met:

> (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated [by the party against whom preclusion is asserted] in the prior litigation; and (3) the determination of the issue in the prior action must have been a critical and necessary part of the judgment in the earlier action.

Trevino v. Gates, 99 F.3d 911, 923 (9th Cir. 1996) (alteration in original). Those requirements are satisfied here. The claims and issues Plaintiffs raise with regard to the composition of the Tribe's membership are identical to the issue at stake in the previous actions. Those issues were fully and fairly litigated in *Miwok I*, *II*, and *III* and resolved by those courts. In all three cases, the question of whether the tribe consisted of five people or many more than five people was central to the judgment.

Although Plaintiffs' assert that they were not parties to those litigations, the record clearly shows that they in fact actually litigated those cases. *See* Compl. ¶ 139. In *Miwok I* and *II*, Plaintiffs brought the suit on behalf of the Tribe challenging the Assistant Secretary's refusal to approve their proposed Tribal constitution, and seeking a declaration that the Tribe was organized under the IRA. In *Miwok III*, a lawsuit filed by the Dixie Group on behalf of the Tribe, Plaintiffs, as proposed intervenors, filed a motion to dismiss with accompanying statement of points and authorities. 2017AR000092-128. The court granted Plaintiffs intervenor status. *Id.* at 240-54. After the United States and the Dixie Group filed oppositions to their motion to dismiss, Plaintiffs filed a reply in support setting forth their arguments seeking to uphold the 2011 Decision. *Id.* at 392-408; 409-39. After denying their motion to dismiss, the court joined Plaintiffs to the suit. *Id.* at 762-78. Plaintiffs sought reconsideration, which the court denied. *Id.*

at 867-71. As the record show, Plaintiffs had a full and fair opportunity to litigate the claims and issues settled in those suits.

2. Claim Preclusion

In addition, because Plaintiffs could have and did raise, in the prior actions, the Tribal membership claims asserted herein, those claims are barred under the doctrine of claim preclusion. Under the doctrine of claim preclusion, also known as res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims, or causes of action, that were or could have been raised in the previous action. *Allen*, 449 U.S. at 94. This principle dictates that all legal theories arising out of the same transaction or event be raised in the first lawsuit. 1B Moore's Federal Practice ¶ 0.410[1] at III-176. *See C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987); *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986); *ITT Rayonier, Inc.*, 627 F.2d at 1001.

The Ninth Circuit has delineated four factors to consider in determining whether successive lawsuits involve the same cause of action under the res judicata doctrine:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

C.D. Anderson & Co., 832 F.2d at 1100 (citing *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). "'The last of these criteria is the most important.'" *Id.* at 1100.

Again, all of these criteria are satisfied with respect to Plaintiffs. The Assistant Secretary's determination that the Tribe's membership consists of more than five individuals, established in the previous actions, could be impaired by a conflicting judgment in this case. Because all cases involve exactly the same administrative record, the same "evidence" would be presented. The suits involve infringement of the same right, whether Plaintiffs—under the 1998 General Council—are the Tribe's duly authorized leadership. And, both arise out of the same "transactional nucleus of facts"– the membership of the Tribe. Plaintiffs' claim therefore is

barred by issue preclusion and claim preclusion and the Court should grant Federal Defendants summary judgment on this claim.

B. The Only Waiver of Federal Defendants' Sovereign Immunity is the APA

As the party invoking the jurisdiction of this Court, Plaintiffs bear the burden of demonstrating that the Court has the requisite subject matter jurisdiction to grant the relief they request. *Gibbs v. Buck*, 307 U.S. 66, 72 (1939); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936); *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992). In meeting their burden of establishing jurisdiction, Plaintiffs must overcome the presumption that this Court lacks jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 970 (9th Cir. 1981); *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1190 (9th Cir. 1970).

