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CALIFORNIA VALLEY MIWOK TRIBE,
THE GENERAL COUNCIL, SILVIA BURLEY,
RASHEL REZNOR, ANJELICA PAULK and
TRISTIAN WALLACE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, a federally-recognized Indian tribe, **THE GENERAL COUNCIL, SILVIA BURLEY, RASHEL REZNOR; ANJELICA PAULK**; and **TRISTIAN WALLACE**

Plaintiffs,

vs.

SALLY JEWELL, in her official capacity as U.S. Secretary of Interior, et al.,

Defendants

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.

Intervenor-Defendants.

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

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: May 30, 2017
Time: 1:30 p.m.

Judge: Hon. William B. Shubb
Courtroom 5

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

Plaintiffs CALIFORNIA VALLEY MIWOK TRIBE ("the Tribe" or "the Miwok Tribe"), THE GENERAL COUNCIL, SILVIA BURLEY ("Burley"), RASHEL REZNOR ("Rashel"), ANJELICA PAULK ("Angelica"), and TRISTIAN WALLACE ("Tristian") (collectively "the Burley Faction"), submit the following Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion for Summary Judgment.

I.

INTRODUCTION

In 1998, Yakima Dixie ("Dixie") enrolled Burley, his distant cousin, and her two family members into the Tribe. At the time, the Tribe had dwindled down to Yakima Dixie and his brother, Melvin Dixie, as the last known remaining Tribal members. Melvin Dixie's whereabouts were unknown at the time. The Bureau of Indian Affairs ("BIA") recognized this and encouraged Dixie and his newly adopted Tribal members to organize the Tribe with a governing body known as a "General Council." The BIA directed that Dixie do so by resolution and provided Dixie with a sample resolution to follow. Both Dixie and Burley prepared the document and called it Resolution #GC-98-01 (herein after sometimes called "the 1998 Resolution"), which established the General Council as the governing body of the Tribe. The Tribe had only five (5) members and the General Council was comprised of Dixie as Tribal Chairman, Burley as Vice Chairperson, and Rashel Reznor as Secretary.

Sometime after the General Council was established and the Tribe began engaging in government-to-government relations with the federal government, Dixie voluntarily resigned as Tribal Chairman, and signed a written resignation to that effect. Burley was elected as the new Tribal Chairperson, and Dixie signed a written document consenting to that as well. Soon after Dixie's resignation, a white, non-Indian by the name of

Chadd Everone contacted Dixie and told him about the new 1999 California State Compacts the Governor had signed, allowing various tribes in California to build and operate gambling casinos and generate high amounts of income. Because the Tribe was a federally-recognized tribe and qualified to have a gambling casino, no matter how small it was, Everone was interested in using Dixie's name to build and operate a gambling casino to enrich Everone and other non-Indian investors. The only problem at the time was that Dixie had already resigned, and control of the Tribe was with Burley.

To accomplish his scheme of taking over control of the Tribe for his own personal, financial gain of building a casino, Everone conspired with Dixie to have him falsely claim that he never resigned as Tribal Chairman, and that Dixie's resignation was forged. This created the Tribal leadership dispute that Everone used to further his scheme of creating uncertainty in the Tribal governing body and working toward trying to get the Tribe "re-organized" through the Dixie faction which he continues to control. This Tribal leadership dispute has crippled the Tribe over the years and has caused havoc in its ability to function and operate as a federally-recognized tribe. Dixie ultimately admitted in 2012 in a sworn deposition that he in fact resigned and that his resignation was never forged. By the time Dixie was forced to admit he in fact resigned, he had filed numerous declarations, pleadings and other documents in both state and federal court falsely stating under penalty of perjury that he never resigned and that his resignation was forged.

Faced with this damning evidence, the Dixie faction has attempted to downplay Dixie's false statements about his resignation and fraud he perpetrated on the courts, by arguing the issue is "irrelevant," because the General Council

established under the 1998 Resolution was purportedly invalid at the outset. This argument misses the point that but for Everone and Dixie's fraud in creating a false and fraudulent Tribal leadership dispute, the Tribe would be functioning today under the General Council and receiving federal contract funding and Revenue Sharing Trust Fund ("RSTF") payments under the California State Compacts without interruption.

Everone sought and obtained sympathy from the BIA, which was led to believe, falsely, that Burley "stole" the Tribe from Dixie. The BIA sought to accommodate Everone's claims, and took it upon itself to "re-organize" the Tribe in an attempt to indirectly resolve the ongoing Tribal leadership dispute. The Burley faction challenged the BIA's efforts to do so, and the matter was taken up to the Interior Board of Indian Appeals ("IBIA") who then in turn referred the issue to the Assistant Secretary of Interior, Indian Affairs ("AS-IA"). The AS-IA Larry Echo Hawk decided the issue in August 2011 and concluded that the BIA had no right to attempt to re-organize the Tribe against its wishes, that the Tribe was not required to re-organize under the Indian Reorganization Act of 1934 ("IRA") in order to receive federal funding, or for any reason, that its governing body comprising of the General Council established under the 1998 Resolution would be recognized as the Tribe's governing body having a government-to-government relationship with the federal government, and that the Tribe consisted of five (5) enrolled members subject to enlargement as to be determined by the General Council without interference by the BIA.

The Dixie faction controlled by Everone challenged Echo Hawk's 2011 decision, and the U.S. District Court ordered the AS-IA reconsider its decision. By the time the U.S. District Court made its order, AS-IA Echo Hawk has retired and was

replaced by Kevin Washburn. On his last day in office on December 31, 2015, before he, too, retired, AS-IA Washburn reversed AS-IA Echo Hawk's decision and concluded that the Tribe was not limited to five (5) members and that the General Council was never properly organized by the 1998 Resolution, because it did not consist of valid representatives of the Tribe. He refused to recognize the General Council as the governing body of the Tribe, and then directed that unenrolled, "potential" (but not actual) members be allowed to participate in re-organizing the Tribe under the IRA. In short, Washburn did a complete 180-degree turn on the Echo Hawk decision.

The Burley faction then filed this action challenging Washburn's decision, because it is erroneous as a matter of law and an arbitrary and capricious final agency action. The 2011 Echo Hawk decision should be reinstated, because it is based upon correct principles of Indian law.

II.

STATEMENT OF FACTS

A. HISTORY OF THE TRIBE

In 1915, the United States government purchased approximately 0.92 acres of land in Calaveras County, California, for the benefit of twelve (12) named Indians living on the Sheep Ranch Rancheria. (AR-CVMT-2011-001687). The Indian agent who recommended the purchase of the land for these Indians described the group as "the remnant of once quite a large band of Indians in former years living in and near the old decaying mining town known and designated on the map as 'Sheepranch.'" (Id.). However, the Indian Agent specifically stated that this 0.92 acre land would be purchased only for "this small band" of 12 or 13 Sheepranch Indians. (CVMT-2011-000001-002). While the Indian Agent observed that "to some extent" this little band of 12 or 13 Sheepranch Indians were "interchangeable in their

relations" with four other small band of Indians in the area, he never stated that these other band of Indians were members of the 12 or 13 Sheepranch band of Indians, and never stated that the 0.92 acre land was to be purchased for anyone other than this "little band" of 12 or 13 Sheepranch Indians. (CVMT-2011-000001-002). The phrase "interchangeable in their relations" does not equate to Tribal membership, but can only be understood to mean that these distinct band of Indians were simply neighbors who enjoyed peaceful, social intercourse and trade. Otherwise, the Indian Agent would have recommended the purchase of a larger parcel of land to accommodate all of these neighboring bands. But he did not do so. For example, the Indian Agent himself distinguished members of these neighboring bands as follows:

> "[T]he two Indians, 'Abe Lincoln' & 'Jeff Davis,' Abe at Murpheys & Jeff at Sheepranch, were c[h]ristened their respective names by the early miners during the progress of the civil war, they then being quite chunks of boys, spending much of their time around the mining camps."

(CVMT-2011-000002). During the Civil War, these two Indian boys, both from different band of Indians in the area, "hung out" at the mining camps, but maintained their identity to their own band of Indians. Thus, even though these bands interacted with each other, they still maintained their identity to their own respective bands.

Over the years, it became apparent that whoever actually resided on the 0.92 parcel of land had the authority to enroll Indians as members and organize the Tribe.

For example, in 1934, Congress passed the Indian reorganization Act ("IRA"), which, among other things, required the U.S. Secretary of Interior ("the Secretary") to hold elections through which the adult Indians of a reservation decided whether to accept or reject the applicability of certain

provisions of the IRA to their reservation, including provisions authorizing tribes to organize and adopt a constitution under the IRA. 25 U.S.C. Sections 476 and 478. (AR-CVMT-2011-001687). In 1935, Jeff Davis, the only Indian living on the Rancheria, voted in favor of the Tribe being organized under the IRA. (Id.). However, the process was never followed through, and as a result the Tribe was never organized under the IRA. (Id.).

Also in 1958, in keeping with the then-popular policy of assimilating Native Americans into American society, Congress enacted the California Rancheria Act, which authorized the Secretary to terminate the federal trust relationship with several California tribes, including several Rancherias, and to transfer tribal lands from federal trust ownership to individual fee ownership. (Act of Aug. 18, 1958, Pub.L. No. 85-671, 72 Stat. 619). To this end, the BIA prepared a plan in 1966 to distribute the assets of the Sheep Ranch Rancheria as a prelude to termination. (AR-CVMT-2011-001687). At that time, Mabel Hodge Dixie was the only adult Indian living on the Rancheria who was entitled to receive the assets of the Rancheria. (Id.). She, therefore, voted to accept the distribution plan and was issued a deed to the land in 1966. (AR-CVMT-2011-001687-88).

Although the Sheep Ranch Rancheria land had been distributed to Mabel Dixie pursuant to a distribution plan, the Secretary never published a final notice of termination and had accepted the land back from Mabel Dixie through a quitclaim deed. As a result, the Tribe was administratively "unterminated" before it could be formally terminated. In other words, the Tribe was never terminated. (AR-CVMT-2011-002051, 1399, 1689).

When Mabel Dixie died in 1971, the 0.92 parcel of land, originally purchased for the 12 or 13 band of Indians identified by the Indian Agent in 1915, went into probate in California

State court. The probate order listed Yakima Dixie and his brother, Melvin Dixie, as the only surviving heirs of Mabel Dixie, and awarded them their respective interest in the land. (CVMT-2011-000172-173). The probate order had the effect of confirming and ratifying the BIA's longstanding policy that whoever resided on the land had the authority to enroll Indians as members of the Tribe and organize the Tribe. It had the effect of excluding any claim of any other Indians who may have lived in the area, and who did not reside on the land, as having any interest or authority over the land. It solidified Mabel Dixie and her family as the sole members of the Sheepranch band of Indians. When Melvin left and Dixie remained on the land, the probate order solidified Dixie's sole authority, like what the BIA extended to Jeff Davis back in 1935, as the sole member of the Sheepranch band who, because he alone resided on the property, had the authority to enroll Indians as members and organize the Tribe.

In 1979, individuals from a number of terminated Rancherias filed an action in the U.S. District Court, Northern District, styled Hardwick v. U.S. (Civ. No. C-79-1710). The Hardwick plaintiffs sought restoration of their status as Indians, entitlement to federal Indian benefits, and the right to re-establish their tribes as formal government entities. Specifically, the Hardwick plaintiffs sought by injunction to undo the effects of the California Rancheria Act and to require the Secretary to "unterminate" each of the subject Rancherias and to "treat all of the subject Rancherias as Indian reservations in all respects." The Hardwick lawsuit ended in a settlement between the tribes and the federal government, culminating in a series of stipulated judgments. In the settlement, the Secretary agreed to restore "any of the benefits or services provided or performed by the United States for

Indians because of their status as Indians" and to "recognize the Indian Tribes, Bands, Communities or groups of the seventeen Rancherias...as Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act." (Stipulation and Order, Hardwick v. United States, No. C-79-1710 (Dec. 22, 1983)).

In 1994, Yakima Dixie ("Dixie"), the son of Mabel Dixie, wrote to the BIA asking for BIA assistance for home repairs on the Rancheria, and described himself as "the only descendent and recognized...member" of the Tribe. (AR-CVMT-2011-001688). At that time Dixie and his brother, Melvin Dixie, were the only surviving children of Mabel Dixie, but Melvin Dixie's whereabouts were unknown. (AR-CVMT-2011-000177). Melvin later died in 2008. (AR-CVMT-2017-001400, fn. 20).

In the mid-1990s, Burley contacted the BIA for information related to her Indian heritage. (AR-CVMT-2011-001688). The BIA provided her with information that showed she was related to Jeff Davis who had initially voted in favor of the Tribe being organized under the IRA. (Id.). Burley was also related to Dixie. (Id.). Thereafter, Burley contacted Dixie and told him about her interest in her Indian heritage that ultimately led to him and his dwindling Tribe. (Id.).

On August 5, 1998, Dixie, as "Spokesperson/Chairman" of the Tribe, signed a statement accepting Burley as an enrolled member of the Tribe, and also enrolled Burley's two daughters and her granddaughter. (AR-CVMT-2011-001688). As a result of Dixie's actions, the Tribe in 1998 consisted of six enrolled members: (1) Yakima Dixie; (2) Melvin Dixie; (3) Silvia Burley; (4) Anjelica Paulk; (5) Rashel Reznor; and (6) Tristian Wallace. (Id.).

In September of 1998, Yakima Dixie and Burley met at the Rancheria with BIA staff to discuss organizing the Tribe. (AR-CVMT-2011-001688). One of the issues discussed was developing criteria for membership in the Tribe. (Id.). At the time, the whereabouts of Melvin Dixie, Yakima's brother, were unknown. As a result, the BIA staff told Yakima Dixie that he had both the authority and the broad discretion to decide the criteria for membership. According to the BIA, Yakima Dixie, his brother Melvin Dixie, Burley and Burley's adult daughter were the "golden members" of the Tribe. (Id.). And because Melvin Dixie's whereabouts were unknown, the BIA concluded that the three adult members consisting of Yakima Dixie, Burley and her adult daughter were the General Council of the Tribe that had the authority to take actions on behalf of the Tribe. (AR-CVMT-2011-001688-89).

Because the Tribe was never formally terminated, there was no court decision, like Hardwick, supra, that affected the Tribe, and to which the Tribe and the BIA could look to so as to determine who was a member of the Tribe or otherwise entitled to organize it. Typically, California tribes who had been unlawfully terminated by the federal government regained federal recognition through litigation like Hardwick, supra, and the court judgment in that litigation identified the class of persons entitled to organize the tribe, e.g., the distributes and their dependents, and their lineal descendants. However, in the case of the Sheep Ranch Rancheria, although the land had been distributed to Mabel Dixie pursuant to a distribution plan preparatory to termination, the Secretary never actually followed through and published a final notice of termination. Instead, the Secretary accepted the land back from Mabel Dixie through a quitclaim deed, thus essentially administratively

"unterminating" the Tribe before it had ever been formally terminated. (AR-CVMT-2011-001689).

