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UNITED STATES FEDERAL DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Plaintiffs,

vs.

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

Defendants,

THE CALIFORNIA VALLEY MIWOK TRIBE, et al.,

Intervenor-Defendants.

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

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR JUDICIAL NOTICE

Hon. William B. Shubb

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

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I. INTRODUCTION

The issue before the Court is whether the Assistant Secretary's December 2015 Decision finding that (1) the CVMT's membership consists of more than five people and (2) a 1998 General Council is not the Tribe's valid representative is arbitrary and capricious under the Administrative Procedure Act. In their Cross-Motion for Summary Judgment, Plaintiffs fail to demonstrate that the decision is arbitrary and capricious or otherwise not in accordance with law. Plaintiffs focus their argument on allegations of time-barred claims and fraud committed by third parties, but none of these matters have any relevance on the decision they challenge today. Rather, the Assistant Secretary, after careful review of the record before him, offered a reasoned explanation for the findings that CVMT's membership consists of more than five people and that a 1998 General Council is not the Tribe's valid representative. The Assistant Secretary's December 2015 Decision was made after consideration of all the relevant factors and is entitled to substantial deference. The Court should uphold the decision and deny Plaintiffs' Cross-Motion for Summary Judgment.

Plaintiffs also submitted a Request for Judicial Notice of extra-record documents in conjunction with their cross-motion for summary judgment. In light of the Court's order requiring the parties to file any motions to supplement the record by February 6, 2017, Plaintiffs' belated attempt should also be denied.

II. RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

In their Statement of Facts and Argument, Plaintiffs cite to and rely upon many documents that are not part of the administrative record and that were not directly or indirectly considered by the Assistant Secretary. *See* ECF No. 44-1 at 9-10, 15-7, 21-23, 25-26, 29-33 (Pls.' Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. (Pls.' Mot.) citing to documents attached to Pls.' Request for Judicial Notice, ECF No. 45). Plaintiffs, however, cannot rely on these documents to serve as the basis for any facts in this case. The Court reviews Plaintiffs'

challenge to the December 2015 Decision under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et. seq. Under the APA, a "reviewing court shall hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Unlike other types of civil actions, the Court is not to act as a finder of fact when reviewing final agency action; rather, the full administrative record that is compiled by the agency delineates the scope of judicial review. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate standard of APA review . . . to the agency decision based on the record the agency presents to the reviewing court."). The [APA] directs the Court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Review of the whole record is based on the full administrative record that was before the agency decisionmakers at the time they made their decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977).

On January 7, 2017, Federal Defendants lodged the certified administrative record for the December 2015 Decision. ECF No. 43. Although the Court provided Plaintiffs the opportunity to file a motion to supplement the administrative record, Plaintiffs did not do so. *See* ECF No. 41. Plaintiffs cannot now seek to supplement the record by citing to extra-record documents attached to a separate Request for Judicial Notice. The agency's decision is based on the administrative record lodged with the Court and the Court's review is limited to that record. Therefore, this Court should disregard Plaintiffs' statements and assertions based on extra-record documents. Additionally, Plaintiffs assert several statements as fact supported by the administrative record with which Federal Defendants disagree and discuss below.

A. The 1998 Resolution and General Council

In November of 1998, Silvia Burley and Yakima Dixie signed Resolution #GC-98-01 ("1998 Resolution"), which established the adults of the Tribe as the General Council ("1998 General Council"). 2011AR001401. The 1998 Resolution states that membership of the Tribe consists of at least Yakima Dixie, Silvia Burley, Silvia Burley's daughters and grandchild, and that membership may change in the future consistent with the Tribe's ratified constitution and any duly enacted tribal membership statutes. *Id.*