Plaintiffs identify 28 U.S.C. §§ 1331, 1361, 1362 as providing the Court jurisdiction in this matter. Compl. ¶¶ 6-8. A statute may create subject matter jurisdiction yet not waive sovereign immunity. *Powelson v. U.S., By & Through Sec'y of Treasury*, 150 F.3d 1103, 1105 (9th Cir. 1998). Sections 1331, 1361, and 1362 create jurisdiction, but do not waive Federal Defendants' sovereign immunity. *See Pit River Home & Agric. Co-op., Ass'n v. United States*, 30 F.3d 1088, 1098 n.5 (9th Cir. 1994) (citing *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (section 1331); *Smith v. Grimm*, 534 F.2d 1346, 1352 n.9 (9th Cir. 1976) (section 1361); *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970) (section 1362)). Additionally, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, does not constitute a waiver of sovereign immunity but merely grants an additional remedy in cases where jurisdiction already exists in the Court. *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1382-83 (9th Cir. 1988).

The only statute Plaintiffs allege that may possibly serve as a waiver of Federal Defendants' sovereign immunity is the APA. *See* Compl., ¶ 10. The APA confers jurisdiction

on federal district courts with respect to non-monetary claims. 5 U.S.C. § 702. The APA does not, through section 702, create an independent basis of jurisdiction; it allows for judicial review of final agency action only if there is also an independent basis for subject matter jurisdiction. *See Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). Here, the December 2015 Decision provides that it is final agency action. 2017AR001403. This court has jurisdiction to conduct APA review of the December 2015 Decision.

C. The December 2015 Decision is not Arbitrary and Capricious

Plaintiffs assert that the December 2015 Decision is arbitrary and capricious because: (1) Yakima Dixie's enrollment of Plaintiffs in 1998 was appropriate; (2) Yakima Dixie's enrollment of Plaintiffs did not compromise his brother Melvin Dixie's interests; (3) enrolling Plaintiffs did not impair the interests of "unenrolled potential tribal members"; (4) the Tribe's membership is currently comprised of five individuals; and (5) the 1998 General Council is the Tribe's authorized and legitimate government. Compl. ¶¶ 43, 45. 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

As an initial matter, the December 2015 Decision did not decide issues relating to Plaintiffs' enrollment in the Tribe. Plaintiffs contend that the decision is in violation of the APA because it wrongly decided that Yakima Dixie did not properly enroll Plaintiffs and that such enrollment compromised and impaired Melvin Dixie's interests or the interests of Eligible Groups. But these contentions have no relevance to the decision Plaintiffs challenge.[5] Whether

[5] 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."

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. 2017AR00001402. 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 Tribe consists of more than five individuals. 2017AR001399-400. 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, 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 and they cannot seek to challenge that issue before this Court. 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 at 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 rings false. The December 2015 Decision precisely follows the decision of the circuit court. Plaintiffs fail to demonstrate that the December 2015 Decision is arbitrary and capricious or otherwise not in accordance with the law on these grounds. The court should therefore grant summary judgment in favor of Federal Defendants on these issues.

2. The Assistant Secretary's Determination that the Tribe's Membership is Comprised of More than Five People is Supported by the Record

Even if the Court determines that Plaintiffs' claim that the Tribe's membership consists of more than five people is not barred by claim preclusion and issue preclusion, Federal Defendants are still entitled to summary judgment on this issue because the December 2015 Decision is amply supported by the administrative record and a reasonable basis exists for the Assistant Secretary's decision. In the December 2015 Decision, the Assistant Secretary engaged in a thorough analysis of the record that went beyond the federal courts' rejection of Plaintiffs' argument. The Assistant Secretary examined the history of the term "Rancheria" and the uses of that term. 2017AR001400. He found that "Rancheria" has been used to refer to both the land itself and the Indians residing on the land. *Id.* In many instances, the size of a Rancheria did not permit all of the members of a Rancheria to take up residence on the land. *Id.* Nonetheless, BIA field officials remained cognizant that Indians not residing on a rancheria were nevertheless associated with the rancheria. *Id.* The Assistant Secretary concluded that "[t]hus, such associated band Indians who were non-residents were potential residents. And since membership in an unorganized rancheria was tied to residence, potential residents equated to potential members." *Id.*