Therefore, because of the unique circumstance that the Sheep Ranch Rancheria found itself in never being terminated, the BIA concluded that "for purposes of determining the initial membership of the Tribe," Yakima Dixie and Melvin Dixie must be included, because they were the remaining heirs of Mabel Dixie. (Id.). In addition to these two initial members, the BIA recognized that Yakima Dixie had adopted Burley, her two daughters, and her granddaughter, into the Tribe. As a result, the BIA concluded that Burley and her adult daughter, together with Yakima and Melvin Dixie had "the right to participate in the initial organization of the Tribe." (Id.). The BIA's actions were consistent with its long-standing practice and policy of treating whoever resided on the 0.92 acre plot of land as having sole authority to enroll Indians as members and organize the Tribe.

On September 24, 1998, the BIA told Yakima and Burley that it "recommend[ed] the Tribe operate as a General Council," because of its "small size," so that they could elect or appoint a chairperson and conduct business. (Id.). To this end, the BIA offered the Tribe $50,000.00 in grant money for purposes of improving its tribal government, and provided Dixie and Burley with a draft resolution "form" for them to use in requesting the grant. (Id.). The draft resolution contained language establishing the General Council.

Using the draft resolution form prepared by the BIA, Dixie and Burley prepared and signed a resolution on November 5, 1998, establishing a General Council consisting of all adult members of the Tribe, to serve as the governing body of the Tribe. (AR-CVMT-2011-001690, 00172-176). The resolution became known as Resolution #CG-98-01, which the BIA accepted as the governing

document of the Tribe. (AR-CVMT-2011-000179). The document was signed by Yakima Dixie and Silvia Burley, and later by Rashel Reznor, and specifically noted that the whereabouts of Melvin Dixie were at that time unknown. Resolution #GC-98-01 vested the General Council with the governmental authority of the Tribe to conduct the full range of government-to-government relations with the United States. (AR-CVMT-2011-000178).

Pursuant to Resolution #GC-98-01, Yakima Dixie was appointed and elected as the Tribal Chairman. (AR-CVMT-2011-002052).

B. DIXIE'S FRAUD AND TRIBAL LEADERSHIP DISPUTE

On April 20, 1999, Yakima Dixie signed a notice of resignation as Tribal Chairman. (RJN "32", Letter to Washburn from Corrales, 6/6/2014, Ex. "46" to Decl. of MCJ). On the same date, Yakima Dixie also signed a document confirming his resignation as Tribal Chairman and agreeing to the appointment of Silvia Burley to replace him as the new Tribal Chairperson. (Id.).

Sometime after he resigned, Yakima Dixie was approached by a non-Indian, Chadd Everone, who sought Yakima's cooperation in taking control of the Tribe in order to build a gambling casino using the name and status of the Tribe. (AR-CVMT-2017-000955-56). The problem was that Yakima Dixie had already expressly resigned. To regain control of the Tribe, Everone conspired with Yakima to have Yakima falsely say that he never resigned and that his written resignation was a forgery. Yakima Dixie then thereafter falsely told the BIA and others that he never resigned and that his resignation was forged. This then created a Tribal leadership dispute between Yakima Dixie and Burley that has since 1999 caused havoc with the Tribe and crippled the Tribe's ability to operate effectively over the years. (AR-CVMT-2011-002051, 001573-75). Yakima maintained that claim from 1999

up through February 7, 2012, when he was deposed and testified in a California state action that he in fact resigned in April of 1999, that his resignation was not forged as he had previously claimed, and that the signatures on the Tribal resignation documents were in fact his. (RJN "33", Letter to Washburn from Corrales, 7/9/2014).

Despite Dixie's claim that he never resigned, the BIA chose to acknowledge Burley as the Chairperson of the Tribe, and, as a result, accepted and honored numerous Tribal resolutions passed by the General Council under Burley's leadership from 1999 through July 2005. (AR-CVMT-2011-001691). For example, from 1999 through July 2005, the BIA entered into annual P.L. 638 federal contracts with the Tribe under Burley's leadership, and awarded the Tribe federal contract funding. (Id.). The California State Gambling Control Commission ("the CGCC") followed the BIA's lead and acknowledged Burley as the authorized Tribal representative to receive $1.1 million in annual RSTF payments for the Tribe. However, behind the scenes, Everone continued to stir up false claims of a Tribal leadership dispute between Dixie and Burley, causing the BIA to stop awarding the Tribe 638 federal contract funding in August 2005, which in turn caused the CGCC to withhold RSTF payments to the Tribe as well. (AR-CVMT-2017-000958-963).

C. THE JANUARY 28, 2010 IBIA DECISION

Because of the ongoing Tribal leadership dispute was not coming to an end, the BIA took it upon itself, through the urging of Everone and the Dixie faction, to begin a process of "re-organizing" the Tribe under the IRA. (AR-CVMT-2011-001684-85). It invited several nonmembers it called "potential" or "putative" members to participate in a general council meeting in this re-organization process, which included enrolling new members. (AR-CVMT-2011-001684). The BIA claimed these actions

were necessary, because, according to the Interior Board of Indian Appeals ("IBIA") it felt "until the tribal organization and membership issues were resolved, a leadership dispute between Burley and Yakima...could not be resolved, and the resolution of that dispute was necessary for a functioning government-to-government relationship with the Tribe." CVMT v. Pacific Regional Director, BIA (Jan. 28, 2010) 51 IBIA 103, 103-104. (AR-CVMT-2011-001684-85).

The Burley faction appealed the Pacific regional Director's decision to the IBIA. (AR-CVMT-2011-001684). The IBIA, however, deemed the matter to be a membership enrollment dispute, because it involved the issue of whether the BIA could re-organize the Tribe under the IRA without the Tribe's consent and force the enrollment of nonmembers to participate in that re-organization. (AR-CVMT-2011-001703). Because the IBIA did not have jurisdiction over enrollment disputes, it referred the issue to the Assistant Secretary of Interior, Indian Affairs ("AS-IA"). (Id.).

The IBIA did not refer to the AS-IA any issue concerning whether the 1998 Resolution establishing the General Council was invalid for any reason. Nor did the Burley faction raise that as an issue before the IBIA. (AR-CVMT-2011-001684-1705).

D. AS-IA LARRY ECHO HAWK'S AUGUST 31, 2011 DECISION

On August 31, 2011, the AS-IA Larry Echo Hawk, in response to the IBIA's referral of the enrollment dispute, made the following decisions concerning the Tribe:

1. He reaffirmed that the Tribe is a federally recognized tribe whose entire citizenship, as of August 31, 2011, consists of five acknowledged citizens;

2. The 1998 Resolution established a General Council form of government, comprised of all the adult citizens of the Tribe,

with whom the Department may conduct government-to-government relations;

3. The Department shall respect the validly enacted resolutions of the General Council; and

4. Only upon a request from the General Council will the Department assist the Tribe in refining or expanding its citizenship criteria, or developing and adopting other governing documents.

5. Although the Tribe's General Council does not render the Tribe organized under the IRA, as a federally recognized tribe, the Tribe is not required to "organize" under the IRA.

6. It is impermissible to treat the Tribe, as a non-IRA tribe, differently from tribes organized under the IRA and not allow it to receive federal benefits. (AR-CVMT-2011-002049-50).

Echo Hawk, therefore, determined that there was "no need for the BIA to continue its previous efforts to organize the Tribe's government, because it is already organized as a General Council, pursuant to the 1998 General Council Resolution it adopted at the suggestion of the BIA." (AR-CVMT-2011-002049). It concluded further that there was "no need for the BIA to continue its previous efforts to ensure that the Tribe confers tribal citizenship upon other individual Miwok Indians in the surrounding area." (Id.).

In his decision, Echo Hawk observed that the BIA wrongly concluded it had an obligation to potential members in the surrounding community. (AR-CVMT-2011-002050-51). He made it clear that only the Tribe's General Council has the exclusive authority to decide who can be enrolled as members. He stated:

> "...the BIA clearly understood in 1998 that the acknowledged CVMT citizens had the right to exercise the Tribe's inherent sovereign power in a manner they chose. It is unfortunate that soon after the 1998 General Council resolution was enacted, an intra-tribal leadership dispute

> erupted, and both sides of the dispute found, at various points in time in the intervening years, that it served their respective interests to raise the theory that the BIA had a duty to protect the rights of approximately 250 'potential citizens' of the Tribe. A focus on that theory has shaped the BIA's and the Departments' position on the citizenship question ever since. By contrast, today's decision clears away the misconceptions that these individuals have inchoate citizenship rights that the Secretary has a duty to protect. They do not. The Tribe is not comprised of both citizens and potential citizens. Rather, the five acknowledged citizens are the only citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe...."

(Id.).

E. U.S. DISTRICT COURT DECEMBER 2013 ORDER REMANDING TO AS-IA FOR RECONSIDERATION

Dixie challenged the Echo Hawk 2011 decision in federal court. (AR-CVMT-2011-000024). In December 2013, the federal district court ("the District Court" or "U.S. District Court") granted summary judgment in favor of Dixie and his Tribal Faction and remanded to the AS-IA for him to "reconsider" his August 31, 2011 decision, because he "assumed" certain factual issues rather than determined them factually. CVMT v. Jewell (U.S.D.C. 2013) 5 F.Supp.3d 86, 100-101. Specifically, the U.S. District Court remanded back to the AS-IA for him to reconsider his August 31, 2011 decision, because, according to the U.S. District Court, the AS-IA merely assumed the Tribe's membership is limited to five persons and further merely assumed that the Tribe is governed by a duly constituted General Council, without setting forth its reasons for these conclusions, in light of the administrative record that questioned the validity of those assumptions. (Id.). Indeed, although much of the decision is predicated on an existing Tribal leadership dispute, the court there did not have the benefit of the deposition transcript of

Yakima Dixie taken in the California State case, wherein he admits resigning as Tribal Chairman, because it was not part of the administrative record.

As a result, the U.S. District Court was misled into thinking that Dixie still maintained that he never resigned as Tribal Chairman, and the court relied upon that on-going claim in her court as a basis for her ruling. For example, the U.S. District Court stated:

> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council. From as early as April 1999, Yakima contested the validity of the Council. *See* AR 000182 (April 21, 1999 letter from Yakima to the BIA stating that he "cannot and will not resign as chairman of the Sheep Ranch Indian Rancheria"); *see also*, AR 000205 (October 10, 1999 letter from Yakima to BIA raising questions about Burley's authority); AR 001690, 000231(Yakima notifying the BIA of "fraud and misconduct" with respect to the Tribe's leadership).

5 F.Supp.3d 86, 100-101. Accordingly, based solely on the administrative record, the U.S. District Court concluded that Dixie's claim that his resignation was forged and that he never resigned raised doubts about the validity of the General Council under the Burley Faction.

Moreover, the U.S. District Court's order was largely based on Dixie's time-barred claim that the 1998 Resolution was invalid at the outset, and therefore was erroneous as a matter of law. (Id.)

F. THE BURLEY FACTION'S INABILITY TO APPEAL THE DISTRICT COURT ORDER OF REMAND

The Dixie Faction has argued that Plaintiffs "cannot re-litigate" the U.S. District Court decision granting summary judgment in the Dixie Faction's favor, because Plaintiffs "did not appeal that decision." This is inaccurate and misleading.

The Burley Faction were Intervenor-Defendants in the Dixie Faction's suit challenging AS-IA Echo Hawk's August 31, 2011 Decision. The Federal Defendants in that suit chose not to appeal the decision. When the Burley Faction attempted to appeal, the Federal Defendants moved to dismiss the appeal for lack of jurisdiction, pointing out that "a private party – unlike the government – may not appeal a district court's order remanding to an agency because it is not final within the meaning of 28 U.S.C. § 1291." (Ex. "1," Motion to Dismiss Appeal for Lack of Jurisdiction, RJN "1"). The Burley Faction conceded this point and stipulated to voluntarily dismiss their appeal. (Ex. "2" Stipulation of Voluntary Dismissal, RJN "2").

Accordingly, Plaintiffs here are not "re-litigating" issues decided by the U.S. District Court that remanded the matter back to the AS-IA to "reconsider" his 2011 Decision. That remand order was not final. Plaintiffs' suit instead is against the AS-IA relative to his December 30, 2015 Decision.

G. AS-IA WASHBURN'S DECEMBER 30, 2015 DECISION

On remand, the AS-IA Kevin Washburn erroneously concluded that the Tribe's membership is more than five people, and that the 1998 General Council does not consist of valid representatives of the Tribe. (AR-CVMT-2017-001402). He erroneously concluded that the Tribe was never properly "reorganized" back in 1998, leaving questions as to the overall membership of the Tribe, and therefore the Tribe must be reorganized. (AR-CVMT-2017-001401). He then wrongfully directed that un-enrolled, potential members be allowed to participate in reorganizing the Tribe. (AR-CVMT-2017-001402). He refused to acknowledge the Tribe's governing document, Resolution #GC-98-01, which established the Tribe's General Council, despite the fact that this governing document has been in place for over 18 years. (AR-CVMT-2017-001401). His decision stated:

> At the time of its enactment, the 1998 Resolution undoubtedly seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of reorganizing the Tribe. But the actual reorganization of the Tribe can be accomplished only via a process open to the whole tribal community. Federal courts have established, and my 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 the reorganization of the Tribe. Accordingly, I cannot recognize the actions to establish a tribal governing structure taken pursuant to the 1998 Resolution. Ms. Burley and her family do not represent the CVMT [the Tribe].

(AR-CVMT-2017-001401). However, these conclusions are based upon Dixie's time-barred claim that the 1998 resolution was invalid at the outset. Moreover, the IBIA never referred that issue to the AS-IA for resolution.

SUMMARY OF ARGUMENT

Contrary to the Federal Defendants' assertions, Plaintiffs' challenge to the AS-IA Kevin Washburn's December 31, 2015 Decision ("AS-IA December 2015 Decision") is not barred by the principles of res judicata or issue preclusion (collateral estoppel), as a result of *Miwok I, II and III.* The issues in *Miwok I and II* are not identical to the issues to be decided in this action. Specifically, those courts did not decide the merits of whether the 1998 Resolution is invalid or whether the Tribal membership is limited to five (5) enrolled members. With respect to *Miwok III,* there is no final judgment, and therefore res judicata does not apply.