Plaintiffs seem to assert that in September of 1998, the BIA determined that Mr. Dixie, his brother Melvin, Ms. Burley, Ms. Burley's two daughters, and Ms. Burley's granddaughter were the initial tribal members. Plaintiffs fail to present the entire picture as provided by the administrative record. On September 24, 1998, the Superintendent addressed a letter to Dixie discussing who was entitled to organize the Tribe. 2011AR000172-76. In that letter, the Superintendent stated that "for purposes of determining the initial members of the Tribe," BIA must include Mr. Dixie and his brother Melvin, as the remaining heirs of Mabel Hodge. 2011AR000173. In addition, to Mr. Dixie and Melvin, BIA recognized that Mr. Dixie had adopted Ms. Burley, her two daughters, and he granddaughter into the Tribe, and therefore, those adoptees who were of majority age also had "the right to participate in the initial organization of the Tribe." *Id.* The Superintendent concluded:

> At the conclusion of [the meeting with the BIA staff], you were going to consider what enrollment criteria should be applied to future perspective members. Our understanding is that such criteria will be used to identify other persons eligible to participate in the initial organization of the Tribe. Eventually, such criteria would be included in the Tribe's constitution.

Id. The Superintendent then recommended that the Tribe, for the time being, operate as a General Council and provided a draft resolution for the Tribe to use. *Id.* The 1998 Resolution was signed by Mr. Dixie and Ms. Burley. 2011AR000179.

B. The Tribal Leadership Dispute

Plaintiffs include as part of their Statement of Facts a long recitation about the Tribe's leadership dispute and alleged fraud committed by Dixie in allowing a third party to attempt to take over the Tribe. Pls.' Mem. 1-4, 9-10. Most of these allegations rely on documents that are not included within the administrative record and should be disregarded by this Court. Further, none of Plaintiffs' assertions have any bearing on the Assistant Secretary's decision. As all parties have stated, disputes developed over who was the Tribe's valid representative. 2017AR001399, 1401-02. The groups have brought multiple lawsuits against the BIA, the State of California Gaming Commission, and each other in various courts, including this one.

III. STANDARD OF REVIEW

A. Scope of Review

In determining whether agency action was arbitrary and capricious, the Court must apply the highly deferential standard of review applicable to agency action under the APA, 5 U.S.C. §§ 551-559, 701-706. The Court must uphold the December 2015 Decision unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court's scope of review is narrow, and the Court should "not substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A decision is arbitrary and capricious:

> only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1224 (9th Cir. 2011). An agency's actions are valid if it "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id.* (internal quotation marks omitted). If the record supports the agency's decision, that decision should be upheld even if the record could

support alternative findings. *Arkansas v. Oklahoma*, 503 U.S. 91, 112–113 (1992). Review of the agency's action is "highly deferential, presuming the agency action to be valid." *Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1080 (9th Cir. 2010).

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

B. Summary Judgment

A motion for summary judgment may be used to review agency administrative decisions within the limitations of the APA. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1481 (9th Cir. 1994). A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the initial burden of informing the court of the basis for the motion, showing that no genuine issue of material fact exists, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

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

IV. ARGUMENT

Plaintiffs filed this complaint on June 16, 2016, challenging the December 2015 Decision as arbitrary and capricious under the APA. ECF Nos. 1 and 4. Plaintiffs allege that the December 2015 Decision is arbitrary and capricious for refusing to recognize Silvia Burley's leadership of the Tribe under the 1998 Resolution and for directing the Tribe's organization process to include individuals beyond Plaintiffs and Yakima Dixie. ECF No. 4 ¶ 1. While Plaintiffs make many assertions of fact and law in their motion, Plaintiffs ignore the very issues they challenge in this suit: the two findings in the December 2015 Decision that (1) the Tribe consists of more than five individuals and (2) the 1998 General Council is not the Tribe's valid representative. Plaintiffs vigorously assert that statute of limitations bar arguments made by other parties in other forums and that third parties conspired to take over the Tribe with the aim of asserting control over its potential gaming possibilities. Plaintiffs seek to interject extra-record documents and circular, irrelevant reasoning to obfuscate the facts. Nevertheless, it is the facts in the administrative record that form the basis for the Assistant Secretary's determination. Considered within that record are the decisions of federal courts finding that Plaintiffs are not the Tribe's valid representative and that the Tribe consists of more than five people. *See Miwok I, Miwok II,* and *Miwok III*. Also included in the record are many decisions and letters of Federal Defendants addressing the history of the Tribe and the issues before the Assistant Secretary. *See* 2017AR001397-402. Reviewing the record as a whole, the Assistant Secretary articulated a rational connection between the facts found and the choices made and his decision is entitled to substantial deference. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 675 (9th Cir. 2016). Plaintiffs fail to demonstrate otherwise and their motion should be denied.