Placing the CVMT into this historical context and understanding of the term "Rancheria," the Assistant Secretary examined the Department's interactions with the Tribe and concluded that its membership could not properly be limited to Yakima Dixie and Plaintiffs. *Id.* Given the acquisition of the land for the benefit of the Mewuk Indians residing in the Sheep Ranch area of Calaveras County, California, the Assistant Secretary reasonably found that for purposes of

reorganization, the Tribe's membership is properly drawn from the Mewuk Indians for whom the Rancheria was acquired and their descendants, which includes (1) the individuals listed on the 1915 Terrell Census and their descendants; (2) the descendants of Jeff Davis; and (3) the heirs of Mabel Dixie. *Id.* The Assistant Secretary examined the record, including Special Indian Agent Terrell's 1915 census and request for land, the 1929 census, the 1935 referendum memorandum, federal register notices, Departmental memoranda, and the Parties' submissions, including Plaintiffs, to reach his conclusion. *Id.*

The Assistant Secretary's decision was the result of careful consideration of the relevant factors and he articulated a rational connection between the facts found and the choices made. *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (finding that agency action is valid if the agency considered the relevant factors and articulated a rational connection). The decision is presumed to be valid and should be affirmed by the Court. The Court should, therefore, grant Federal Defendants summary judgment on this claim.

3. The Assistant Secretary's Determination that the 1998 General Council is not the Tribe's Valid Representative is supported by the Record

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. 2017AR001401 (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.*

Additionally, because the 1998 resolution could not serve as the actual reorganization of the whole Tribe, it is also not true that the BIA has recognized Plaintiffs as the Tribe's authorized government since 1999. *See* Compl. ¶ 102. 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. 2011AR000409. This position is further supported by the fact that in its Motion to Transfer Venue filed in *Miwok I*, the BIA stated that in 2004, it rejected the Burley Group's proposed 2004 constitution on the grounds that the larger tribal community had not been involved in its adoption. 2011AR000774, ¶ 15. Following its evaluation of the constitution submitted by Ms. Burley, the BIA "determined it was necessary to clarify its prior recognition of Ms. Burley . . . and make it clear it could recognize her only as a tribal spokesperson or representative with whom BIA communicates on federal-tribal matters because the Tribe was not organized." *Id.*; *see also* Decl. of Carol in Supp. of Defs' Mot. to Transfer, 2011AR007762-63, ¶ 9 (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. As discussed above, 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; *see also* 2017AR001401-1402. In 2005, the BIA rescinded its interim recognition of Plaintiffs and the 1998 General Council. *Miwok III*, 5 F. Supp. 3d at 93-94. As the Assistant Secretary held, "[f]ederal courts have established, and . . . review of the record confirms, the people who approved the 1998 Resolution (Mr. Dixie, Ms. Burley, and possibly Ms. Burley's daughter Rashel Reznor) are not a majority of those eligible to take part in a reorganization of the Tribe." 2017AR001401.

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. The Court should issue summary judgment in Federal Defendants' favor on this claim.

V. CONCLUSION

The December 2015 Decision is the result of the Assistant Secretary's careful and thorough analysis of the history of the Tribe, the administrative record, and the applicable law. The Assistant Secretary was guided by court decisions that have addressed the challenges Plaintiffs raise and also by the administrative record before him. The Assistant Secretary considered the relevant factors and articulated a rational connection between the facts found and the choices made. After his careful consideration, the Assistant Secretary properly found that the Tribe consists of more than five people and that the 1998 General Council is not the Tribe's valid representative. The December 2015 Decision is presumed to be valid, and Plaintiffs have shown no reason for the Court to deviate from this presumption. Rather, the Court should uphold the

decision and find that it was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The Court should grant summary judgment in favor of Federal Defendants.

Respectfully submitted March 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2017, I electronically filed the foregoing Federal Defendants' Cross-Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof 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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