The AS-IA December 2015 Decision is arbitrary and capricious, because it is erroneously predicated on Dixie's time-barred claim that the 1998 Resolution establishing the General Council was invalid at the outset. See Hardwick v. U.S. (N.D.Cal. 2012) 2012 WL 6524600 (Plaintiff's challenge of

legitimacy and validity of the Tribe's governing body was held barred by the six-year statute of limitations). The U.S. District Court erred in remanding for reconsideration this time-barred claim. Moreover, the validity of the 1998 Resolution was not an issue that the IBIA referred to the AS-IA for resolution, and the Burley Faction did not raise it in their appeal before the IBIA.

The General Council established under Resolution 1998 was not created to "manage the process of reorganization," as the AS-IA December 2015 Decision erroneously concludes. The 1998 Resolution organized the Tribe. The BIA had previously erroneously determined that in order to qualify for federal benefits, the Tribe was required to "re-organize" under the IRA, and sought to "re-organize" the Tribe for this purpose and for purposes of trying to resolve the long-standing Tribal leadership dispute. The August 2011 AS-IA Decision resolved this issue, and correctly concluded that the Tribe was not required to "re-organize" under the IRA in order to receive federal benefits, and that the BIA could not force the Tribe to "re-organize" its governing body, because it is already organized under the 1998 Resolution. The August 2011 AS-IA Decision further concluded that BIA could not force the Tribe to expand its membership without its consent, and that, until the Tribe provides otherwise, the Tribal membership presently consists of five (5) enrolled members. The December 2015 AS-IA Decision concluded otherwise, contrary to well-settled Indian law principles of self-governance. The August 2011 AS-IA Decision should be reinstated as the controlling decision.

Contrary to the December 2015 AS-IA Decision, no prior federal court has ever held that the Tribe's membership is larger than five (5) enrolled members.

The Dixie Faction should be estopped from challenging the 1998 Resolution, based on fraud. The Tribal leadership dispute that has thrust the two competing factions into this 16 year dispute, was contrived and fabricated by Dixie and Everone, so that Everone, a non-Indian, could take over control of the Tribe and build a casino using the Tribe's name and status as a federally-recognized Indian tribe, and the Tribe's RSTF payments from the State Gambling Commission. Dixie ultimately admitted in 2012 that his resignation was never forged. But for Dixie and Everone's fraud, the Tribe would be functioning and operating under the 1998 Resolution and receiving the federal benefits and RSTF payments from the State Gambling Commission without interruption.

III.

ARGUMENT

A. PLAINTIFFS' CHALLENGE TO THE DECEMBER 2015 AS-IA DECISION IS NOT BARRED BY ISSUE PRECLUSION (COLLATERAL ESTOPPEL)

1. The issues are not identical.

The Federal Defendants take up the same argument the Dixie Faction raised before the U.S. District in challenging the AS-IA August 2011 Decision, namely that based on the rulings in *Miwok I and II* (i.e., *CVMT I* and *CVMT II*) Plaintiffs are barred by the doctrine of issue preclusion, i.e., collaterally estoppel, from challenging the AS-IA December 2015 Decision concluding that the 1998 Resolution establishing the General Council is invalid and that the Tribe's membership is presently limited to five (5) enrolled members. This contention was expressly rejected by the U.S. District Court, and the same reasoning applies here. In footnote 15 of the U.S. District Court Order remanding to the AS-IA for reconsideration, the Court stated:

> Plaintiffs [the Dixie Faction] challenge the August 2011 Decision on several other legal grounds. However, each of these arguments fails. First, relying on the *CVMT I* and

> *CVMT II* decisions, Plaintiffs [the Dixie Faction] argue that the Secretary is barred by the doctrine of issue preclusion and/or judicial estoppel from recognizing the General Council as the governing body of the Tribe. [Citation]. This argument is without merit because *CVMT I* and *CVMT II* do not share the same contested issue with this case. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). **The only issue before the courts *CVMT I* and *CVMT II* was whether the Secretary had the authority to refuse to approve a constitution submitted under IRA §476(h)(1). The courts did not directly address the issues raised here, namely whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe...**(Emphasis added).

5 F.Supp.3d at 101, fn. 15. The issues have not changed, since the U.S. District Court ruling. Plaintiffs here have likewise challenged the same issues, but in reverse, i.e., whether the AS-IA's December 2015 decision is correct in concluding that the Tribe does not consist of five members and also concluding that the 1998 Resolution establishing the General Council was invalid at the outset. Those issue were never decided in the prior *CVMT I* and *CVMT II* cases. As a result, Plaintiff is not barred from litigating them here. Dodd v. Hood River County (9th Cir. 1998) 136 F.3d 1219, 1224-1225; Allen v. McCurry, supra.

2. No final judgment as to *Miwok III*.

Collateral estoppel or "issue preclusion" under federal law requires that there be a final judgment before it can apply. In re Palmer (9th Cir. 2000) 207 F.3d 566, 568. Since the Federal Defendants have conceded that, when they chose not to appeal the U.S. District Court Order, the Burley Faction could not appeal it as a "private party," because the order remanding to an agency "was not final within the meaning of 28 U.S.C. §1291." (Ex. "1," Motion to Dismiss Appeal for Lack of Jurisdiction, RJN "1"). As a result, collateral estoppel or "issue preclusion" does not apply to *Miwok III*.

B. PLAINTIFFS' CHALLENGE TO THE AS-IA DECEMBER 2015 DECISION IS NOT BARRED BY RES JUDICATA

1. The prior litigation did not involve the same claims.

Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties. Owens v. Kaiser Found. Health Plan, Inc. (9th Cir. 2001) 244 F.3d 708, 713. As stated, the claims raised in *Miwok I* and *II* are not identical to the claims being litigated here. As a result, res judicata does bar the litigation of the claims in this action. See Stanton v. D.C. Court of Appeals (D.C. Cir. 1997) 127 F.3d 72, 78 (two cases must share the same nucleus of facts for res judicata to apply).

2. No final judgment as to *Miwok III*.

Because the order in *Miwok III* does not involve a final judgment on the merits, there can be no res judicata effect of that case on the present claims being made in this case. Owens, supra.

C. THE RECORD DOES NOT SUPPORT THE AS-IA'S CONCLUSION THAT THE TRIBE WAS COMPRISED OF MORE THAN FIVE (5) MEMBERS WHO WERE ENTITLED TO PARTICIPATE IN THE ORGANIZATION OF THE TRIBE IN 1998

The Federal Defendants argue that the AS-IA's 2015 Decision was not arbitrary and capricious in determining that the Tribe is composed of more than five (5) members that purportedly must include the "lineal descendants" of the Sheepranch band of Indians first identified in 1915 by a BIA Indian Agent. This contention lack merit, given the fact that the administrative record does not support this conclusion. Instead, the administrative record shows historically and overwhelmingly that the 0.92 acre piece of land was purchased solely for the 12 or 13 "little band" of Sheepranch Indians, and for them alone, and that whoever actually resided on the property would alone have

the authority to enroll Indians as members and organize the Tribe.

For example, the Indian Agent specifically stated that this 0.92 acre land would be purchased only for "this small band" of 12 or 13 Sheepranch Indians. (CVMT-2011-000001-002). While the Indian Agent observed that "to some extent" this little band of 12 or 13 Sheepranch Indians were "interchangeable in their relations" with four other small band of Indians in the area, he never stated that these other band of Indians were members of the 12 or 13 Sheepranch band of Indians, and never stated that the 0.92 acre land was to be purchased for anyone other than this "little band" of 12 or 13 Sheepranch Indians. (CVMT-2011-000001-002). The phrase "interchangeable in their relations" does not equate to Tribal membership, but can only be understood to mean that these distinct band of Indians were simply neighbors who enjoyed peaceful, social intercourse and trade. Otherwise, the Indian Agent would have recommended the purchase of a larger parcel of land to accommodate all of these neighboring bands. But he did not do so. For example, the Indian Agent himself distinguished members of these neighboring bands as follows:

> "[T]he two Indians, 'Abe Lincoln' & 'Jeff Davis,' Abe at Murpheys & Jeff at Sheepranch, were c[h]ristened their respective names by the early miners during the progress of the civil war, they then being quite chunks of boys, spending much of their time around the mining camps."

(CVMT-2011-000002). During the Civil War, these two Indian boys, both from different band of Indians in the area, "hung out" at the mining camps, but maintained their identity to their own band of Indians. In addition, the Indian Agent described this "small band of Sheepranch Indians" as having a "long and strong attachment" to their own band. (CVMT-2011-000001). Thus, even though these neighboring bands interacted with each other,

they still maintained their identity to their own respective bands.

Over the years, it became apparent that whoever actually resided on the 0.92 parcel of land had the authority to enroll Indians as members and organize the Tribe. This was the case in 1935 with Jeff Davis, who, by virtue of being the sole resident on the property, voted for an IRA government, and was the one the BIA recognized as having the sole authority to organize the Tribe under the IRA, which for some unknown reason never took place. (CVMT-2011-001687). This was also the case with Mabel Dixie who, being the sole adult resident on the property in 1966, voted for termination and, as a result, the BIA gave her alone the deed to the property as a prelude to termination, which administratively never occurred. (CVMT-2011-001687-1688). When Mabel died, the interest to the property went to Yakima Dixie and his brother, Melvin. (CVMT-2011-000173). Significantly, it was the "Department of Interior" who "probated the property." (CVMT-2011-001688). However, because Melvin left and Yakima was the only resident on the property in 1998, Yakima Dixie alone had the authority to enroll Burley and her family as adopted members of the Tribe and organize the Tribe.

The probate order listed Yakima Dixie and his brother, Melvin Dixie, as the only surviving heirs of Mabel Dixie, and awarded them their respective interest in the land. (CVMT-2011-000172-173). The probate order had the effect of confirming and ratifying the BIA's longstanding policy that whoever resided on the land had the authority to enroll Indians as members of the Tribe and organize the Tribe. It had the effect of excluding any claim of any other Indians who may have lived in the area, and who did not reside on the land, as having any interest or authority over the land. It solidified Mabel Dixie and her family as the sole members of the Sheepranch band of Indians.

When Melvin left and Dixie remained on the land, the probate order solidified Dixie's sole authority, like what the BIA extended to Jeff Davis back in 1935, as the sole member of the Sheepranch band who, because he alone resided on the property, had the authority to enroll Indians as members and organize the Tribe.

In addition, the AS-IA's assumption that the 0.92 acre land "was not large enough for all members of the band to take up residence" when it was first purchased in 1915 (CVMT-2017-001400) is not supported in the administrative record. In fact, the Indian Agent taking the census in 1915 found only three (3) "old little Indian cabins" in the Sheepranch area. The 12 or 13 Indians he identified were actually comprised of three or four families (CVMT-2011-000002), with Peter Hodges as the band's leader. (CVMT-2011-CVMT-2011-000001). Under the circumstances, the 0.92 acre plot of land was large enough to accommodate these 12 or 13 band of Indians, given their custom of living in "little Indian cabins" and spending their time usually "in the nearby streams panning for gold." (CVMT-2011-000001).

Finally, Dixie himself admitted in September 1999, when interviewed by the Los Angeles Times, that he was the last remaining member of the Sheepranch band. (LA Times Article, 9/28/1999, Ex. "24", RJN #11 [After his relatives either left the reservation or died, the resident population of Dixie's branch of the Sierra Miwok dwindled to just him."]).

D. THE FEDERAL DISTRIBUTION REGULATIONS FOR TERMINATED RANCHERIAS IN CALIFORNIA CONFIRM THAT RESIDENCE ON THE SUBJECT 0.92 ACRE LAND WAS EQUATED WITH ACTUAL MEMBERSHIP IN THE SHEEPRANCH BAND OF INDIANS

The Dixie Faction argues that the 2015 Decision "reasonably determined that the Sheep Ranch distribution plan prepared in 1966 did not define or limit the Tribal community" in accordance with federal regulations in effect at that time. (Page 18 of

Dixie PAs). The Federal Defendants' motion is predicated on this assertion. However, this contention is without merit, and ignores the plain language of the federal regulations governing distribution of assets of Rancherias in 1966, and case law interpreting those regulations.

As part of its policy of assimilating Indians into American society, the United States sought to terminate its federal trust relationship with several tribes beginning in 1958, including the California Rancherias. Congress later passed 25 C.R. 242 which provided for policies and procedures governing distribution of assets of the California Rancherias. As indicated, Mabel Dixie was the only adult Indian from the Sheepranch band living on the 0.92 acre plot of land, and therefore she alone was entitled to receive the assets of the 0.92 acre Rancheria (or reservation), even though the Sheepranch band was "unorganized" at the time. 25 C.R. 242.3(a)(3). Because she presumably made a written request for distribution of assets of the 0.92 acre Rancheria, the BIA was required to include her in a final list of distributees to be published in the FEDERAL REGISTER. 25 C.R. 242.12. And because Mabel voted to accept the distribution plan, the BIA gave her the deed to the 0.92 acre Rancheria as a prelude to the final termination of the Sheepranch band of Indians. However, the BIA never published a final notice of termination in accordance with 25 C.R. 242.12, and thereafter accepted the land back from Mabel Dixie through a quit claim deed. The result was the Sheepranch band was never formally terminated. (AR-CVMT-2011-002051, 1399, 1689).

However, had the BIA published notice of termination, the Sheepranch band would have been terminated by virtue of the single act of Mabel Dixie alone, and all members of the Sheepranch band would have lost their status and rights and

privileges as Indians, and would have no longer been entitled to receive federal benefits and federal assistance. In other words, by Mabel Dixie's name appearing on the distribution list, all of the members of the Sheepranch band would have lost their status as Indians, because the Sheepranch band's relationship with the federal government would have been terminated. To this end, 25 C.R. 242.4 provided:

> When the provisions of a plan have been carried out to the satisfaction of the Secretary, he shall publish in the FEDERAL REGISTER a notice declaring that the special relationship of the United States to the Rancheria or reservation and to the distributees and the dependent members of their immediate families is terminated. The notice shall list the names of the distributes and the dependent members of their immediate families who are no longer entitled to any services performed by the United States for Indians because of their status as Indians, the fact that all restrictions and tax exemptions applicable to trust or restricted land or interests therein owned by them are terminated, the fact that all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and that State laws shall apply to them in the same manner as they apply to other citizens. (Emphasis added)

It would be unreasonable, therefore, to have terminated Mabel Dixie's rights as an Indian residing on the Sheepranch 0.92 acre Rancheria, but not other purported members living off of the Rancheria (even assuming that were the case). Thus, termination of the Sheepranch band would have applied to only those who lived on the Rancheria, and only those who lived on the Rancheria would have been considered members of the Sheepranch band. Most importantly, since the Sheepranch band was "unorganized" at the time Mable Dixie voted to accept the distribution plan as a prelude to termination, it had no "list" of "membership" identifying those who belonged to its band. For example, 25 C.R. 242.2 (j) provided:

> "Unorganized Rancheria or reservation" means any tribe, band, or community of Indians, which does not have an organic document containing membership criteria approved by the Secretary.