A. The D.C. Federal Courts Determinations about Tribal Membership

Plaintiffs assert that the December 2015 Decision is arbitrary and capricious because "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." Pls.' Mem. 4. In support of their assertion, Plaintiffs correctly note

that the *Miwok III* court, in a footnote rejected Mr. Dixie's argument that the *Miwok I* and *II* decisions had already established that the Tribe consisted of more than five people. The court opined that "the only issue before the courts in [*Miwok I*] and [*Miwok II*] was whether the Secretary had the authority to disapprove a constitution . . . . The courts did not directly address the issues raised here, namely, whether the Tribe's membership consists of five members and whether the General Council is the duly constituted government of the Tribe." *Miwok III*, 5 F. Supp. 3d 86, 101 n.15. Plainly, *Miwok I* and *II* addressed more than whether the Assistant Secretary had the authority to disapprove a constitution. The courts found not only that the Assistant Secretary had the authority to disapprove the Constitution submitted by Ms. Burley but that the Assistant Secretary was correct in doing so. As stated by the D.C. Circuit, the Assistant Secretary's rejection of Ms. Burley's constitution was appropriate for the specific reason that Ms. Burley and her family comprise "a small cluster of people within the California Valley Miwok tribe" and went on to note "[t]he Secretary declined to approve the constitution because it was not ratified by anything close to a majority of the tribe." *Miwok II*, 515 F.3d at 1263.[1] Contrary to the footnoted dicta in *Miwok III*, the membership of CVMT was fundamental to the decisions in *Miwok I* and *II*.

B. The December 2015 Decision Properly Considered the Import of the 1998 Resolution

Plaintiffs argue that the December 2015 Decision is arbitrary and capricious because it is based on a time-barred claim—that the 1998 Resolution was invalid at the outset. Pls.' Mem. 16-27. Plaintiffs appear to allege that because Mr. Dixie argued in *Miwok II* that the 1998 Resolution was "invalid at the outset," Defendant-Intervenors cannot make the same argument here. *Id.* This claim, however, has no impact on the Assistant Secretary's ability to consider the issues before him and to render a decision. As an initial matter, the December 2015 Decision

[1] In addition, the D.C. circuit court took judicial notice of the complaint filed by Ms. Burley in this court in which she asserted that the Tribe has "a potential membership today of nearly 250 people." *Miwok II*, 515 F. 3d at 1265 (citing *CVMT v. United States*, ED Cal. Case 2:02-cv-00912-FCD-GGH, ECF No. 1).

made no findings as to the validity of the 1998 Resolution "at the outset." To the contrary, the December 2015 Decision, in considering the issue of the Tribe's valid representatives, found that the 1998 Resolution "seemed a reasonable, practical mechanism for establishing a tribal body to *manage the process* of organizing the Tribe," but that the actual reorganization could be accomplished only by a process open to the whole tribal community. 2017AR001401. (emphasis added). The December 2015 Decision further found that, as the courts in *Miwok I* and *Miwok II* had established, and the administrative record had confirmed, because the 1998 Resolution was approved by only Mr. Dixie and Ms. Burley, it could not serve as the actual reorganization of the whole tribal community, which includes the Eligible Groups. *Id.* It was on this basis that the Assistant Secretary found he "[could not] recognize the actions to establish a tribal governing structure taken pursuant to the 1998 Resolution." *Id.*

Even if the December 2015 Decision can be read as finding the 1998 Resolution invalid at the outset —which it cannot—the statute of limitations does not apply to the Assistant Secretary's decision. The statute of limitations applicable to an APA claim, 28 U.S.C. § 2410, speaks to limits on filing an action against the United States in federal court. It does not bar the Assistant Secretary from addressing the issues raised in the administrative process for the challenged decision. Plaintiffs, therefore, rely on an unquestionably flawed statute of limitations argument in their challenge to the December 2015 Decision.