As a result, only those Indians who actually resided on the 0.92 acre Sheepranch Rancheria were considered members of the band who were entitled to services, rights and privileges because of their status as Indians. This is because this particular plot of land was purchased specifically for a small band of 12 or 13 band of Indians, not for Indians generally residing in the area. (CVMT-2011-000001-002). Thus, a preparation of a membership roll at the time Mabel Dixie voted to accept the distribution plan under 25 C.R. 242 was not "impracticable," largely because this particular group was in fact "well defined." Thus, the following language from the Senate Report, cited by the Dixie Faction, has no application to the Sheepranch band of Indians:

> "Attention is directed to the fact that no provision is made for preparing a membership roll for each Rancheria or reservation. The preparation of such rolls would be impracticable because the groups are not well defined. Moreover, the lands were **for the most part** acquired and set aside by the United States for Indians in California, generally, rather than for a specific group of Indians and the consistent practice has been to select by administrative action the individual Indians who may use the land..." (Emphasis added).

See Kelly v. U.S. Dept. of Interior (E.D.Cal. 1972) 339 F.Supp. 1095, fn. 8. The key phrase here is "for the most part," which leaves room for an exception to the general rule or practice. As shown, the Sheepranch little band of 12 or 13 Indians specifically targeted by the Indian Agent in 1915 were an exception to this general rule. The land was specifically acquired for them, and them alone, not the other band of Indians in the surrounding community. See also Hardwick v. U.S.

(N.D.Cal. 2014) 2014 WL 1006576, page 1 (observing that the 1958 Rancheria Act "provided that the lands of forty-one enumerated California Rancherias were to be removed from trust status and distributed to the individual Indians of those Rancherias").

In fact, the Dixie Faction concedes that tribes covered under the stipulated judgment in the Tillie Hardwick case "use[d] distribution plans to identify the individuals entitled to participate in the subsequent 'reorganization' of those tribes." (Page 19 of Intervenor PAs, lines 8-11). Thus, had the Sheepranch Rancheria been terminated and subsequently restored under the Tillie Hardwick stipulation/order, only Mabel Dixie or her descendants would have the right to organize the Sheepranch band, because she was the only one listed for the Sheepranch Rancheria that was residing on the property. Moreover, Mabel or her descendants would not have been required to organize under the IRA and be forced to enroll other Indians in the surrounding area, as the BIA improperly attempted to do in this case, and which the AS-IA 2015 decision unlawfully directs. By restoring these previously terminated Rancherias, the Hardwick order defined the individual Indians who were entitled to "reorganize" or "organize" these terminated Rancherias. They were those listed in the distribution plan who either had an allotment, assignment or who actually resided on the property. The fact that the Sheepranch Rancheria was never terminated is irrelevant.

The case of Williams v. Gover (9th Cir. 2007) 490 F.3d 785, cited by the Dixie Faction is controlling on this point. There, the Mooretown Rancheria, consisting of two separated 80 acre parcels, was terminated under the Rancheria Act in 1959, after the two families that resided on those parcels voted for termination. The Hardwick stipulated class action judgment restored the Mooretown Rancheria as federally-recognized

Rancheria and Indian tribe. 490 F.3d at 788. Consistent with a tribe's right to define its own membership for tribal purposes under Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 56, the Mooretown Rancheria used the distribution list, their dependents, and their lineal descendants as a starting point for determining its Tribal membership roll when it organized a tribal government in 1987. 490 F.3d at 790. Significantly, the Mooretown Rancheria did not organize its tribal government under the IRA. Id., fn. 11. Then, in 1998, the Mooretown Rancheria decided to limit Tribal membership to "only those members who are direct *Lineal Descendants* of the four distributes." 490 F.3d at 790. As a result, other Indians living in the surrounding community who were "Concow-Maidu Indians [that] descended from people who had lived at Mooretown Rancheria" got "squeezed out" of full membership. The Court held that the Mooretown Rancheria had the right to define its membership when it organized in 1987 after termination and restoration, without any interference by the BIA, even though its membership decision had the effect of "squeezing out" some of its members who it felt were not direct descendants of the four 1959 distributees. 490 F.3d at 791.

For the same reasons, only Mabel Dixie's descendants, i.e., Yakima Dixie and his brother, Melvin Dixie, alone had the right to define membership and organize the Sheepranch band in 1998, so long as they remained on the Rancheria. Because Melvin had left, Yakima was the only one with that authority, and he properly exercised that authority in 1998 when he enrolled Burley and her family and organized the Tribe. As what occurred with the Mooretown Rancheria in Gover, supra, the Sheepranch band was not required to be organized under the IRA. 25 U.S.C. §476(h). Accordingly, the AS-IA's 2015 Decision concluding that the Tribe must be "re-organized" with membership drawn from the

Mewuk Indians in the Sheepranch area is erroneous as a matter of law and arbitrary and capricious.

E. THE AS-IA'S 2015 DECISION'S USE OF THE PHRASE "NOT LIMITED" WITH RESPECT TO CVMT MEMBERSHIP IS NOT SUPPORTED IN THE RECORD

The AS-IA's 2015 Decision makes repeated use of the phrase "the Tribe is not limited to five individuals," and that other federal court decisions have purportedly stated the Tribe is "not limited to five individuals." (CVMT-2017-001399). First of all, no federal court decision has ever made such a statement or even held that that is the case. Even the U.S. District Court that remanded to the AS-IA for reconsideration acknowledged this when it stated:

> The only issue before the courts *CVMT I* and *CVMT II* was whether the Secretary had the authority to refuse to approve a constitution submitted under IRA §476(h)(1). The courts did not directly address the issues raised here, namely whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe...(Emphasis added).

CVMT v. Jewell (D.D.C.2013) 5 F.Supp.3d 86, 101, fn. 15.

Secondly, the AS-IA's August 2011 Decision which the Dixie Faction had challenged merely concluded that the Tribe "consists" or is presently comprised of five (5) members. It never stated or concluded that it was limited to only five members. For example it stated:

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

(CVMT-2011-002054). The AS-IA's 2015 Decision erroneously creates an issue where none exists, and thus drew an erroneous conclusion without any support in the administrative record. Clearly, the AS-IA's August 2011 Decision concluded that the

Tribe had the right to expand its membership beyond the five (5) presently constituted membership, and never concluded that was to remain or be "limited" to these five individuals.

F. THE AS-IA'S 2015 DECISION ERRONEOUSLY CONCLUDED THAT THE 1998 RESOLUTION WAS INVALID

As stated in more detail below, the Dixie Faction's challenge of the 1998 Resolution establishing the Tribe's General Council is barred by the six-year statute of limitations. 28 U.S.C. §2401(a); see Hardwick v. U.S. (N.D.Cal. 2012) 2012 WL 6524600 (Plaintiff's challenge of the legitimacy and validity of the Tribe's governing body was held barred by the six-year statute of limitations). As a result, the AS-IA's 2015 Decision granting the Dixie Faction's challenge of the AS-IA's 2011 decision and concluding that the 1998 Resolution establishing the Tribe's General Council is invalid is erroneous as a matter of law and arbitrary and capricious.

Even if the Dixie Faction's challenge were timely (which it is not), the above-referenced history of the Tribe demonstrates that Yakima Dixie alone had the authority to enroll Burley and her family as members and organize the Tribe when he did in 1998. The Tribe was not organized under the IRA at that time, nor did it need to be. As stated in Cohen's Handbook of Federal Indian Law:

> "Today, at least 160 Indian nations have constitutions adopted pursuant to the IRA, more than 75 have established constitutions outside its framework, and still others remain without written constitutions, either because they continue to be governed by customs and traditions, or because their basic laws are in the form of statutes. **No federal law, including the IRA itself, requires tribes to adopt any particular kind of constitution**. The decision whether to have an IRA constitution, or any written constitution at all, is a matter of tribal sovereignty and tribal initiative." (Emphasis added).

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 2012 ed., §405[3], page 271.

Accordingly, based on recognized Indian law, Dixie could have organized the Tribe orally and outside the IRA framework. As further stated in Cohen's Handbook of Federal Indian Law:

> "Tribes may thus adopt constitutions outside the IRA process.
>
> * * *
>
> "...Some tribes operate without a written constitution. **The absence of a written constitution does not affect the self-governing powers of Indian nations under federal law**." (Emphasis added).

Id. at §4.04[3][b], page 260.

However, even though he chose to organize the Tribe in a written document, Indian law did not require it to be in any particular form. Thus, the Dixie Faction's attack of Dixie's own written constitution as "invalid" lacks merit.

Factually, the 1998 Resolution establishing the General Council was outside the IRA framework. The BIA could not later force the Tribe to "re-organize" under the IRA, or in any fashion, as the AS-IA's 2015 Decision dictates. (CVMT-2011-002054); see Cohen's Handbook on Federal Indian Law, supra at §4.04[3][b], page 260 ("tribes today may revoke their IRA constitutions," citing 25 U.S.C. §476(b)).

G. AS-IA WASHBURN'S 2015 DECISION IS ERRONEOUSLY PREDICATED ON A TIME-BARRED CLAIM THAT THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL WAS INVALID AT THE OUTSET

The issue of whether the validity of the 1998 Resolution was barred by the statute of limitations was raised before AS-IA Washburn upon reconsideration of the AS-IA's decision. (Ex. "47", RJN "33").

Dixie filed a Complaint against the federal government on January 24, 2011, challenging the AS-IA's December 22, 2010 decision recognizing the General Council established under the 1998 Resolution. After the AS-IA withdrew his December 22, 2010

decision, he issued another decision on August 31, 2011, reaffirming his December 2010 decision. Dixie then amended his Complaint on October 17, 2011 challenging the AS-IA's August 31, 2011 decision. (AR-CVMT-2017-000023, 53). Dixie's original Complaint included a claim that the 1998 Resolution establishing the Tribal Council was invalid at the outset, even though that was not an issue referred to the AS-IA to decide. In his amended Complaint, Dixie reasserted that claim. (Id. At 000032-33). Specifically, Dixie's attack on the validity of the 1998 Resolution was that "the identification of the Burleys as members was incorrect because Yakima Dixie did not have the authority to enroll them into the Tribe without the consent of the Tribe's existing members," which Dixie alleged to be members who were "living in the vicinity of the Sheep Ranch Rancheria in 1998" who "were readily identifiable as Tribal members, and were known or should have been known to the BIA." (AR-CVMT-2017-000032). Dixie's claim in his federal action attacking the validity of the 1998 Resolution was, however, time-barred, and the AS-IA's decision based upon that claim was, therefore, erroneous as a matter of law. Hardwick v. U.S. (N.D.Cal. 2012) 2012 WL 6524600 (Plaintiff's challenge of legitimacy and validity of the Tribe's governing body was held barred by the six-year statute of limitations).

Actions for judicial review of final agency actions brought under the Administrative Procedure Act are subject to a **six-year** statute of limitations. Wind River Min. Corp. v. U.S. (9th Cir. 1991) 946 F.2d 710, 713; 28 U.S.C. § 2401(a). Generally, a claim subject to the six-year statute of limitations period under § 2401(a) first accrues when the plaintiff comes into possession "of the critical facts that he has been hurt and who has inflicted the injury." United States v. Kubrick (1979) 444 U.S. 111, 122. Under federal law, a cause of action accrues

when the plaintiff is aware of the wrong and can successfully bring a cause of action. Acri v. Int'l Ass'n of Machinists & Aerospace Workers (9th Cir. 1986) 781 F.2d 1393, 1396. Stated another way, "[t]he moment at which a cause of action first accrues within the meaning of Section 2401(a) is when 'the person challenging the agency action can institute and maintain a suit in court.'" Muwekma Ohlone Tribe v. Salazar (D.D.C.2011)(quoting Spannaus v. U.S. Dep't of Justice (D.C.Cir.1987) 824 F.2d 52, 56).

In Muwekma, supra, the U.S. District Court concluded that the Tribe's claims under the APA against the Department of Interior ("DOI") and its agency officials for purportedly terminating its tribal status was barred by the six year statute of limitations under 28 U.S.C. § 2401(a). It found that the Tribe's claim first accrued and thus it could have pursued a cause of action against the agency on the following three occasions:

(1) in 1927, when the Muwekma contends that "the Department provided [it with only] a fraction of the federal funding and services allocated to ... Indian tribes;

(2) in 1979, when the Muwekma "was not listed on the Federal Register list of entities recognized by the Secretary of Interior as a tribe;" and

(3) in 1989, when the Muwekma filed its petition for federal acknowledgment.

813 F.Supp.2d at 191. The Court then stated:

> Of these three dates, the Court finds that the most obvious point at which the Muwekma **could have brought suit** against the agency for purportedly terminating its tribal status was **in 1989, when it was clear that it was aware that it was not a federally recognized tribe**. Given that the Muwekma did not bring this action against the Department until 2001, approximately twelve years after it undoubtedly **possessed knowledge** that it **lacked acknowledgment by the**

> **federal government as a tribe**, its unlawful termination of tribal status claim is plainly barred by the limitations period of 28 U.S.C. § 24001(a). (Emphasis added).

813 F.Supp.2d at 191.

For the same reasons, the Dixie Faction's claim that the 1998 Resolution was purportedly invalid is barred by the six year statute of limitations, because Dixie knew more than six years before he and his Faction filed suit against the DOI and its agencies on January 24, 2011, that the DOI and the BIA were acknowledging and accepting the General Council established under the 1998 Resolution while he was simultaneously objecting to it. As in the case of Muwekma, supra, there were several dates that Dixie could have brought suit against the DOI and the AS-IA for purportedly acknowledging and recognizing the General Council established under the 1998 Resolution which the Dixie Faction claimed in its 2011 suit was invalid at the outset. These dates are as follows:

(1) The U.S. District Court noted that "from as early as April 1999" Dixie "contested the validity of the [General] Council." It stated:

> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raises significant doubts about the legitimacy of the General Council. **From as early as April 1999, Yakima [Dixie] contested the validity of the Council**. *See* AR 000182 (April 21, 1999 letter from Yakima to the BIA stating that he "cannot and will not resign as chairman of the Sheep Ranch Indian Rancheria"); *see also*, AR 000205 (October 10, 1999 letter from Yakima to BIA raising questions about Burley's authority); AR 001690, 000231 (Yakima notifying the BIA of "fraud and misconduct" with respect to the Tribe's leadership). (Emphasis added).

California Valley Miwok Tribe v. Jewell (D.D.C.2013) 5 F.Supp.3d 86, 100.

(2) On February 4, 2000, the BIA wrote to Dixie in response to his allegations of "fraud or misconduct" concerning the change in Tribal leadership that Dixie claims occurred in April and May of 1999. The BIA letter memorialized a meeting between BIA personnel and Dixie that occurred in December 1999. The letter recounts that Dixie presented the BIA with his own "constitution" for governing the Tribe that was purportedly adopted by Dixie and his Faction on December 11, 1999. The BIA returned the document to Dixie in its letter and stated that:

> "...the body that acted on December 11, 1999, upon the document **does not appear to be the proper body to so act.**" (Emphasis added).

(AR-CVMT-2011-000241, 245). In short, the BIA unequivocally informed Dixie that it was recognizing the General Council established under the 1998 Resolution, and not the Dixie Faction's Tribal Council, despite Dixie's claim of fraud in connection with its formation.

(3) On March 7, 2000, the BIA wrote Silvia Burley, as the Chairperson of the Tribe, and summarized discussions its personnel had with Dixie on February 4, 2000. The letter recounts that Dixie was challenging his enrollment of Burley and her family into the Tribe. (Ex. "5," BIA letter to Burley dated March 7, 2000, page 2). His argument was obviously that if he never intended to enroll them as Tribal members, then the General Council established under the 1998 Resolution was invalid at the outset. The BIA indicated that it rejected Dixie's claims and requested he submit his grievances to the Tribe's General Council, thus reaffirming the BIA's recognition of the General Council established under the 1998 Resolution. The letter stated:

> "**We also reiterated [to Dixie] our view**, notwithstanding a Tribal decision to the contrary, **that the appropriate Tribal forum is the General Council [established under the**

> **1998 Resolution]**. At present, we view, again notwithstanding a Tribal decision to the contrary, the General Council as comprised of Yakima Dixie, Rashel Reznor, and you [Burley]..." (Emphasis added).

(AR-CVMT-2011-000249-250).

(4) On July 18, 2001, Dixie filed suit in the U.S. District Court, Eastern District of California, alleging fraud against Burley in connection with the formation of the General Council established under the 1998 Resolution. Dixie alleged that the Tribe was "small," and that he, his brother Melvin and his son "Rocky" were the only members of the Tribe by virtue of being "lineal descendants of the Sheep Ranch Miwok Tribe." (Ex. "6," Complaint, "Sheep Ranch Miwok Tribe v. Burley, et al.," Case No. CIV.S-01-1389 MLS-DAD, pp. 14, 27, 30-31, filed July 18, 2001, RJN "3"). He alleged that his enrollment of Burley and her family was conditioned on them "following his leadership." Id. He alleged that Burley and her family by fraud voted her to become the Tribal Chairperson and that they never intended to follow his leadership. Id. He alleged that had he known of Burley's true intentions, he would have never accepted her and her family as members. Id.

The U.S. District Court dismissed Dixie's suit and observed as follows:

> As an initial matter, the court may take judicial notice of evidence that defendants Silvia Burley and Rashel Reznor are **recognized by the BIA as the sole members of the governing body of the Sheep Ranch Rancheria of Me-Wuk Indians**. See BIA July 12, 2000 Letter of Recognition, Burley Decl. Exh. C. (Emphasis added).

(Ex. "23," Order, January 24, 2002, No. CIV. S-01-1389 LKK/DAD, page 3, lines 12-16, AR-CVMT-2011-000278, 280). Dixie never appealed this order of dismissal. The BIA letter of July 12, 2000, which was attached to the motion to dismiss, and which

Dixie obviously got a copy of during the briefing of the motion, explicitly states:

> "The Bureau of Indian Affairs, Central California Agency, recognizes the following individuals as members of the Tribal Council, governing body, of the Sheep Ranch Rancheria of Me-Wuk Indians:
>
> 1. Silvia F. Burley, Chairperson
> 2. Vacant, Vice-Chairperson
> 3. Rashel K. Reznor, Secretary/Treasurer
>
> "Please contact Raymond Fry, Tribal Operations Officer, at (916) 566-7124 should you require additional information with regard to this matter."

(Ex. "7," BIA letter of July 12, 2000, to Burley, AR-CVMT-2011-000257). As stated, Dixie got a copy of this letter during the briefing of the motion to dismiss, and was therefore put on notice of the BIA's position with respect to the validity of the General Council established under the 1998 Resolution, at least as far back as January 24, 2000, the date of the order.

(5) On October 30, 2003, Dixie wrote a letter to the U.S. Department of the Interior ("DOI") attempting to appeal the BIA's 1999 recognition of Burley as the Chairperson of the Tribe, and requesting that the DOI "nullify her appointment and her and her families' adoption as member of the Tribe." His appeal states in pertinent part:

> "In this appeal, I Yakima K. Dixie, as Appellant, am contesting the administrative action (without my knowledge and consent) by agents of the Bureau of Indian Affairs, in which Silvia Burley fraudulently came to be the recognized authority for and Chairperson of my ancestral tribe, of which I am the hereditary Chief and **rightful** Chairperson by lineal descent. As explained herein, I was tricked by Silvia Burley and others; and I, the Appellant, am requesting the nullification of both her appointment as Chairperson and the nullification of her original adoption and the adoption of her daughter and two grand-daughters into my tribe, which, again, I allege was fraudulent..."

> (Emphasis added as to "hereditary" only; other emphasis in the original).

(Ex. "8," Dixie Notice of Appeal, dated October 30, 2003, page 1, RJN "4"). Here, Dixie is claiming to have hereditary rights and powers as the "hereditary chief" of the Tribe, notwithstanding the 1998 Resolution, which specifically provides:

> "**RESOLVED**, That all other inherent rights and powers not specifically listed herein shall vest in the General Council..." (Emphasis added).

(Ex. "9," Resolution #GC-98-01, "Establishing a General Council to Serve as the Governing Body of the Sheep Ranch Band of Me-Wuk Indians," dated November 5, 1998, page 1, AR-CVMT-2011-000177). Accordingly, Dixie's 2003 Notice of Appeal is clear evidence that he was attempting to challenge the validity of the General Council established under the 1998 Resolution, and thus was aware of the existence of such a claim more than six years from the time he filed his Complaint against the AS-IA on January 24, 2011.

In any event, Dixie's appeal was dismissed on procedural grounds and as untimely. In a letter dated February 11, 2005, the BIA wrote to Dixie as follows:

> "I am writing in response to your appeal filed with the office of the Assistant Secretary-Indian Affairs on October 30, 2003...In that appeal, you challenged the Bureau of Indian Affairs' ("BIA") recognition of Sylvia Burley as tribal Chairman and sought to 'nullify' her admission, and the admission of her daughter and granddaughters into your Tribe. Although your appeal raises many difficult issues, I must dismiss it on procedural grounds.
>
> * * *
>
> "In addition, your appeal appears to be untimely. In 1999, you first challenged the BIA's recognition of Ms. Burley as Chairman of the Tribe. In February 2000, the BIA informed you that it defers to tribal resolution of such

> issues. On July 18, 2001, you filed a lawsuit against Ms. Burley in the United States District court for the Eastern District of California challenging her purported leadership of the Tribe. **On January 24, 2002, the district court dismissed your lawsuit, without prejudice and with leave to amend, because you had not exhausted your administrative remedies by appealing the BIA's February 2000 decision**. After the court's January 24, 2002, order, you should have pursued your administrative remedies with the BIA. Instead, you waited almost a year and a half, until June 2003, before raising your claim with the Bureau. As a result of your delay in pursuing your administrative appeal after the court's January 24, 2002, order, your appeal before me is time barred." (Emphasis added).

(Ex. "10," BIA letter to Dixie, dated February 11, 2005, pages 1-2, AR-CVMT-2011-000610). As the BIA explained to Dixie in this letter of February 11, 2005, Dixie could have challenged the BIA's recognition of the General Council established under the 1998 Resolution as far back as 1999, by first exhausting his administrative remedies and then filing suit in the U.S. District Court. The District Court nevertheless gave Dixie another chance and allowed him to proceed with his claims after exhausting his administrative remedies, but he never followed through with that requirement. In the same way he was time-barred in February 2002, he was also time-barred under the six-year statute of limitations when he attempted to challenge the validity of the General Council established under the 1998 Resolution in his January 24, 2011 suit in federal court.

In addition, Dixie's attempt to "nullify" Burley and her family's adoption as members of the Tribe goes to the heart of the validity of the 1998 Resolution establishing the General Council, which states in pertinent part:

> "**RESOLVED**, That Yakima Dixie, Silvia Fawn Burley, and Rashel Kawehilani Reznor, as a majority of the adult members of the Tribe, hereby establishes a General Council to serve as the governing body of the Tribe..."

(Ex. "9," Resolution #GC-98-01, "Establishing a General Council to Serve as the Governing Body of the Sheep Ranch Band of Me-Wuk Indians," dated November 5, 1998, page 2, AR-CVMT-2011-000178). Without these adopted members, there could be no General Council, and the Tribe would not have been organized with a General Council governing body.

(6) On May 5, 2004, Yakima Dixie executed a "Will & Testament." In this document, Dixie reiterates he is the "Chief and rightful authority of the Sheep Ranch Rancheria of MiWok Indians of California a.k.a. California Valley Miwok Tribe," because of his "hereditary and lineal descent." (Ex. "11," Yakima Dixie Will & Testament, May 5, 2004, page 1). The document also references the establishment of a Tribal Council, separate and apart from the "General Council" established under the 1998 Resolution, and states:

> "At the time of this signing, the only member of the Tribal Council is Velma WhiteBear, who is designated as the Executive Director of the Tribe."

(Ex. "11," Yakima Dixie Will & Testament, May 5, 2004, page 2, RJN "5", AR-CVMT-2017-000957). The document then lists ten (10) persons as the only members of the Tribe, but does not name Burley and her three family members Dixie adopted into the Tribe in 1998. (He was also contradicting his claims that the Tribe consists of more than 200 members). Thus, at the time of the execution of his Last Will & Testament, dated May 5, 2004, Dixie was denying the validity of the General Council established under the 1998 Resolution. Together with his October 30, 2003 letter to the DOI and previous letters to the BIA objecting to the BIA's recognition of Burley as Chairperson of the Tribe and the BIA's recognition of Burley and her family as adopted members of the Tribe, Dixie therefore knew he had a claim against the federal government for recognizing the Tribe's

General Council that was purportedly invalid at the outset, more than six years from the date he filed suit on January 24, 2011.

(7) Notice that the Tribe had changed its name to the California Valley Miwok Tribe was published in the July 12, 2002 Federal Register. (See Ex. "12," copy of 2002 Federal Register and Ex. "13," June 7, 2001, letter from BIA to Burley accepting new name for publication, RJN "7"). The placement of the new name of the Tribe was an act of recognition by the DOI of the validity of the General Council established under the 1998 Resolution, after the General Council passed a resolution to change the name of the Tribe and submitted it to the BIA for approval. As the DOI stated in a letter to Silvia Burley on June 7, 2001:

> "The *Sheep Ranch Rancheria* (Tribe) is a small tribe that does not have a tribal constitution. The tribe has a tribal council and conducts tribal business through resolution. A tribal resolution, such a resolution No. R-1-5-07-201, enacted by the Tribal council on May 7, 2001, is sufficient to effect the tribal name change. The Tribe's new name has been included on the Tribal Entities list that will be published in the FEDERAL REGISTER later this year."

(Ex. "13," Letter from Sharon Blackwell at BIA to Burley, dated June 7, 2001, RJN "7").

The DOI's publication of the Tribe's new name in the FEDERAL REGISTER was adequate notice to Dixie and his followers that on July 12, 2002, the DOI recognized the validity of the General Council established under the 1998 Resolution, thereby giving Dixie critical facts to institute a lawsuit.

"[S]tatute of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." Hopland Band of Pomo Indians v. United States (Fed.Cir.1988) 855 F.2d 1573, 1576; Sissten-Wahpeton Sioux Tribe v. United States

(9th Cir. 1990) 895 F.2d 588, 592 ("Indian Tribes are not exempt from statute of limitations governing actions against the United States"). Also, [a]ctual knowledge of government action...is not required for a statutory period to commence." Shiny Rock Mining Corp. v. United States (9th Cir. 1990) 906 F.2d 1362, 1364. Instead, "[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." Id. Accordingly, the notice published in the Federal Register on July 12, 2002, was adequate to apprise Dixie and his followers that the federal government was acknowledging the validity of the General Council established under the 1998 Resolution. Thus, based on the Federal Register publication alone, a timely action challenging the validity of the 1998 Resolution establishing the General Council should have been filed before July 12, 2008, six years after the 2002 FEDERAL REGISTER publication.

H. THE U.S. DISTRICT COURT IMPROPERLY DIRECTED THAT THE AS-IA RECONSIDER HIS 2015 DECISION BASED ON A TIME-BARRED CLAIM

As indicated, the Burley Faction, as an Intervenor-Defendant in Dixie's federal suit challenging the August 2011 AS-IA's decision, was unable to appeal the U.S. District Court's order granting summary judgment in favor of the Dixie Faction, because the Federal Defendants chose not to appeal and the remand order was not final. As a result, the AS-IA reconsidered its August 2011 decision based on erroneous remand instructions that included an order that the AS-IA address the issue of whether the General Council as established under the 1998 Resolution was valid at the outset, as pled in the Dixie Faction's complaint.

The U.S. District Court stated:

> The August 2011 Decision declares: "[t]he [November] 1998 Resolution established a General council form of government, comprised of all adult citizens of the Tribe, with whom the [BIA] may conduct government-to-government relations. AR 002056. Once again, in reaching this conclusion, the Assistant Secretary simply assumes, without addressing, the validity of the General Council...
>
> The Court finds that the August 2011 Decision is unreasonable in light of the facts contained in the administrative record...Before invoking the principle of tribal self-governance, it was incumbent on [the Assistant Secretary] to first determine whether a duly constituted government actually exists...
>
> Here, the August 2011 Decision fails to address *whatsoever* the numerous factual allegations in the administrative record that raise significant doubts about the legitimacy of the General Council. From as early as April 1999, Yakima contested the validity of the Council...
>
> ...Accordingly, the Court will remand this issue to the Secretary for reconsideration. (Emphasis added).

California Valley Miwok Tribe v. Jewell (2013) 5 F.Supp.3d 86, 99-101.

However, as stated, the issue of whether the General Council was invalid at the outset was barred by the six-year statute of limitations.

I. PLAINTIFFS PRESERVED THE STATUTE OF LIMITATIONS ISSUE BEFORE THE U.S DISTRICT COURT IN DIXIE'S FEDERAL ACTION

On March 26, 2012, the Burley Faction filed a motion to dismiss the Dixie Faction's FAC in the federal action challenging the AS-IA's 2011 Decision. Among other things, the Burley Faction alleged that the Dixie Faction's claims were barred by the six-year statute of limitations, including the claim challenging the validity of the General Council established under the 1998 Resolution. The motion stated in pertinent part as follows:

> "...Claims which arise under the APA are subject to the statute of limitations governed by 28 U.S.C. §2401(a), which bars civil actions against the United States that are not filed within six years after the right of action first accrues...
>
> * * *
>
> "Plaintiffs' Amended Complaint also very clearly challenges the September 24, 1998 BIA final agency action which first recognized the tribe's five member citizenship and their authority to establish a Tribal government, alleging that the BIA acted 'erroneously'...Neither the Non-Members...nor Mr. Dixie ever challenged the 1998 Final Agency Action. Nor did Plaintiffs challenge subsequent BIA final agency actions issued on February 2000 and March 2000, which reaffirmed the authority of the Tribe's governing body, pursuant to Resolution #GC-98-01, and its five federally recognized members...."