In addition to the fact that the December 2015 Decision makes no mention of finding the 1998 Resolution invalid, and the fact that the statute of limitations does not apply to the Assistant Secretary's ability to consider issues raised during the administrative process, Plaintiffs' argument that the statute of limitations applies here because Mr. Dixie's argument is time-barred is simply wrong. Plaintiffs challenge the 2015 December Decision under the APA. The Dixie challenge to which Plaintiffs refer is not to the recognition of the General Council in 1998 and 2000, but to the Assistant Secretary's August 2011 Decision finding that the 1998 Tribal Council was a valid government. *See California Valley Miwok Tribe v. Salazar*, 967 F. Supp. 2d 84, 92-93 (D.D.C. 2013). The court in that case found that once Interior issued its decision in 2005

stating that it did not recognize any Tribal government, Mr. Dixie had no need to challenge the prior recognition of the 1998 government. *Id.*

C. The Assistant Secretary had the Authority to Consider the Validity of the Tribe's Leadership

Plaintiffs allege that in its 2010 decision, 2011AR001683-705, the IBIA limited its referral to the Assistant Secretary to only an enrollment dispute. Pls.' Mem. 31. As such, Plaintiffs argue that the December 2015 Decision exceeded the Assistant Secretary's authority by deciding whether the 1998 General Council was the Tribe's valid representative. *Id.* Plaintiffs' argument is undermined by the wealth of authority that establishes the Assistant Secretary's "plenary administrative authority in discharging the federal government's trust obligations to Indians." *Miwok III*, 5 Supp. 3d at 101 n.15 (quoting *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1996)); *see also* 43 U.S.C. § 1457; *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) (noting that the Secretary "has the responsibility to ensure that [a tribe's] representatives, with whom [she] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole."). Thus, the Assistant Secretary was not limited in his decision to consider only issues referred by the IBIA and could consider the matter of whether the 1998 General Council is the Tribe's valid representative.

D. Plaintiffs Remaining Challenges to the December 2015 Decision

In addition to the above arguments, Plaintiffs make many distorted contentions that seek to confuse the basic issues before the Court.

1. Third Party Scheme to Take Control of the Tribe

Throughout their brief, Plaintiffs devote considerable time asserting that the current Tribal dispute is the result of interference by a third party individual, Mr. Chad Everone, who they allege is attempting to take over the Tribe through Mr. Dixie. Pls.' Mem. 2. Plaintiffs cite numerous extra-record documents and assert unsupported allegations. These arguments, however, fail to demonstrate that the December 2015 Decision was arbitrary and capricious. The cause of the Tribe's internal dispute is not at issue nor did it play any part in the Assistant

Secretary's decision. There is no argument that the dispute itself exists and that the parties have devoted significant time and resources toward pursuing their claims in federal courts, state courts, and administrative tribunals. The December 2015 Decision, however, is premised on the well-established fact that the Tribe consists of more than five people. Allegations of fraud, greed, and general skullduggery played no role in the Assistant Secretary's decision and Plaintiffs fail to demonstrate that the December 2015 Decision is arbitrary and capricious on these grounds.