(Ex. "14," PAs in Support of Intervenor-Defendant's Motion to Dismiss, filed 3/26/2012, pages 18-19, RJN "8").

The U.S. District Court's Order denying the motion to dismiss on these grounds was factually and legally erroneous. It stated:

> It is true that in February 2000, the Secretary accepted the "General Council...as the governing body of the Tribe," A.R. at 236, and the Dixie Faction could have challenged his determination then. Any such challenge would have been mooted, however, by the Secretary's reversal in February 2005, when he held "the [Bureau] does not recognize any tribal government." Non-Recognition Letter, A.R. at 611. Because the Secretary's decision on review "mark[ed] a 180-degree change of course" by once again recognizing the General Council as the Tribe's government, the Dixie Faction's challenge is timely. Decision Letter, A.R. at 2050.

(Ex. "15," Memorandum Opinion Denying Motion to Dismiss, 9/06/2013, pages 13-14, AR-CVMT-2017-000762, 774-775). This conclusion is erroneous. First of all, the February 11, 2005 letter relied upon by the Court states that because the Tribe was at that time not "organized" under the IRA, the BIA did not

recognize its governing body, but it did "recognize" Silvia Burley as a "person of authority within the California Miwok Tribe." The letter further stated that the BIA would not recognize either Burley or Dixie as "Chairman" of the Tribe, until the Tribe organized itself under the Indian Reorganization Act of 1934 ("IRA"). The BIA was clearly trying to get the Tribe to "re-organize" itself under the IRA, but was continuing to recognize Burley as a person with authority with whom the BIA was at that time conducting government-to-government relations. The letter never stated that the BIA considered the General Council established under the 1998 Resolution to be invalid. Indeed, recognizing Burley as a person of "authority" within the Tribe would seem to contradict that notion, since her authority was derived from the General Council. Thus, the statute of limitations issue was not mooted by the BIA's February 2005 letter.

Secondly, the February 11, 2005 letter did not address the issue of whether the General Council was invalid or not recognized, but simply made passing reference to a letter from the BIA dated March 26, 2004 that indicated the Tribe was not organized, and, because of that, the BIA stated in its February 11, 2005 letter that it therefore could not "defer to any tribal dispute resolution process at [that] time" with respect to the BIA's recognition of Burley as the Tribal Chairperson and the admission of Burley's family as Tribal members.

Third, the AS-IA's 2011 Decision was not a "180-degree change of course" which "once again" "recognize[ed] the General Council as the Tribe's government," as the U.S. District Court characterized it in its Order. Rather, the 2011 Decision made it clear that its "180-degree change of course" was only with respect to its "finding (6)" that stated:

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

(Ex. "16," AS-IA's August 31, 2011 Decision, page 2, AR-CVMT-2011-002050). Up to that point, the DOI was requiring the Miwok Tribe to "reorganize" itself under the IRA in order for it to be eligible to receive federal benefits. The 2011 Decision further stated:

> "I reject as contrary to § 476(h) the notions that a tribe can be compelled to 'organize' under the IRA and that a tribe not so organized can have 'significant federal benefits' withheld from them. Either would be a clear violation of 25 U.S.C. § 476(f)."

(Id. At 2054). This different (180 degree) policy direction was that the BIA should no longer require the Tribe to re-organize its governing body under the IRA, in order to be eligible to receive federal benefits, including P.L. 638 federal contract funding. The "policy" was not whether the General Council was to be recognized as a valid governing body or whether it was invalid at the outset, as the Court was suggesting.

Dixie's claim that the General Council established under the 1998 Resolution was invalid at the outset was time-barred, and the Burley Faction's motion to dismiss this claim should have been granted. Instead, the Court allowed this time-barred claim to proceed against the federal government and improperly ordered the AS-IA to re-evaluate on remand whether the 1998 Resolution establishing the General Council was invalid at the outset.

J. THE ISSUE OF THE VALIDITY OF THE 1998 RESOLUTION ESTABLISHING THE GENERAL COUNCIL WAS NEVER REFERRED TO THE AS-IA FOR REVIEW BY THE INTERIOR BOARD OF INDIAN APPEALS

The issue of improper referral was also raised before Washburn on reconsideration. (Ex. "47", RJN "33").

The issue the Interior Board of Indian Appeals ("IBIA") referred to the AS-IA for resolution was limited to an "enrollment dispute," i.e., whether the BIA could force the Tribe to organize under the IRA and convene a "general council" meeting without the Tribe's consent and have non-members in the surrounding community participate in that "re-organization." Ex. "17," California Valley Miwok Tribe v. Pacific Director, BIA (01/28/2010) 51 IBIA 103, 120. (AR-CVMT-2011-001701). As stated, the BIA was forcing this issue, not because it felt the General Council was invalid at the outset, but rather because it felt the Tribe could not qualify for federal benefits without being re-organized under the IRA. The IBIA did not refer any issue concerning the validity of the General Council. It referred this "enrollment" dispute to the AS-IA because the IBIA lacked jurisdiction to decide that issue. It stated:

> "...In this appeal, Burley contends that BIA exceeded its authority in determining who would constitute the 'greater tribal community,' or class of 'putative members,' and in deciding that they could participate as part of a 'general council' meeting of the Tribe, to decide membership and organizational issues.
>
> "As evidenced by the decisions of the Superintendent and the Regional Director, and the public notices published by BIA in 2007, BIA apparently has decided to create a base roll of individuals who satisfy criteria that BIA has determined to be appropriate and who will be entitled to participate—effectively as members (albeit in a somewhat undefined capacity)—in a 'general council' meeting of the Tribe to organize the Tribe. Although the facts of this case render BIA's decision far from a typical enrollment adjudication, we conclude [...], in substance, that is what it is. Whether or not some or all of the individuals BIA would determine, under the Decision, to be 'putative members' of the Tribe will ultimately be enrolled, BIA's determination of their 'putative membership' apparently will effectively 'enroll' them as members of the 'general council' that is to meet. And that general council, as apparently envisioned by BIA, will have the authority to determine permanent membership criteria.

> "Understood in the context of the history of this Tribe, and BIA's dealings with the Tribe since approximately 1999, **this case is properly characterized as an enrollment dispute**...Because the Board lacks jurisdiction to adjudicate tribal enrollment disputes, we dismiss this claim and refer it to the Assistant Secretary." (Emphasis added).

51 IBIA at 120-121, AR-CVMT-2011-001701-1702.

In the same way the AS-IA observed as undisputed that the Tribe was a federally-recognized Tribe (AS-IA August 31, 2011 Decision, page 1), the AS-IA in his August 2011 Decision observed as undisputed the fact that the Tribe "operates under a General Council form of government, pursuant to Resolution #CG-98-01." (Id. at page 2). Whether the General Council was invalid at the outset was not referred to him for resolution. Nor could it have been, because **Burley was not disputing that issue in her appeal before the IBIA**. Nor was the BIA. As stated, the issue first came up when Dixie, not Burley, raised it in his January 24, 2011 complaint he filed in federal court challenging the AS-IA's December 22, 2010 Decision, and again on October 17, 2011, when he challenged the August 31, 2011 AS-IA's Decision.

Accordingly, it was improper and erroneous for the AS-IA to entertain and decide that issue in his December 30, 2015 Decision.

K. THE 2015 DECISION ERRONEOUSLY CONCLUDED THAT THE 1998 GENERAL COUNCIL WAS ESTABLISHED MERELY TO "*MANAGE THE PROCESS* "OR REORGANIZING THE TRIBE"

In his 2015 Decision, the AS-IA concluded that the 1998 Resolution establishing the General Council was enacted merely to "*manage the process* of re-organizing the Tribe." (2015 Decision, page 5, AR-CVMT-2017-001401). The AS-IA used this erroneous statement to justify its further determination that

the Tribe was required to re-organize under the IRA with the participation of non-members ("putative members") in the surrounding community, all in opposition to the determinations made by the previous AS-IA in his August 2011 Decision. In truth and fact, nowhere in the 1998 Resolution is there any mention that it was established to "manage the process of re-organizing the Tribe."

While the Tribe had the option of re-organizing under the IRA, and the record reflects the Tribe pursued that option for a while but decided against it, the 1998 Resolution clearly provides that it "establishe[d] a General Council to serve as the governing body of the Tribe." (Page 2 of Resolution). It was not established to "manage the process of reorganizing the Tribe" under the IRA. Indeed, the title of the Resolution clearly states:

> "ESTABLISHING A GENERAL COUNCIL TO SERVE AS THE GOVERNING BODY OF THE SHEEP RANCH BAND OF ME-WUK INDIANS"

(Ex. "9," Resolution #GC-98-01, page 1, AR-CVMT-2011-000177). If, pursuant to 25 U.S.C. § 476(h), the Tribe is not required to "organize" under the IRA, and the Tribe decides not to pursue that option, then the General Council remains as the governing body of the Tribe. As stated in the 1998 Resolution:

> "**RESOLVED**, That the General Council shall exist until a Constitution is formally adopted by the Tribe and approved by the Secretary of the Interior or his authorized representative, unless this resolution is rescinded through subsequent resolution of the General Council." (Emphasis added).

(Ex. "9," Resolution #GC-98-01, AR-CVMT-2011-000179).

In addition, the BIA initially suggested the Tribe operate either as a General Council or an Interim Tribal Council, but the Tribe chose the first option, strongly suggesting that it did not want to be tied to the idea of having to re-organize

under the IRA if it later decided against it. (Ex. "18," BIA letter to Dixie, dated September 24, 1998, pages 2-3). Indeed, the Tribe ultimately chose to simply operate as a General Council outside the IRA, and that's where the trouble began with the BIA later trying to force the Tribe to re-organize under the IRA.

L. THE 2015 DECISION INCORRECTLY CONCLUDES THAT PRIOR FEDERAL COURT DECISIONS HAVE HELD THAT THE TRIBE'S MEMBERSHIP IS LARGER THAN FIVE MEMBERS AND HAS MISCONSTRUED THE HISTORY OF THE CALIFORNIA RANCHERIAS

The 2015 Decision states that "[a]ll of the Federal court decisions examining the CVMT dispute make clear that the Tribe is not limited to five individuals." (Page 3 of AS-IA December 30, 2015 Decision, AR-CVMT-2017-001399). This is inaccurate.

No federal court decision involving the Tribe directly addressed the issue of whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe. Indeed, the U.S. District Court remanding the AS-IA's 2011 Decision for reconsideration made the same observation. In rejecting the Dixie Faction's argument that collateral estoppel bars the Secretary from recognizing the General Council, the Court observed in a footnote as follows:

> ...*CVMT I* and *CVMT II* do not share the same contested issue with this case. (citation). The only issue before the courts *CVMT I* and *CVMT II* was whether the Secretary had the authority to refuse to approve a constitution submitted under IRA § 476(h)(1). The courts did not directly address the issues raised here, namely whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe...

5 F.Supp.3d at 101, fn. 15. The U.S District Court remanding the 2011 Decision for reconsideration merely criticized the AS-IA for simply assuming that the Tribe consists of five members, but made no ruling or holding itself that it was. 5 F.Supp.3d

at 99 ("...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"). Thus, no Court has ever held that the Tribe includes more than five members.

In addition, the AS-IA recounted an inaccurate history of the California Rancherias to further support its erroneous conclusion that the Tribe is not limited to five members. It stated without any evidentiary support as follows:

> "When a parcel on a Rancheria came available, BIA would assign the land to such a non-resident Indian who was associated with the band, if possible...Thus, 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."

(Ex. "19," AS-IA's December 30, 2015 Decision, page 4, AR-CVMT-2017-001400). There has never been an occasion where the BIA has determined that the membership lists of unorganized California Rancherias should be culled from "potential residents," and neither the AS-IA nor the Dixie Faction can provide evidence of such instances.

In most instances, the California Rancherias were terminated by the Rancheria Termination Act, i.e., P.L. 85-671. Thereafter, many unorganized Rancherias sought restoration of their status as federally recognized tribes through litigation. In those instances, following restoration of these Rancherias through stipulated judgments, the BIA looked to the ***actual*** residents and relied on distributee lists created during the termination period as the most accurate representation of the active members of a particular tribe and determined that only those individuals were entitled to participate in the tribes' reorganization. See Stipulated Judgment, Paragraph 6, Wilton

Miwok Rancheria v. Salazar (N.D.Cal. June 8, 2009) No. C-07-02681, Dkt. 61 (stipulation between the United States and the Wilton Miwok Rancheria that "the initial tribal organization of the Tribe shall be a General Council consisting of all distributes and dependent members listed in the Distribution Plan...."); Alvarado v. Table Mountain Rancheria (N.D.Cal. July 28, 2005) 2005 WL 1806368, at *1 (noting that the restoration of the Table Mountain Rancheria involved reference to "Indians named in the distribution plan of the assets of the Table Mountain Rancheria and their successors in interests"), *aff'd on other grounds*, (9th Cir. 2007) 509 F.3d 1008; Alan-Wilson v. Sacramento Area Dir. (1997) 30 IBIA 241, 255 (concluding that the individuals entitled to participate in the organization of the Cloverdale Rancheria was based on the list of distributees and the distributees' lineal descendants). These cases show that when the BIA has had to determine who is eligible to reorganize a tribe, it has looked to the distribute list—reflecting actual residence on the Rancheria—as a reliable record to determine membership. There is no legal basis whatsoever—in the case of terminated tribes or tribes that maintained federal recognition—for treating ***potential*** residents as members for purposes of reorganization as the AS-IA's 2015 decision states.

Accordingly, the AS-IA relied upon these inaccurate facts to support its erroneous conclusion that the Tribe is not limited to five members.

M. THE "ELIGIBLE GROUP SYSTEM" IMPROPERLY FORCES THE TRIBE TO "RE-ORGANIZE"

The AS-IA's 2015 Decision establishing the novel "Eligible Group" system creates a system contrary to federal precedent and the requirements of the IRA that equates potential membership with actual membership.