2. Organization of the Tribe

Plaintiffs assert that the December 2015 Decision is arbitrary and capricious because the Assistant Secretary erroneously concluded that the Tribe was never properly "reorganized" in 1998. Pls.' Mem. 33-34. Plaintiffs' statement is unsupported by the record. Every decision by Interior and the courts since 2004 has held that the Tribe is not organized. The Superintendent's letter of March 26, 2004, found that the Tribe was unorganized. 2011AR000409. The Acting Assistant Secretary affirmed this statement in correspondence dated February 11, 2005, stating that: "[u]ntil such time as the Tribe has organized, the Federal government can recognize no one, including yourself [Mr. Dixie] as the tribal Chairman. I encourage you, either in conjunction with Ms. Burley, other tribal members, or potential tribal members, to continue your efforts to organize the Tribe." 2011AR000610.

In *Miwok II*, the circuit court's discussion centered on Ms. Burley's efforts to organize the Tribe under the IRA and to have Interior approve a constitution. *Id.*, 515 F.3d at 1266-67. Indeed, even the Assistant Secretary's August 2011 Decision was premised on the fact that "the current General Council form of government does not render CVMT an 'organized' tribe under the [IRA] . . . as a federally recognized tribe, it is not required 'to organize' in accord with the procedures of the IRA." 2011AR002025. In sum, it would have been contrary to law for the Assistant Secretary to determine that the Tribe was organized.

3. Recognition of Ms. Burley as Person with Authority

Plaintiffs appear to argue that it was error for the December 2015 Decision to not recognize Ms. Burley as the Tribe's Chairperson because, citing to the Acting Assistant Secretary's February 11, 2005, decision, Plaintiffs allege that at that time the BIA recognized Ms. Burley as a person with authority and considered the 1998 General Council to be the Tribe's valid representative. Pls.' Mem. 30. Plaintiffs mischaracterize the Acting Assistant Secretary's letter. The February 11, 2005, decision found that the federal government did not recognize Ms. Burley as the tribal Chairperson and that the BIA did not recognize any tribal government. 2011AR000610-11. This is in line with the other evidence in the administrative record finding that the 1998 General Council is not the Tribe's valid representative.

It is also not true that the BIA has recognized Plaintiffs as the Tribe's authorized government since 1999. *See* Compl. ¶ 102. While correspondence from the BIA acknowledged the authority of the General Council until at least November 24, 2003, the Superintendent's letter of March 26, 2004, explained that the BIA recognized Ms. Burley as "a person of authority within the California Valley Miwok Tribe" for the purposes of providing the Tribe with federal funds under the Indian Self-Determination Act. 2011AR000409. The position that Ms. Burley was not recognized as the Chairperson of a Tribal government is further supported by the fact that in its Motion to Transfer Venue filed in *Miwok I*, the BIA stated that in 2004 it rejected the Burley Group's proposed 2004 constitution on the grounds that the larger tribal community had not been involved in its adoption. 2011AR000774, ¶ 15. Following its evaluation of the constitution submitted by Ms. Burley, the BIA "determined it was necessary to clarify its prior recognition of Ms. Burley . . . and make it clear it could recognize her only as a tribal spokesperson or representative with whom BIA communicates on federal-tribal matters because the Tribe was not organized." *Id.*; *see also* Decl. of Carol in Supp. of Defs' Mot. to Transfer,

2011AR007762-63, ¶ 9 (in 2004 the BIA "determined that it was inappropriate to continue to acknowledge Burley as a tribal chairperson who leads an organized tribe or to acknowledge a governing council for the Tribe.").

4. The August 2011 Decision

Assistant Secretary Echo Hawk issued a decision on August 31, 2011 ("August 2011 Decision) finding that, among other things, that: the citizenship of CVMT consisted solely of Mr. Dixie, Ms. Burley, Ms. Burley's two daughters, and Ms. Burley's granddaughter; CVMT operated under a General Council form of government pursuant to the 1998 Resolution; CVMT's General Council was vested with the governmental authority of the Tribe; and CVMT was not organized. 2011AR002049-50. The August 2011 Decision includes a statement that the decision "marks a 180-degree change of course from positions defended by this Department in administrative and judicial proceedings over the past seven years." Pls.' Mem. 30-31 (quoting 2011AR002050). Plaintiffs mischaracterize this statement, asserting that it was limited to the Assistant Secretary's "finding #6," regarding the application of IRA amendments, and did not apply to the other findings in the August 2011 decision. Plaintiffs' assertion is disproven by the substance and structure of the August 2011 Decision.

First, many of the findings of the August 2011 Decision are directly contrary to prior Interior positions where the Department found, in part, (1) that the Tribe was not organized, (2) that the 1998 General Council was not the Tribe's valid representative, and (3) that the Tribe consisted of more than five people. 2011AR002049-50 (August 2011 Decision findings number 1 through 7, which reversed the decision of March 26, 2004 (finding that that the participation of the greater tribal community in determining membership criteria and that the Tribe "base roll" could not be limited to the five individuals), the decision of February 11, 2005 (stating that the BIA did not recognize any tribal government), and the decisions in *CVMT I* and *II*). The plain

language of the August 2011 Decision does not limit or isolate the "180 degree" language to the discussion on the IRA amendment. The "180 degree" language is separated from finding #6 by lengthy finding #7. In fact, the 2010 Decision, which the August 2011 Decision affirmed, identified a number of agency actions that were to be rescinded, including the letters of March 26, 2004, and February 11, 2005, where Interior specifically found that the Tribe was not organized, did not have a valid government, and consisted of more than five people. 2011AR002056. Plainly, the August 2011 Decision's reference to a "180 degree change of course" was not limited to finding #6, but applied to the entirety of the decision's findings.

5. Membership in Unorganized Tribes and Rancherias

Plaintiffs appear to argue that the December 2015 Decision, in determining that the Tribe consists of more than five individuals, incorrectly includes Eligible Groups[2] as part of the Tribe's potential members and thus is arbitrary and capricious on those grounds. In the December 2015 Decision, the Assistant Secretary engaged in a thorough analysis of the record that went beyond the federal courts' rejection of Plaintiffs' argument that the Tribe is limited to five people. The Assistant Secretary examined the history of the term "Rancheria" and the uses of that term. 2017AR001400. He found that "Rancheria" has been used to refer to both the land itself and the Indians residing on the land. *Id.* In many instances, the size of a Rancheria did not permit all of the members of a Rancheria to take up residence on the land. *Id.* BIA field officials remained cognizant that Indians not residing on a rancheria were nevertheless associated with the rancheria. *Id.* The Assistant Secretary concluded that "[t]hus, such associated band Indians who were non-residents were potential residents. And since membership in an unorganized rancheria was tied to residence, potential residents equated to potential members." *Id.*

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

Placing the CVMT into this historical context and understanding of the term "Rancheria," the Assistant Secretary examined Interior's interactions with the Tribe and concluded that its membership could not properly be limited to Mr. Dixie and Plaintiffs. *Id.* Given the acquisition of the land for the benefit of the Mewuk Indians residing in the Sheep Ranch area of Calaveras County, California, the Assistant Secretary reasonably found that for purposes of reorganization, the Tribe's membership is properly drawn from the Mewuk Indians for whom the Rancheria was acquired and their descendants, which includes (1) the individuals listed on the 1915 Terrell Census and their descendants; (2) the descendants of Jeff Davis; and (3) the heirs of Mabel Dixie. *Id.* The Assistant Secretary examined the record, including Special Indian Agent Terrell's 1915 census and request for land, the 1929 census, the 1935 referendum memorandum, federal register notices, Departmental memoranda, and the Parties' submissions, including Plaintiffs, to reach his conclusion. *Id.*

In discussing the Eligible Groups and the rights of non-resident Indians associated with the Rancheria, the Assistant Secretary provided a clearer standard for terms like "putative members," "potential members," "whole tribal community," and "greater tribal community," terms that had been used by the parties and courts in the past to describe those individuals who may be eligible to participate in the Tribe's organization as members.