When Burley and her family were adopted into the Tribe by Dixie, their enrollment changed their status from individuals with Miwok ancestry to members of a small tribe. In fact, the 2015 Decision recognizes that at the time of the Burley family's enrollment the Tribe was suffering from the effects of a "dwindling tribe." (Ex. "19," AS-IA's December 30, 2015 Decision, page 4, fn. 20, AR-CVMT-2017-001400). Inexplicably, the 2015 Decision rejects the 1998 Resolution establishing the General Council on the purported ground that "the people who approved the 1998 Resolution...are not the majority of those eligible to take part in the reorganization of the Tribe." (Id. at page 5). The 2015 decision then erroneously creates an "Eligible group" system to facilitate the reorganization of the Tribe that includes a larger pool of eligible people based not upon membership, but based upon descent, contrary to well established Indian law.

To be sure, the purported "Eligible group" system improperly places persons with only Miwok ancestry on par with enrolled members. See Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 55-56, 72, fn. 32. It also violates the provisions of 25 U.S.C. § 476(f) and (h), because it forces the Tribe to reorganize under the IRA in order to receive federal benefits.

N. THE DIXIE FACTION IS ESTOPPED FROM CHALLENGING THE 1998 RESOLUTION

The record is clear that Dixie participated in the drafting and approval of the 1998 Resolution establishing the General Council. He now claims the whereabouts of his brother, Melvin Dixie, were known at the time of the 1998 Resolution, even though he represented to the BIA and to Burley and others that his whereabouts were unknown. To now contend that the 1998 Resolution is now defective or invalid because Dixie in fact

knew where he could be contacted, but that he may have simply lied about it, runs contrary to the principles of equity.

As stated in Menominee Indian Tribe of Wisconsin v. Thompson (W.D.Wis.1996) 943 F.Supp 999, "it is inaccurate to say that equitable defenses can never apply to Indian tribes." 943 F.Supp at 1021(the court also stating that it is aware of no cases holding that collateral estoppel or res judicata can never apply to an Indian tribe). The doctrine of equitable estoppel provides that "whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing is true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Cal. Evid. Code §623; Wilk v. Vencill (1947) 30 Cal.2d 104, 107. California equitable estoppel is thus similar to and not inconsistent with federal common law. Lukovsky v. City and County of San Francisco (9th Cir. 2008) 535 F.3d 1044, 1052.

Accordingly, Dixie is equitably estopped from attacking the validity of the 1998 Resolution establishing the General Council on the grounds that his brother, Melvin did not sign the resolution and could have been contacted, because he expressly misled the BIA and Burley into believing that the whereabouts of Melvin were unknown at the time the parties executed and passed the resolution.

O. AS-IA ECHO HAWK'S SHOULD BE REINSTATED AND ADOPTED AS THE MOST LEGALLY CORRECT DECISION ON THE TRIBE'S GOVERNING BODY AND MEMBERSHIP

The AS-IA's August 2011 Decision is clearly a correct statement of Indian law and should be re-instated as the final agency action resolving the dispute between the two factions.

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P. EVERONE AND THE DIXIE FACTION HAVE COMMITTED FRAUD UPON THE COURT AND THE BIA BY FALSELY CREATING A TRIBAL LEADERSHIP DISPUTE TO JUSTIFY RE-ORGANIZING THE TRIBE

As stated, Everone conspired with Dixie to concoct a Tribal leadership dispute, so that the BIA would question the governing body of the Tribe and, at the urging of the Everone and Dixie, reorganize the Tribe's governing body. The sole purpose of these actions was to "hijack" or take over control of the Tribe from Burley, so that Everone and his non-Indian investors can build a gambling casino and enrich themselves at the expense of the Tribe. These issues were raised before AS-IA Washburn when the 2011 AS-IA decision was remanded for him to reconsider. (AR-CVMT-2017-000954 [Memo 1/17/2014: Origination of the CVMT Dispute]; Letter to Washburn 6/6/2014 from Corrales, RJN "32" Ex. "46").

Everone sowed confusion with the BIA and the DOI which he used to implement his casino plans and build a casino.

In 1999, two non-Indian California developers named Bill Martin ("Martin" and Leroi Chapelle ("Chapelle") read a newspaper article about Yakima Dixie and the Tribe's plight. (AR-CVMT-2017-000955). The Governor had just signed various state-Compacts allowing various federally-recognized tribes to own and operate gambling casino in California. Since the Tribe was federally-recognized and had very few members, it was an easy target to use for this venture. Shortly after reading the newspaper article, Martin and Chapelle quickly headed up to Calaveras County, California, to sign up Dixie to represent him in developing an Indian casino. Thinking they could profit from Dixie's situation, they contacted Dixie and entered into an agreement with him to build a tribal gambling casino. Unfortunately, Dixie had already resigned as Chairperson of the Tribe, and Burley was the current Chairperson. Martin and

Chapelle then contacted Everone who agreed to take over and help formulate a plan. (AR-CVMT-2017-000956).

Everone then took over control of Dixie's affairs, and made himself Dixie's and the Dixie Faction's Tribal "Deputy & Consol General". (AR-CVMT-2017-000956). Everone is white and is not an Indian, and is not a member of any Indian tribe. As the Dixie Faction's "Deputy and Consul General," Everone is the managing agent and "officer" of that organization. Everone manages all loaned money for this scheme through an entity called "Friends of Yakima." (Id.). He also managed and directed Dixie's litigation in the state and federal cases and manages the "Tribal Organization," known as the "Dixie Faction."

Everone himself admits he "controls" Dixie. For example, he stated:

> "They [Chadd Everone and Bill Martin] asked for investment monies and provided me with a prospectus without asking how much I could give. They said my return would be by November 2006. I then asked them why would I give monies to Yakima who can't stay out of jail, and how is he going to run an Indian Casino? Both laughed and **Everone stated he controlled Yakima and the casino venture** and told me not to worry about that..." (Emphasis added)

(August 31, 2006 Email quoting Everone in meeting).

Thus, in light of Dixie's instability, serious criminal history, including murder and alcohol problems, Everone was easily able to manipulate and control Dixie, and use him for his own personal, financial benefit. (Id.).

When he met Dixie in late 1999, one of the first things Everone did was to tackle the problem of Burley being the Chairperson of the Tribe as a result of Dixie's resignation. (Id.). He told someone he thought was a potential investor that he "went to work using the UC Berkeley Law Library to study up on Indian Law to begin his quest for removing Burley as Chairperson of the Tribe." For his scheme to take over control

of the Miwok Tribe to work, however, he needed Dixie to be the Chairperson, not Burley. His plan was simply to fabricate a forgery claim with respect to Dixie's letter of resignation.

The fact that the issue of forgery relative to Dixie's resignation letter was never raised until after the Everone team became involved strongly suggests that it was, and continues to be, a sham claim as part of Everone's scheme to take over the Tribe for his own financial purposes. Indeed, Everone admitted as much, when he was interviewed by someone he thought was a potential investor. He is reported to have said the following:

> "Only after signing up Yakima did Chapelle (later) find out (from the BIA) that the Tribe was under the control of Silvia Burley. That was when Martin enlisted the help of Everone who came up with a plan to take the tribe out of Silvia's control by saying Yakima only gave up [the] 'spokesperson' role to Silvia and not the Chair." (Emphasis added).

(Email from C. Ray, dated August 31, 2006, AR-CVMT-2017-000955). Dixie's ultimate admission in his deposition on February 7, 2012 that he in fact resigned, and that his signature on his resignation was not forged after all, only further supports the view that Everone in fact concocted this false claim to the detriment of the Tribe, and conspired with Dixie to assert it in the litigation and thwart the Tribe's efforts to govern under the General Council.

Moreover, Dixie's false claim that his resignation letter is a forgery is contradicted by several other documents he admits signing thereafter. For example, after resigning, Dixie admits signing another Tribal document appointing Burley as the new Chairperson. Then, ten (10) days after resigning, Dixie signs a document for the development of a casino with the Tribe. However, he signs as "Tribal Member" under the signature of Silvia Burley who signed as "Chairperson" of the Tribe. On July

7, 1999, Dixie wrote the BIA, through his attorney who had a power of attorney, and referred to himself as the "Vice President" of the Tribe, not the Chairman (RJN "33"). Later, on July 23, 1999, Dixie signed an Addendum to the Development Agreement. He again signed as "Tribal Member," not as Tribal Chairperson, under the signature of Burley who signed as "Chairperson" of the Tribe. (RJN "33"). Dixie obviously signed these documents before he met with Bill Martin and Everone who most likely convinced Dixie that he could develop a casino without Burley. It is also clear that he knew that Burley was signing as the Chairperson of the Tribe, since that her signature block appears directly above his, yet he signed these documents as a mere Tribal member, not as the Tribe's Chairman. The false notion that Dixie never resigned and that his resignation was forged were then concocted by Everone and Dixie, and that has been their "story," though false, up until February 2012, when Dixie ultimately recanted his story under oath at his deposition.

Thus, by the time Everone and his group came up with the false notion that Dixie's "resignation letter" could be claimed as a purported forgery in late 1999, Dixie had already confirmed Burley's right to be Tribal Chairperson by signing multiple documents to that effect from April 10, 1999 through the end of July 1999.

This forgery claim was carried over into the recent state court actions and against the California Gambling Control Commission by Dixie's litigation team controlled by Everone. In addition to the forgery claim being alleged in the Complaint in Intervention in the recent action against the Commission, Dixie submitted a false declaration in support of the motion to intervene, stating that his resignation letter from the Tribe was a purported "forgery."

1. Dixie's Last Will and Testament.

In an obvious attempt to protect his financial interests, in the event Dixie should die, Everone and his team arranged to have Dixie sign a "Will and Testament", wherein Dixie confirms his agreements with the Everone group to allow them to build a casino, in the event their scheme succeeds in stealing the Tribe away from Burley, after he dies. (AR-CVMT-2017-000957).

2. Everone's team sought to influence the Commission to "freeze" the Tribe's RSTF money.

As part of his plan, Everone contacted and hired Arlo Smith, a former California Gambling Control Commissioner, and Pete Melnicoe, a former Chief Counsel for the Commission. (AR-CVMT-2017-000961). His plan was to get the Commission to stop paying Revenue Sharing Trust Fund ("RSTF") money to the Tribe under Burley's leadership, and to have the money paid to Dixie instead. (AR-CVMT-2017-000961). RSTF money are licensing payments made by Compact tribes which are shared with Non-Compact tribes. The Miwok Tribe is a non-Compact Tribe entitled to receive $1.1 million per year from the Commission. Those payments have been suspended since 2005 because of the current Tribal leadership dispute. Everone is planning on using the Tribe's RSTF money "as security" to convince other non-Indians to invest in his scheme to take the Tribe away from Burley and place it under Everone's control with Dixie as the "puppet" Tribal Chairman. (Id.).

To this end, Everone wrote an Email boasting that his hired team was successful in "influencing" the then Chief Counsel for the Commission, Cyrus Rickards, to stop RSTF payments to the Tribe, beginning in 2005. He stated:

> "I have hired Peter Melnicoe and Arlo Smith (the former Chief Counsel and the former Commissioner of that agency, respectively); and they were instrumental in getting the money frozen." (Emphasis added).

(AR-CVMT-2017-000961, September 11, 2006 Email from Everone).

3. Everone is soliciting "investment money" for the building of a casino, and is offering the Tribe's RSTF money as security.

In connection with his strategy to solicit investment money from non-Indians to finance his scheme, Everone prepared a "Bridge-loan Agreement & Prospectus" in 2004, which states in pertinent part as follows:

> "...[A]dministrative procedures and litigation are now in progress to return control of the tribe to Yakima so that he may receive about $1.2 million in income that currently accrues to the tribe from the California Gambling Control Commission and so that the tribe can be position[ed] to create a casino.
>
> "A sum, not to exceed $250,000.00 is being sought, in the form of Bridge Loans, to pay for the expenses that are necessary to regain control of the tribe to Yakima, to reorganize the tribe, and to negotiate the location and financial backing for a casino..."

(AR-CVMT-2017-000957, Bridge Loan document, dated February 26, 2004). In addition, the prospective investors were promised a "bonus interest" which would be paid to them "from gambling revenue to the tribe...for a period of 5 years after the casino is created." The prospectus then adds that Burley is still the target, stating:

> "This $1.2 million royalty [RSTF money on deposit in 2004] presently goes to the tribe but is under the control of the Chairperson whose appointment we are attempting to nullify in administrative appeal and litigation." (Emphasis added).

(AR-CVMT-2017-000957, Bridge Loan prospectus). Thus, Everone and his group of investors are not concerned at all about membership or the welfare of other potential Tribal members. They are only concerned about "nullifying" Burley as Chairperson, and stealing the Tribe, so that they can build a

casino for their own financial gain. Dixie is just a tool for their plans.

In fact, the Dixie faction's claims that the Tribe consists of over 200 adults and their children is contradicted by statements made in Yakima Dixie's "Bridge-loan Agreement and Prospectus" under his letterhead purportedly on behalf of the Tribe, which states:

> "'Sheep Ranch…' is a **very small (<10 members)**, long-established (1916), federally recognized California Indian tribe that is qualified to receive benefits, including the right to establishment a Class III gambling facility..." (Emphasis added).

(Yakima Dixie "Bridge-loan Agreement & Prospectus, 2/26/2004, RJN "33"). The sign "<" means "less than." Thus, Dixie's statement here is that the Tribe consists of "less than 10 members," not "over 200 adults and their children" as falsely stated by him to the AS-IA and the courts.

Everone has made it clear that any outcome of the litigation favorable to Dixie means ultimate control of the Tribe for his group of investors, not any potential members of the Tribe. Getting control of the Tribe means, to Everone, control for him. For example, in 2006, he wrote in an Email the following:

> "[Burley's] last two court maneuvers were dismissed; and the BIA is moving forward with its determination on the authority for the tribe, which almost certainly **will give control to Yakima's faction, and that means to us**." (Emphasis added).

(AR-CVMT-2017-000958, Everone Email dated September 29, 2006). In short, it is not about control of the Tribe for Dixie, but control of the Tribe for Everone and his investors bent on stealing the Tribe so they can build a casino. Finally, Everone puts it all in context, when he stated:

> "There are few opportunities to 'make a financial killing' and this, I sincerely believe, is one of them." (Emphasis added).

(AR-CVMT-2017-000958, Everone Email dated September 29, 2006).

Q. DIXIE'S FALSE ASSERTION THAT HIS RESIGNATION WAS FORGED AND THAT HE NEVER RESIGNED IS HIGHLY RELEVANT

The Dixie Faction argues that the issue of whether Dixie resigned as Tribal Chairman is irrelevant, because the 1998 Resolution establishing the General Council is purportedly invalid. This contention is without merit and misses the point of Dixie's false and fraudulent claims that his resignation was forged and that he never resigned. The Federal Defendants' position turns of the relevancy of Dixie's deposition testimony.

This issue was tendered to AS-IA Washburn after the U.S. District Court remanded the previous 2011 Decision for reconsideration. (CVMT-2017-001044-1046; CVMT-2017-001028-1029).