In support of their argument that the Assistant Secretary improperly included Eligible Groups as potential members, Plaintiffs elaborate on the precedents provided by *restored* rancherias, which limited initial eligibility to persons on, or descended from, the distributee lists. Pls.' Mem. 52. Plaintiffs ignore the fact that such restorations were premised on an *illegal termination* under the Rancheria Act: on that premises, "restoration" was limited to *undoing* the illegal acts of the Secretary. Under the Rancheria Act, the residents of a terminated Rancheria lost their Federal status as Indians and the Rancheria ceased to be a Reservation. 72 Stat. 619 (1958). As spelled out in detail in *Alan-Wilson v. Acting Sacramento Area Director*, 1998 I.D. LEXIS 85; 33 IBIA 55 (IBIA 1998), in response to a remand from the IBIA, the BIA undertook a survey of restored Rancherias, and reached the following conclusion:

> The record reflects that BIA established two variables in its interpretation of *Hardwick* when aiding in the organization or reorganization of the 17 terminated tribes. One variable was whether a rancheria had a pre-termination governing document, in which case the BIA recognized the membership criteria set forth in that document. The Bureau utilized the pre-termination governing document because paragraph 4 of the *Hardwick* decision restored each rancheria to the same status it had prior to termination by requiring the Secretary of the Interior to recognize them ". . . as Indian entities with the same status as they possessed prior to distributions of the assets of these Rancherias . . . ." However, where there was no pre-termination governing document, the BIA used the distribution plans for the respective rancherias by instructing the Indians thereof that the rightful parties to organization of the rancheria were the distributees, dependent members and lineal descendants thereof.

Alan-Wilson, 1998 I.D. LEXIS 85 at *8. No such considerations apply to the initial organization of a tribe or Rancheria that was not terminated. Thus the recent restoration of the Wilton Rancheria under the principles of *Hardwick*, cited to by Plaintiffs, is not informative nor is it applicable to CVMT. *See* Pls.' Mem. 36. More relevant is the guidance provided by Assistant Secretary Ada Deer in 1994 for the initial organization of the Ione Band of Mewuk Indians. In her decision, Assistant Secretary Deer identified the need to create a "preliminary membership roll . . . based on descent from the Miwok families historically associated with the Ione band. . . . Any base roll should include the families of those adjudged in the 1972 lawsuit as having an interest in the land, as well as the descendants of those on the 1915 list which are still maintaining relations with the Ione Band." July 14, 1994, Memorandum (Ex. A). Similar guidance was provided by Assistant Secretary Washburn in 2012 for the initial organization of the Tejon Indian Tribe. April 24, 2012, Memorandum (Ex. B). In an April 24, 2012, letter clarifying the Tejon reaffirmation, the Assistant Secretary explained that he was not attempting "to decide who are the current citizens of the Tribe. Central to my decision, however, was a determination that the Tribe's citizens were enumerated on and are descended from the 1915 Terrell BIA Census and have maintained their tribal affiliation to 1979." *Id.* at 9. The Assistant Secretary further stated, "[t]he maintenance of tribal affiliation has been demonstrated by being enumerated on, or having a parent or grandparent enumerated as Tejon on any of the BIA's 1929, 1930, and 1931 Indian censuses for Kern, Kings, and Tulare counties, or by other

evidence." *Id.* The December 2015 Decision challenged in this suit is consistent with the Assistant Secretary's decisions in Ione and Tejon. Plaintiffs, therefore, fail to demonstrate that the December 2015 Decision is arbitrary and capricious on these grounds.

V. OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE AND TO INTRODUCE ADDITIONAL DOCUMENTS

On November 15, the Court entered its Status (Pretrial Scheduling) Order ("Status Order") setting forth the schedule for this case, including lodging of the administrative record, filing motions to augment the administrative record, and filing motions for summary judgment. Pls.' Mem. 2-3. On January 13, 2017, Federal Defendants lodged an electronic, word-searchable version of the record in PDF format and served copies of the record on Plaintiffs' counsel and Defendant-Intervenors' counsel. Pursuant to the Status Order, Plaintiffs had until February 6, 2017, to file any motion to augment the administrative record. *Id.* at 2-3. Plaintiffs did not file a motion to augment. Instead, on March 3, 2017, when they filed their cross-motion for summary judgment, Plaintiffs filed a separate Request for Judicial Notice under Federal Rule of Evidence 201 ("FRE 201") of 33 extra-record documents totaling over 200 pages. ECF No. 45. In their request, Plaintiffs identify a number of documents as "relevant on Plaintiffs' statute of limitations argument" or "relevant to the issue of Plaintiffs' argument of fraud." *Id.* Some documents are identified as being relevant to both arguments. Plaintiffs provide no other support for their request.[3]

Plaintiffs' request for judicial notice is an invalid and untimely end-run around the Status Order's schedule and the requirements for supplementing the administrative record. The Court should not consider the extra-record documents because Plaintiffs have failed to carry—nor have

[3] On March 3, 2017, in conjunction with their cross-motion for summary judgment, Plaintiffs submitted the Declaration of Manuel Corrales, Jr. in Support of Plaintiffs' Motion for Summary Judgment. ECF No. 44-2. Attached to the declaration are 47 exhibits totaling nearly 400 pages of additional documentation. The exhibits include documents from the administrative record and also documents listed in Plaintiffs' Request for Judicial Notice. Federal Defendants request that the Court strike the Declaration as an impermissible attempt to circumvent its Status Order, which provided the method by which the parties would provide administrative record documents to the Court, and as an invalid and untimely attempt to supplement the administrative record.

they even tried to carry—their heavy burden of establishing an exception to APA's limit on judicial review. *See Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010). In cases that are brought under the APA, unlike other types of civil actions, the Court is not to act as a finder of fact when reviewing final agency action; rather the full administrative record that is compiled by the agency delineates the scope of judicial review. *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 549. Judicial notice is usually inappropriate under the APA because "[t]he fact finding capacity of the district court . . . is typically unnecessary to judicial review of agency decisionmaking." *Fla. Power & Light Co.*, 470 U.S. at 744. Instead, "courts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.*

The United States Court of Appeals for the Ninth Circuit narrowly allows judicial notice of documents in APA cases only when the documents otherwise meet one of the record-review exceptions. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 975-76 (9th Cir. 2006); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (construing a motion for judicial notice as a motion to supplement the agency's administrative record). Put simply, "a party cannot circumvent the rules governing record supplementation by asking for judicial notice instead of supplementation . . . ." *Native Ecosys. Council v. Weldon*, 848 F. Supp. 2d 1207, 1228 (D. Mont. 2012), *vacated as moot*, No. CV-11-99-M-DWM, 2012 WL 5986475 (D. Mont. Nov. 20, 2012).

Plaintiffs provide no basis for supplementing the administrative record. Plaintiffs had ample opportunity to seek to supplement the administrative record, but chose not to do so. They cannot now seek to supplement the record under the guise of a FRE 201 request. Although Plaintiffs assert in the broadest terms that the extra-record documents are "relevant on" issues raised in their summary judgment motion, ECF No. 45, Plaintiffs make no attempt to explain how the documents are relevant or how their request meets any of the record-review exceptions. To the extent Plaintiffs attempt to argue that the extra-record documents are needed to correct the administrative record, the APA prohibits this. "Consideration of the evidence to determine the

correctness . . . of the agency's decision is not permitted . . ." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Ctr. for Biological Diversity v. Fish & Wildlife Serv.*, 450 F.3d 930, 944 (9th Cir. 2006) (rejecting extra-record evidence because it was offered to advance "'a new rationalization . . . for attacking an agency's decision.'"); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (same). Plaintiffs' request for judicial review should therefore be denied.

VI. CONCLUSION

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

Respectfully submitted April 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I electronically filed the foregoing Federal Defendants' Response in Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Request for Judicial Notice by using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Jody H. Schwarz
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