Dixie's 2012 deposition testimony admitting that he did in fact resign as Tribal Chairman in 1999 and that his claim of his resignation being forged was never true, is highly relevant. First of all, it explains the fraud perpetrated by Dixie and Chadd Everone in fabricating a Tribal leadership dispute in order to maneuver themselves to oust Burley from being the Tribal Chairperson, and take over control of the Tribe so they can build a casino.

Second, Dixie's deposition testimony is an admission of a party opponent under FRE 801(d)(2)(A); Gilbrook v. City of Westminster (9th Cir. 1999) 177 F.3d 839, 859 (in action against Mayor for retaliatory firing, Mayor's hearsay statement ["I'll have your ass"] admissible as express admission). Dixie's 16 year-long false assertion caused an unnecessary leadership dispute which in turn caused havoc with the Tribe in its relations with the BIA. It is relevant and admissible to show

that Dixie accepted the 1998 Resolution establishing the General Council as the Tribe's valid governing body. Otherwise, why would he persist over a 16-year period that his resignation was forged and that he never resigned? It was only after the AS-IA's 2010 and 2011 Decisions came down that the Dixie Faction's lawyers first came up with the idea to attack the 1998 Resolution establishing the General Council as purportedly invalid. However, as stated above, that claim is time-barred by the six-year statute of limitations.

Dixie's admission is also admissible to show that Dixie believed he was one of the last remaining members of the Tribe. As indicated above, Dixie's mother, Mabel Dixie was the last remaining adult member of the Sheepranch band who was living on the 0.92 acre Rancheria given to the band in 1915. She alone was listed as the only one authorized to vote for termination and receive a deed to the property. Even though the termination never took effect, the property was probated upon her death in 1971 and all interest in the property went to Yakima and Melvin Dixie. When Melvin left the Rancheria, all authority to enroll new members and organize the band fell to Yakima. By claiming he never resigned and that his resignation was purportedly forged, Dixie was in fact ratifying the validity of the General Council which he alone was authorized to organize as one of the last remaining members of the Sheepranch band residing on the 0.92 acre Rancheria.

R. DIXIE'S DEPOSITION TESTIMONY WAS NOT COERCED AND STANDS AS AN UNREFUTED ADMISSION OF FRAUD

The Dixie Faction argues that Dixie's admission during his deposition that he in fact resigned and there was no forged resignation after all was coerced by Attorney Corrales who purportedly "threatened Mr. Dixie's life on the record." (Page 24 Dixie Faction PAs, lines 2-3). This contention is without

merit. The Federal Defendants' position here in defending the AS-IA's 2015 Decision turns on the reliability and relevance of Dixie's admission of fraud. The relevant portions of Dixie's deposition testimony, which was given to AS-IA Washburn to consider on remand is set forth below. It highlights Dixie's violent outbursts during the deposition and Mr. Corrales' comments to Dixie in response. There is nothing in the transcript even hinting or suggesting that Dixie's deposition testimony was unreliable because he was threatened by counsel.

1. Dixie is a convicted murderer with a life history of extreme violence and incarceration for violent crimes

Contrary to the Dixie Faction's assertion, it was Plaintiff's counsel, not Dixie, whose life was threatened by Dixie during the deposition. Portions of Dixie's criminal history from a Probation Report were read into the record to impeach Dixie on his claim that he had never participated in a scheme to lie about something to try and get an advantage in a situation. (Pages 184-185 of Dixie deposition, CVMT-2017-000153). The question was probative of Plaintiff's theory that Dixie fabricated the claim of his resignation being forged, after he met with investors in late 1999 who were interested in building a casino under the Tribe's name, but because Dixie had already resigned, he had to agree to lie about resigning, so that he and his investors could remove Burley and take over the Tribe. In addition, his criminal history is relevant, because it explains why he resigned as Tribal Chairman back in 1999. He was in and out of prison, was habitually intoxicated, and thus was not able or competent to function as the Tribal leader.

Dixie's violent murder of a one-legged man (Silvia Burley's uncle) is detailed in this Probation Report in part as follows:

> "Such arguing is alleged to have continued [between Dixie and the victim] for approximately thirty minutes,

> concluding with defendant getting a gun from a cabinet and shooting victim.
>
> "Defendant is alleged to have dragged victim into the kitchen, stating to Vivian [his common law wife], **'I told you I could kill; I can kill…I will show you I can do something else, too.'**
>
> "Defendant is then alleged to have taken a big knife from a kitchen cabinet and to have **started stabbing victim on the kitchen floor**.
>
> "Defendant is alleged to have pushed and threatened Vivian to assist in placing victim in the car, to have demanded that she go with him to get rid of the body.
>
> * * *
>
> "Defendant is alleged to have become suspicious that his sixty-seven year old father might have told someone of the instant offense, and defendant **beat his father in the face**, stating that defendant **was going to shoot anybody that got in his way**. He reloaded the gun and took off in the car." (Emphasis added).

(Page 6 of Probation Report, Exhibit "38" to Dixie Deposition, CVMT-2017-000153).

The Probation Report quotes the District Attorney as describing the crime as involving acts of "high degree of viciousness or callousness." (Page 8, Exhibit "38" to Dixie Deposition, CVMT-2017-00153). Dixie also attempted to interfere with the judicial process by writing letters to a witness asking that she commit perjury. (CVMT-2017-00153). Given Dixie's prior convictions and prior, multiple prison terms, the probation officer concluded this about Dixie:

> "…[Dixie] is capable and willing to commit acts of coercion and violence upon individuals. It would appear that Society needs protection from defendant for the longest period of time possible."

(Page 11 of Probation Report, Exhibit "38" to Dixie Deposition, CVMT-2017-00153).

It was based upon this information that Plaintiff's counsel responded to Dixie violent outburst and physical threats at his deposition, thinking that Dixie would indeed carry out his physical threats. The exchange, selectively edited by Intervenors, correctly and fully was as follows, when Plaintiff's counsel attempted to inquire whether Dixie was changing his testimony about his signatures on the resignation documents, after Dixie had conferred with his counsel during a break:

Q: Are you changing your testimony, yes or no? Answer the question.

MR. McCONNELL: Same objections. Do you understand the question?

MR. CORRALES: He understands the question. He's just refusing to answer. He just said uh-huh. Is that what you said? Answer the question, sir.

Are you changing your testimony with respect to Exhibit Number 34?

WITNESS: We can sit here all night. Are you getting hungry?

MR. CORRALES: We will if we have to.

THE WITNESS: We will.

BY MR. CORRALES:

Q: Earlier, before we took a break, you testified that the signature that is on Exhibit 34 was your signature. After the break, after you had a chance to talk to your lawyer, you now say that that is not your signature.

Are you changing the testimony that you gave before the break?

MR. McCONNELL: Vague. Asked and answered. Compound.

BY MR. CORRALES:

Q: Yes or no, sir?

A: We can sit here all night.

Q: I'm asking you to answer the question, sir.

A: What did I say? I said we can sit here all night. [*As recorded by the video camera, it is at this point that Dixie becomes violent and starts pounding his hands on the table in a threatening manner*].

Q: I heard what you said. You don't have to slap your hand on the desk.

A: I'll slap you in the face.

Q: Do you want to do that?

A: Yeah.

Q: You'll be a dead man. Nobody threatens me, including you, Mr. Dixie—

A: Don't tell me—

Q: I would be very careful about that. And, Mr. McConnell, I would advise you to tell your client not to make physical threats against me.

A: Don't make a comment about you can be somebody will kill you.

Q: I'm sorry, Mr. Dixie. I have an obligation to protect myself. If you want to try and physically assault me, I will protect myself.

The question is: Exhibit Number 34, the signature that's on Exhibit 34, before we took a break you said that was your signature. After you consulted with your lawyer, you now say it's not your signature. Are you changing your deposition testimony, yes or no?

MR. McCONNELL: Same objections.

THE WITNESS: We can sit here all night.

MR. CORRALES: I'd like an answer to my question, sir.

THE WITNESS: That's what you're going to get, pointblank, (indicating).

(Deposition of Dixie, pages 212-214, CVMT-2017-000160).

As can be seen, it was Dixie, not Plaintiff's counsel who was becoming violent and was threatening to assault counsel. Plaintiff's counsel was simply telling Dixie that if he tried to hit him, he (Plaintiff's counsel) would have to protect himself. Since Dixie is a convicted murderer with a violent past, Plaintiff's counsel's response was understandable. In fact, Plaintiff's counsel apologized to Dixie ("I'm sorry, Mr. Dixie", page 214, line 10, CVMT-2017-000160), and promptly asked Mr. McConnell to tell his client not to make physical threats towards him. (Deposition of Dixie, page 214, CVMT-2017-000160). The deposition transcript shows that Mr. McConnell ignored that request, and said nothing to Dixie.

2. Dixie never expressed on the record that he was feeling coerced to have to admit he resigned as Tribal Chairman

The above-cited deposition transcript clearly shows that Dixie was not under duress at all. Neither the witness nor Mr. McConnell requested to take a break, but instead the witness continued on with his rude and obstinate behavior in refusing to answer a simple question. The witness, without any intervention by Mr. McConnell, continued to say that they would "sit there all night," but he will not answer the question. Finally, Mr. Corrales stated that he intended to break for the day, and reconvene the next day with an emergency telephone call to Judge Styn in San Diego (the deposition was being taken in Sacramento). He suggested they take a break and asked that Mr. McConnell talk to Dixie, and see if he could get him to answer the question. (Pages 215-16 of Dixie Deposition, CVMT-2017-000160-161).

After a seven (7) minute break and a chance to confer with his attorney, Dixie finally testified as follows:

Q: Okay. Before the break, the first break that we had, you testified in the deposition that the signature that appears on Exhibit 34 was your signature. After we took a break and you consulted with your attorney, you then said that is not your signature.

So my question is: Are you changing your testimony?

A: It appears not to be my signature.

Q: That's not the question. Move to strike.

Are you changing your testimony, yes or no?

A: **No**.

(Deposition of Dixie, page 216, lines 20-25, page 217, lines 1-5, CVMT-2017-000161).

At no time did Dixie indicate that he was under duress when he gave his previous testimony that Exhibit 34 contained his signature. It was clear that his attorney tried to get him to change his testimony, but, when pressed, Dixie ultimately conceded that he was not changing his testimony about the document containing his signature.

3. Dixie's damaging admission that he resigned as Tribal Chairman was confirmed under examination by his own lawyer

It was at this point in the deposition that Mr. McConnell, knowing that his client gave damaging testimony, began to examine his own witness in an attempt to get Dixie to say that Exhibits 33 (his resignation notice) and Exhibit 34 (his consent to Burley becoming the new Tribal Chairperson) did not contain his signatures. (CVMT-2017-000565-566). The fact that Mr. McConnell alone examined his own witness on this subject vitiates any claim of duress. What followed was Dixie's admission that he resigned as Tribal Chairman, and that the signatures on Exhibits 33 and 34 were in fact his, all elicited by his own attorney. Dixie testified as follows:

BY MR. McCONNELL:

Q: Mr. Dixie, I know this has been a long day, but again turning to Exhibits 33 and 34, both of these documents purporting to show your resignation, the two signatures [on] Exhibit 33 and 34, did you write those signatures?

A: It appears.

Q: Exhibit 33, is that a signature that you believe you wrote on Exhibit 33?

A: Uh-huh.

Q: You believe that's your signature?

A: Umm, I don't—umm, they're pretty close.

Q: This is the document indicating on Tuesday, April 20th, 1999, that you are resigning as chairperson. Do you believe that you wrote the signature on Exhibit 33 resigning as chairperson?

A: I don't remember that one.

Q: On Exhibit 34—

A: Okay. Yeah. Yeah. [*referring to his signature on Exhibit 33*].

Q: Okay. Yeah. This is or is not your signature? [*referring again to Exhibit 33*].

MR. CORRALES: I'll object to the question.

THE WITNESS: It is. [*referring to Exhibit 33*].

Q: You think it is?

A: Yeah.

Q: And on Exhibit 34, do you think that's your signature? Again, this is—

A: Yes.

Q: —accepting the resignation of chairperson?

A: Uh-huh.

Q: **And did you resign as chairperson of the Miwok Sheep Ranch Tribe?**

A: Yeah. Yes.

Q: You did. **Were you able to resign as chairperson?**

A: Yeah.

MR. McCONNELL: No further questions.

(Dixie deposition, pages 217-218, CVMT-2017-000161) (Emphasis added).

Contrary to Intervenors' assertion, Dixie's testimony that he resigned as Tribal Chairman was not made under duress, and was not contradictory. Dixie clearly testified that Exhibits 33 and 34 contain his signatures, before his attorney tried to get him to change his testimony. For example, early on in the deposition Dixie testified as follows:

BY MR. CORRALES:

Q: And this [Exhibit 33] purports to be a Formal Notice of Resignation signed by Yakima Kenneth Dixie. Have you seen that before, sir?

* * *

Q: Is that your signature?

A: Yeah, that's my signature.

* * *

Q: …Now, next in order is Exhibit Number 34. This purports to be a General Council Governing Body Special Meeting.

* * *

Q: Is that your signature on the document?

A: That is yes.

(Dixie deposition pages 170-173, CVMT-2017-000149-000150).

The parties then later took a break for fifteen (15) minutes, which gave Dixie a chance to consult with his attorney about his damaging testimony. (Dixie deposition, page 188, lines 1-4, CVMT-2017-000154). After the break, Plaintiff's counsel finished up his examination on other topics, and Mr. McConnell went right in and asked Dixie questions about his signatures on Exhibit's 33 and 34, in an attempt to get Dixie to

change his testimony, presumably based upon a discussion they had had during the break. His efforts were awkward at best. For example, when Mr. McConnell asked Dixie if Exhibit "33" contained his signature, Dixie said he did not believe so, but pointed to Exhibit "34" as his signature. (Dixie deposition, page 200, CVMT-2017-000157). Frustrated, Mr. McConnell showed Dixie another document that bore his signature, and Dixie said he did not think it was his signature, because the "Y" in that signature was not like his "Y" as depicted in Exhibit "33" (his formal resignation). (Dixie deposition, page 201, CVMT-2017-000157). Thus, any confusion was generated by Mr. McConnell's efforts to get Dixie to change his testimony. However, as stated, Dixie later conceded that he was not changing his testimony the first time he was asked the question about his resignation, and then, under the examination of his own attorney, specifically testified that he resigned and that the signatures on documents showing that he resigned were his.

IV.

CONCLUSION

For the foregoing reasons, the Federal Defendants' motion for summary judgment should be denied. Summary judgment should be entered in favor of the Burley faction. The AS-IA should be ordered to reconsider his 2015 decision, and specifically reconsider reinstating his August 2011 decision.

DATED: March 31, 2017

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